

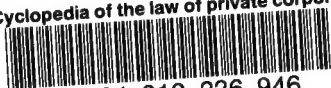
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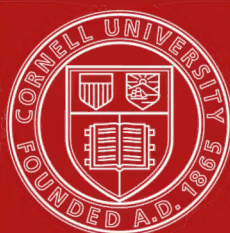
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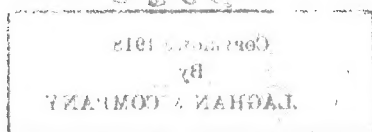
CYCLOPEDIA

OF THE LAW OF

PRIVATE CORPORATIONS

By WILLIAM MEADE FLETCHER

Author of "Corporation Forms," "Illinois Corporations," "Equity Pleading and Practice," etc.



IN EIGHT VOLUMES

VOLUME V

CHICAGO
CALLAGHAN AND COMPANY
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PRIVATE CORPORATIONS

VOLUME V

CHAPTER 47 (Continued)

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VI. EVIDENCE AND WITNESSES

§ 3087. General law of evidence. The object of this subchapter is not to state the law of evidence, which is general, but merely to show some of its applications in actions by or against corporations. No pretense of exhausting the books of all cases is made in so doing. Neither has there been any endeavor to collect authorities wherein the evidence point was decided between other litigants, so that the facts about the corporation were collateral to the main issue. It is obvious that the difference in the rules for proving a direct and a collateral fact would make such cases of doubtful use in this connection, and in many cases even misleading. Being but exemplifications of the general law of evidence, many or most of the rules mentioned in this subchapter are equally applicable in actions where the corporation is not one of the parties, and additional precedents of force may be had by consulting general works on evidence or other chapters of this work. Some of the other chapters herein on special branches of corporation law which contain treatments of the rules for proof in particulars of fact related thereto, are cited below.⁸⁸

⁸⁸For example, see §§ 416-440, § 758 on proof of seal; § 811 on proof supra, on proof of corporate existence; of powers; § 922 on proof of contract; § 488 on proof of by-laws; §§ 660, 703 § 1028 as to bona fides of bondholders; on proof in actions on subscriptions; § 1114 as to power to hold real

§ 3088. Matters judicially noticeable—In general. All public acts of incorporation, whether general or special, are judicially noticed, and such charters need not be proved, but private acts by which corporations are chartered are not within the judicial knowledge, and must be proved in the regular way.⁸⁹ A supplement or amendment to a public charter will of necessity also be public.⁹⁰ This notice does not extend to the private acts and deeds, such as acceptance and organization, by which incorporation becomes accomplished under such an act,⁹¹ or to consolidation,⁹² or succession of corporations⁹³ or to their

property; § 1384 on proof in foreclosure suits; §§ 1492-1494 on parol evidence relating to corporate instruments; §§ 1640, 1654, 1695 as to proof and presumptions regarding meetings and voting; §§ 1755, 1768 as to proof of office and title to same; §§ 1943, 1944 as to authority of officers; §§ 2159-2176 as to admissions of officers and agents to bind corporation. See also generally the corresponding portions of other chapters herein, and consult the general index for detailed references in full.

⁸⁹ § 428, *supra*.

And see the following decisions:

Arkansas. *Washington v. Finley*, 10 Ark. 423, 52 Am. Dec. 244; *McKiel v. Real Estate Bank*, 4 Ark. 592.

Connecticut. *New York, N. H. & H. R. Co. v. Offield*, 78 Conn. 1, 60 Atl. 740.

Georgia. *Davis v. Bank of Fulton*, 31 Ga. 69.

Indiana. *Bartholomew v. Bright*, 18 Ind. 93.

Kentucky. *Com. v. Kinniconick & F. S. R. Co.*, 31 Ky. L. Rep. 859, 104 S. W. 290; *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. 13, 35 Am. Dec. 171, citing *Halbert v. Skyles*, 1 A. K. Marsh. 368.

Massachusetts. *Portsmouth Livery Co. v. Watson*, 10 Mass. 91.

Michigan. *People v. DeMill*, 15 Mich. 164, 93 Am. Dec. 179.

New York. *Hyatt v. McMahon*, 25 Barb. 457.

South Carolina. *Roach v. Farmers' Mut. Ins. Ass'n of Oconee County*, 102 S. C. 478, 86 S. E. 950; *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673.

Texas. *Bank of Alabama v. Simon-ton*, 2 Tex. 531; *Withee v. Citizens' Sav. Bank*, 1 White & W. Civ. Cas. Ct. App. §§ 489, 490.

Charter declaring itself to be public act is judicially noticeable. *Brookville Ins. Co. v. Records*, 5 Blackf. (Ind.) 170.

A special charter will be noticed if given by a public statute, or if recognized in a later public statute. *Crawford v. Planters' & Merchants' Bank*, 6 Ala. 289.

Not a private charter. *Alabama Conference M. E. Church South v. Price*, 42 Ala. 39; *Montgomery v. Montgomery & W. Plank-Road Co.*, 31 Ala. 76; *State v. Judge of Twenty-Sixth Jud. Dist. Court*, 33 La. Ann. 954.

⁹⁰ If the charter was a public act a supplement to it must also be, though not so declared. *Stephens & C. Transp. Co. v. Central R. Co.*, 33 N. J. L. 229.

⁹¹ § 428, *supra*.

⁹² *Southgate v. Atlantic & P. R. Co.*, 61 Mo. 89.

⁹³ That a corporation with a similar name was the predecessor of a defendant company is not known. *St. Louis v. St. Louis, I. M. & S. R. Co.*, 248 Mo. 10, 154 S. W. 55.

existence and private rights⁹⁴ or their insolvency⁹⁵ or extinction.⁹⁶ A public law recognizing the corporation by extending its charter term or powers is noticeable.⁹⁷ A recognition of a territorial charter in a state constitution makes it noticeable.⁹⁸ One early case drew the line very strictly in holding that, though under the law all corporations were formed by special act and all such acts were made judicially noticeable, yet a corporation not pleaded under such an act would not be noticed because conceivably it might have been chartered by colonial or crown grant antedating the state, also because the principle should not be established of judicially assuming the nonexistence of foreign corporations suing by comity.⁹⁹

The federal corporations chartered by special public act of Congress and their names are noticed both in the federal¹ and state courts,² also the consolidation of railroads into such a federal corporation.³ The National Bank Acts⁴ and the term for which a national bank is chartered⁵ are thus known. One of the early New York courts, however, refused to notice the United States Bank.⁶ If matters pertaining to state banks, such as the charter rate of interest, are not judicially known, the National Bank Act allowing the national banks to take the same rates does not draw the state bank rates into notice. They must be proved even where the national bank is a party.⁷ The details

⁹⁴ *Portsmouth Livery Co. v. Watson*, 10 Mass. 91.

Existence or nonexistence of local religious societies. *St. Paul's Parish of Protestant Episcopal Church at East St. Louis v. East St. Louis*, 245 Ill. 470, 92 N. E. 322.

⁹⁵ That receivers are operating a railroad company. *Georgia Pac. Ry. Co. v. Baird*, 76 Miss. 521, 24 So. 195.

That a bank located in a foreign state is insolvent or in failing circumstances. *Market Nat. Bank v. Pacific Nat. Bank*, 27 Hun (N. Y.) 465, aff'd 102 N. Y. 464, 7 N. E. 302.

⁹⁶ *Shea v. Knoxville & K. R. Co.*, 6 Baxt. (Tenn.) 277.

⁹⁷ § 428, *supra*.

⁹⁸ *Vance v. Farmers' & Mechanics' Bank*, 1 Blackf. 2nd Ed. (Ind.) 504.

⁹⁹ *Pendleton v. Bank of Kentucky*, 1 T. B. Mon. (Ky.) 171.

¹ Of the federal incorporation of the Texas & Pacific R. Co. In re

Dunn, 212 U. S. 374, 53 L. Ed. 558; *Texas & P. R. Co. v. Cody*, 166 U. S. 606, 41 L. Ed. 1132.

² § 428, p. 919, *supra*.

³ Of consolidation of railroads into the Texas & Pacific R. Co. *Stephenson v. Texas & P. Ry. Co.*, 42 Tex. 162.

⁴ § 428, *supra*.

⁵ That national bank is chartered for 20 years. *Yankton Nat. Bank v. Benson*, 33 S. D. 399, Ann. Cas. 1916 B 1011, 146 N. W. 582.

⁶ *United States Bank v. Stearns*, 15 Wend. (N. Y.) 314.

⁷ The particular rate of interest which certain banks may charge under terms of their charters will not be noticed though the general banking law is noticed and though national banks, of which defendant was one, have by act of congress a right to take any rate which a state bank could. *First Nat. Bank v. Gruber*, 87 Pa. St. 468, 30 Am. Dec. 378. The

of a federal corporation's administration and its place of business not fixed by the charter or known as a matter of common or general knowledge cannot be noticed.⁸

The state corporations are noticed, when specially created under public act, in the creating state,⁹ the federal courts,¹⁰ and foreign state courts where such corporations have been legislatively recognized,¹¹ but they are not recognized as existing without some recognition or general common knowledge in foreign state courts.¹² No notice can be taken whether a foreign corporation has been domesticated or admitted to do business, unless it has been in some such way publicly recognized.¹³ The federal courts take judicial notice of all public acts of incorporation of the states,¹⁴ also of public statutes of the states conferring rights on a given corporation of another state.¹⁵

All public statutes affecting corporations are noticed, of course, with their consequences upon the formation, existence, succession, and extinction of the corporation,¹⁶ but not municipal ordinances.¹⁷ When a

state bank charters must be produced and proved to show such rate. *Id.*

⁸ Of the organization, purpose and location of the Northern Pacific Railroad, but not of its principal place of business. *Lung Chung v. Northern Pac. Ry. Co.*, 19 Fed. 254.

⁹ § 428, *supra*, and also this section, *supra*.

¹⁰ Of specially chartered corporation of a state. *Covington Drawbridge Co. v. Shepherd*, 20 How. (U. S.) 227, 15 L. Ed. 896.

¹¹ *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336. See also *Miller v. Johnston*, 71 Ark. 174, 72 S. W. 371; *Singer Mfg. Co. v. Bennett*, 28 W. Va. 16.

¹² The court cannot judicially know the name or legal being of such corporation. *Bank of Alabama v. Simonton*, 2 Tex. 531. See also § 429, *supra*.

¹³ Whether a corporation was chartered in another state and had not been domesticated. *Nashville Trust Co. v. Weaver*, 102 Tenn. 66, 50 S. W. 763. See also chapter on Foreign Corporations, *infra*.

¹⁴ *Covington Drawbridge Co. v.*

Shepherd, 20 How. (U. S.) 227, 15 L. Ed. 896.

¹⁵ The federal courts take the same judicial notice of the rights of the Baltimore & Ohio Railroad in West Virginia under the special licensing statutes of that state as its own courts do. *Martin's Adm'r v. Baltimore & O. R. Co.*, 151 U. S. 673, 38 L. Ed. 311.

¹⁶ *Washington v. Finley*, 10 Ark. 423, 52 Am. Dec. 244.

Consolidation of domestic corporations. *Jackson Consol. Traction Co. v. Jackson Circuit Judge*, 155 Mich. 522, 119 N. W. 915, 15 Det. L. N. 1081.

The Act of Congress of March 3, 1817 (3 Stat. at L. 383), to incorporate banks in the District of Columbia is a public law of which the court will take notice. *Central Bank v. Tayloe*, 2 Cranch C. C. 427, Fed. Cas. No. 2,548.

Acts of the legislature conferring corporate powers upon the Baltimore & Ohio Railroad Co. held such public acts that the court should take notice of them *ex officio*. *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336.

¹⁷ *Lawrence McFadden Co. v. Philadelphia*, 59 Pa. Super. Ct. 44.

general law took effect is known.¹⁸ It will be noticed that a corporation must necessarily be formed and have its powers under the general statutes regulating those of its class,¹⁹ or that its powers are those conferred by its special act of incorporation²⁰ and the amendments thereof.²¹

Statutes of other states will not be noticed²² and therefore the existence²³ and the charter limitations and provisions of a foreign charter are not noticed,²⁴ nor the consequences in law of a foreign consolidation.²⁵ The state courts take judicial notice of foreign laws and incorporations when by their own public statutes the corporation has been recognized and admitted to do business so that such matters may thus be known.²⁶ By statutes other laws can be noticed also.²⁷

The existence of certain classes of corporations, e. g., mutual insurance companies, is known, and the statutory features of their organization and business.²⁸ It cannot be noticed generally that any given

¹⁸ *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430.

¹⁹ An incorporated trust company is only such as is provided for in Rev. St. 1899, c. 12, art. 12 (Ann. St. 1906, pp. 1119-1128). *Wycoff v. Epworth Hotel Construction & Real Estate Co.*, 146 Mo. App. 554, 125 S. W. 550.

²⁰ *Com. v. Kinniconick & F. S. R. Co.*, 31 Ky. L. Rep. 859, 104 S. W. 290.

That state bank was authorized by its charter to require security to notes discounted. *State Bank v. Watkins*, 6 Ark. 123.

²¹ *New York, N. H. & H. R. Co. v. Offield*, 78 Conn. 1, 60 Atl. 740.

²² *Grand Lodge A. O. U. W. of Connecticut v. Grand Lodge A. O. U. W. of Massachusetts*, 81 Conn. 189, 70 Atl. 617; *Chapman v. Colby*, 47 Mich. 46, 10 N. W. 74.

Not of a foreign general incorporation act proved only by title. *Northwestern Union Packet Co. v. Shaw*, 37 Wis. 655, 19 Am. Rep. 781.

²³ *Hammett v. Little Rock & N. R. Co.*, 20 Ark. 204.

²⁴ *Chapman v. Colby*, 47 Mich. 46, 10 N. W. 74.

Charter provisions of a foreign in-

surance company limiting its contracts of insurance are not noticeable. *City Fire Ins. Co. v. Carrugi*, 41 Ga. 660.

²⁵ *Jackson Consol. Traction Co. v. Jackson Circuit Judge*, 155 Mich. 522, 119 N. W. 915.

²⁶ The statutes conferring powers on the Baltimore & Ohio Railroad Company are known, and that it was incorporated in Maryland and recognized and admitted in Virginia. *State v. Baltimore & O. R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803; *Hart v. Baltimore & O. R. Co.*, 6 W. Va. 336.

²⁷ Under the statute the court "takes judicial notice of the laws and statutes of new sister states." *Hobbs v. Memphis & C. R. Co.*, 9 Heisk. (Tenn.) 873.

Under Rev. Code 1868, c. 13, § 4, providing that the court may take judicial notice of the law, statutory or otherwise, of another state or country, or of the United States, such court may recognize an act for the distribution of assets of banks among persons entitled to them to adjust losses during the Civil War. *Farmers' Bank v. Willis*, 7 W. Va. 31.

²⁸ That there is a class of insurance companies having no capital stock

society is of a particular class, like a fraternal association,²⁹ or under which of two general acts a given corporation was formed;³⁰ but the eleemosynary character of a known corporation is noticeable.³¹

The name conferred by a public act is known therewith, and not unless it is so established,³² and a change of name by public act will be noticed.³³ It cannot be judicially known that a name is impossible when not forbidden.³⁴ The seal of the corporation is not judicially known,³⁵ and it cannot be known that a scrawl is not the corporate seal.³⁶ The quasi-public character of a railroad corporation and its right to have the power of eminent domain as an incident to its public charter is known,³⁷ and its route and termini as fixed in the charter.³⁸

composed of members equally interested, writing policies of insurance and paying their losses by assessments levied and collected from the members. *Ingle v. Batesville Grocery Co.*, 89 Ark. 378, 117 S. W. 241.

²⁹ *Smith v. Grand Lodge A. O. U. W. of Missouri*, 124 Mo. App. 181, 101 S. W. 662.

³⁰ While it is the duty of the court to judicially know the provisions of charters of plank road companies enacted under a new constitution, the court is not bound to know whether a certain corporation was created under one general public statute or another. *Danville & W. L. Plank-Road Co. v. State*, 16 Ind. 456.

³¹ That free masons' fraternity is purely charitable under the act incorporating the Grand Lodge. *Burdine v. Grand Lodge of Alabama*, 37 Ala. 478.

³² § 750, *supra*, also § 428, *supra*, and *McKiel v. Real Estate Bank*, 4 Ark. 592; *Commercial Bank v. Newport Mfg. Co.*, 1 B. Mon. (Ky.) 13, 35 Am. Dec. 171, citing *Halbert v. Skyles*, 1 A. K. Marsh. (Ky.) 368; *Pendleton v. Bank of Kentucky*, 1 T. B. Mon. (Ky.) 171, 175; *Withee v. Citizens' Sav. Bank*, 1 White & W. Civ. Cas. Ct. App. (Tex.) §§ 489, 490. See also *Bank of Alabama v. Simonton*, 2 Tex. 531.

Will not take notice of the fact

that there is another corporation of a similar name as the defendant in an action. *Mobile Light & R. Co. v. Mackay*, 158 Ala. 51, 48 So. 509; *King Land & Improvement Co. v. Bowen*, 7 Ala. App. 462, 61 So. 22.

³³ Change of name by public law will be noticed. *Water Lot Co. v. Bank of Brunswick*, 53 Ga. 30.

Where by public act plaintiff has been merged in a new corporation the incapacity of the old corporation to sue will be noticed without pleading (this was municipality). *Ft. Wayne v. Jackson*, 7 Blackf. (Ind.) 36.

³⁴ Impossibility of corporation named "Corporation of Lebanon" is not judicially known. *McBroom v. Lebanon*, 31 Ind. 268.

³⁵ § 758, *supra*.

³⁶ *Illinois Cent. R. Co. v. Johnson*, 40 Ill. 35.

³⁷ That the North Carolina Railroad belongs to a quasi public corporation chartered in 1849 by an act of the general assembly giving the corporation full power of eminent domain. *Goodman v. Heilig*, 157 N. C. 6, 36 L. R. A. (N. S.) 1004, 72 S. E. 866.

³⁸ That the Georgia Pacific Railway Company was incorporated in 1882 and authorized to construct a road from Aberdeen or Columbus to the Mississippi River. *Georgia Pac. Ry. Co. v. Baird*, 76 Miss. 521, 24 So. 195.

Notice may also be taken that corporations only can operate railroads and that as a legal consequence individuals have no powers depending thereon,³⁹ and of the necessity of a public grant or franchise to use in any special manner the highways, rivers and other public ways and places,⁴⁰ and that railroad corporations are common carriers,⁴¹ and engaged in interstate commerce⁴² and likewise that street railways are carriers of passengers.⁴³ The court declined to notice that a telegraph corporation was a public transmitter of messages,⁴⁴ or that there was more than one such company in the state.⁴⁵ Judicial notice will not be taken of by-laws.⁴⁶ It may be known judicially that a corporation must exist within the state.⁴⁷

It may be known as a general fact that stockholders in some kinds of corporations often live in other states⁴⁸ but not that all stockholders

³⁹ That all railroads, to which section 7a of the Labor Law, as to hours of employment applies, are and must be operated by corporations and not by individuals, so the latter have no power to acquire land by eminent domain for railroad purposes. *People v. Erie R. Co.*, 198 N. Y. 369, 29 L. R. A. (N. S.) 240, 139 Am. St. Rep. 828, 19 Ann. Cas. 811, 91 N. E. 849, rev'g 135 N. Y. App. Div. 767, 119 N. Y. Supp. 873.

⁴⁰ Poles, wires and electric lighting apparatus in a street. *Nelson v. Narragansett Elec. Lighting Co.*, 26 R. I. 258, 67 L. R. A. 116, 106 Am. St. Rep. 711, 58 Atl. 802.

The fee of canals and locks. *State v. Portland General Elec. Co.*, 52 Ore. 502, 98 Pac. 160, 95 Pac. 722.

A ferry franchise. *State v. Portland General Elec. Co.*, 52 Ore. 502, 98 Pac. 160, 95 Pac. 722.

⁴¹ *Caldwell v. Richmond & D. R. Co.*, 89 Ga. 550, 15 S. E. 678; *Boyle v. Great Northern Ry. Co.*, 13 Wash. 383, 43 Pac. 344.

⁴² *State v. Missouri Pac. R. Co.*, 212 Mo. 658, 111 S. W. 500.

"It is common knowledge, that, under the large meaning of interstate commerce given by the courts, every railroad, however short its own line, engages in interstate commerce in

handling freight or passengers destined to a point in another state, whether such point of destination is reached by its own line or through a connecting carrier." *McIntosh v. St. Louis & S. F. R. Co.*, 182 Mo. App. 288, 168 S. W. 821.

⁴³ *Indianapolis St. R. Co. v. Ray*, 167 Ind. 236, 78 N. E. 978.

⁴⁴ Cannot know that a corporation is "engaged in telegraphing for the public." *Western U. Tel. Co. v. Ax-tell*, 69 Ind. 199.

⁴⁵ *State v. Atlantic Coast Line R. Co.*, 51 Fla. 578, 40 So. 875.

⁴⁶ § 488, *supra*, and *Haven v. New Hampshire Asylum for Insane*, 13 N. H. 532, 38 Am. Dec. 512.

Courts cannot take judicial notice of the statutes and by-laws promulgated by private organizations for the government of their own affairs. *Kempton Lodge, No. 482, I. O. O. F. v. Mozingo*, 180 Ind. 566, 103 N. E. 411; *Portage Lake Miners' & Mechanics' Benev. Society v. Phillips*, 36 Mich. 22; *Simpson v. South Carolina Mut. Ins. Co.*, 59 S. C. 195, 37 S. E. 18, rehearing denied 37 S. E. 225.

⁴⁷ *Lexington Mfg. Co. v. Dorr*, 2 Litt. (Ky.) 256.

As to the doctrine of corporate citizenship, see Chap. 13, *supra*.

⁴⁸ Domestic mining corporations.

are citizens.⁴⁹ It is known to be customary for corporations formed in one state to transact all or nearly all of their business elsewhere, and notice of a frequency of purpose thereby to evade the laws may be taken.⁵⁰ If the location of the principal office is fixed by the public law, as in some states, it may be judicially noticed.⁵¹ The disposal of the public interest in a public property to a corporation may be judicially known when made by public act,⁵² but if the act merely authorizes sale of a railroad the court cannot know that it has been sold pursuant thereto.⁵³ It cannot be known whether a corporation paid certain money to or for the benefit of a state institution.⁵⁴

When the corporation is publicly owned and operated so that its officers are public officers, judicial notice of them is taken, but not otherwise.⁵⁵ The names and signatures of state officers are known and will be noticed on process and other papers of official character hav-

Milroy v. Spurr Mountain Iron Min. Co., 43 Mich. 231, 5 N. W. 287.

⁴⁹ *Lexington Mfg. Co. v. Dorr*, 2 Litt. (Ky.) 256; and see further as to the doctrine of citizenship, § 387 et seq., *supra*.

⁵⁰ Courts will take judicial notice that prior to the enactment of the Act of 1897 regulating foreign corporations, many of such corporations were organized to do business in this state, and that others transferred their business to this state, to evade the payment of fees and state control. *Lehigh Portland Cement Co. v. McLean*, 149 Ill. App. 360, *aff'd* 245 Ill. 326, 137 Am. St. Rep. 322, 92 N. E. 248.

⁵¹ *Wallace v. Southern Exp. Co.*, 7 Ga. App. 565, 67 S. E. 694; *White v. Atlanta, B. & A. R. Co.*, 5 Ga. App. 308, 63 S. E. 234.

⁵² Charter of White Water Valley Canal Co. and transfer of state interest to it is public act. *Hankins v. Lawrence*, 8 Blackf. (Ind.) 266; *White Water Val. Canal Co. v. Boden*, 8 Blackf. (Ind.) 130.

⁵³ *Shea v. Knoxville & K. R. Co.*, 6 Baxt. (Tenn.) 277.

⁵⁴ That a defendant horse racing association has created and paid over

to the state funds for the making of exhibitions at a state fair when in fact no such exhibitions were held. *State v. Delmar Jockey Club*, 200 Mo. 34, 98 S. W. 539, 92 S. W. 185.

⁵⁵ The president of the State Bank, belonging to the public and he a public officer, is judicially known, as is his signature. *Roberts v. State Bank*, 9 Port. (Ala.) 312.

Where the state has not exercised the right to take the stock of a bank under its charter, the president appointed by the stockholders and a commissioner appointed by them with the governor, are not public officers judicially known to the courts. *Crawford v. Planters' & Merchants' Bank*, 6 Ala. 289.

Under a statute providing that the president of a bank shall be one of the board, except in case of sickness or necessary absence, when the board may appoint a president pro tem., the court will not take judicial notice of the fact that an individual of the same name who makes a certificate, was elected a director, the court not being informed that he was president pro tem. when he made the certificate. *Crawford v. Branch Bank*, 7 Ala. 205.

ing to do with the corporation,⁵⁶ but their power to accept or receive service by consent of a corporation cannot be known.⁵⁷

Matters relating to the corporation which are of public record may thereby be known,⁵⁸ especially when the statute so enacts;⁵⁹ but the filing for record was held not to be within such an act.⁶⁰ Such a statute imposing the duty on the lower court was held not to impose a like duty on the supreme court, which could not have such records before it; and the trial court's determination of the fact was therefore conclusive on appeal.⁶¹

§ 3089. — General common knowledge. In addition to those matters known because of their being apparent from the public statutes, there are many things about corporations which are known because of their falling within the scope of general common knowledge. Examples are: the charitable nature of the Masonic fraternity,⁶² the general principles of morality and religion applicable in Christian churches,⁶³ matters of church history that are

⁵⁶ The signature of the state insurance commissioner is judicially known and also his official character. *State v. Brotherhood of American Yeomen*, 111 Minn. 39, 126 N. W. 404.

⁵⁷ Commissioner of insurance as attorney and authorized to acknowledge service of process on a foreign insurance company. *Globe Rutgers Fire Ins. Co. v. Sayle*, 107 Miss. 169, 65 So. 125.

⁵⁸ Decisions of a railroad commission are public records, entitled to judicial notice (*Wis. St. § 1797—37n*). *Chicago & N. W. R. Co. v. Railroad Commission*, 156 Wis. 47, 145 N. W. 216.

⁵⁹ Of organization of draining company within same county. *Eel River Draining Ass'n v. Topp*, 16 Ind. 242; *Herod v. Rodman*, 16 Ind. 241.

⁶⁰ A statute requiring the courts to take judicial notice within the county in which articles are recorded, of existence of draining associations, does not require judicial notice of the fact of recording. *Cicero Hygiene Draining Co. v. Craighead*, 28 Ind. 274. That the act of recording articles

is the inception of the corporation, and not judicially noticeable, see also *McIntire v. McLain Ditching Ass'n*, 40 Ind. 104; *New Eel River Draining Ass'n v. Durbin*, 30 Ind. 173. Contra, *Anderson v. Kerns Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63.

⁶¹ *Cicero Hygiene Draining Co. v. Craighead*, 28 Ind. 274; *Delawter v. Sand Creek Ditching Co.*, 26 Ind. 407; *Herod v. Rodman*, 16 Ind. 241.

⁶² That the grand and subordinate lodges of free masons constitute a charitable or eleemosynary corporation, the society being of long existence, and its purpose having frequently been made public. *Burdine v. Grand Lodge of Alabama*, 37 Ala. 478.

⁶³ Will take notice of the relation in which a minister or priest of the Christian religion stands to the church with which he is connected and to the community in which he lives, so far as personal morality and the fundamental principles upon which religion is based are concerned. *Potter v. New York Evening Journal Pub. Co.*, 68 N. Y. App. Div. 95, 74 N. Y. Supp. 317.

public and general,⁶⁴ the common abbreviations like "pres." and "secy.,"⁶⁵ and common abbreviations in names of corporations,⁶⁶ the location of existing railroad lines,⁶⁷ and the counties traversed by them⁶⁸ and their termini⁶⁹ and to some extent at least the towns reached by their lines,⁷⁰ and that there are no continuous trans-

⁶⁴ As a matter of historical fact and notoriety courts will take judicial notice of the division of the Methodist Episcopal Church, of the territory over which the jurisdiction of such division was to be exercised, and of the articles of separation with reference to a territorial division of the common property. *Malone v. Lacroix*, 144 Ala. 648, 143 Ala. 657, 41 So. 724.

⁶⁵ *Union Trust Co. of San Francisco v. Ensign-Baker Refining Co.*; 29 Cal. App. 641, 157 Pac. 613.

⁶⁶ That "1st" in name 1st National Bank means First, see *Sayers v. First Nat. Bank*, 89 Ind. 230. See also *Locke v. Merchants' Nat. Bank*, 66 Ind. 353, where "Citz. Bank," was judicially noticed as meaning Citizens' Bank.

⁶⁷ Courts will take judicial notice of the "direction, run and location of important railroads within the state." *Gulf, C. & S. F. Ry. Co. v. State*, 72 Tex. 404, 1 L. R. A. 849, 13 Am. St. Rep. 815, 10 S. W. 81; *Missouri, K. & T. Ry. Co. of Texas v. Lightfoot*, 48 Tex. Civ. App. 120, 106 S. W. 395; *Texas & N. O. R. Co. v. Walker*, 43 Tex. Civ. App. 278, 95 S. W. 743. *Contra*, *Stuart v. Colorado Eastern R. Co.*, 61 Colo. 58, 156 Pac. 152.

Permanent location of an important line of railroad which traverses the state upon a firmly established route. *Worden v. Cole*, 74 Kan. 226, 86 Pac. 464.

Route of a railroad which has been built and operated for a number of years from one station to another in the state. *Patterson v. Missouri Pac. R. Co.*, 77 Kan. 236, 15 L. R. A. (N. S.) 733, 94 Pac. 138.

Locality of a railway and where it

terminates. *Galveston, H. & S. A. R. Co. v. Johnson* (Tex. Civ. App.), 29 S. W. 428.

That two railroads are parallel and competing lines. *Gulf, C. & S. F. Ry. Co. v. State*, 72 Tex. 404, 1 L. R. A. 849, 13 Am. St. Rep. 815, 10 S. W. 81.

That a considerable part of a certain railroad is within the state. *Hobbs v. Memphis & C. R. Co.*, 9 Heisk. (Tenn.) 873.

That a number of railroads, other than that of the defendant, run into a certain city. *Texas & P. Ry. Co. v. Black*, 87 Tex. 160, 27 S. W. 118.

⁶⁸ That a railroad runs through a certain county. *Baltimore & O. R. Co. v. Brant*, 132 Ind. 37, 31 N. E. 464; *Goodman v. Heilig*, 157 N. C. 6, 36 L. R. A. (N. S.) 1004, 72 S. E. 866. *Contra*, *Georgia Pac. Ry. Co. v. Baird*, 76 Miss. 521, 24 So. 195.

That a certain railway does not pass through a certain county. *McCullen v. Seaboard Air Line Ry.*, 146 N. C. 568, 60 S. E. 506.

That a railroad of given name extends into a particular county of the state. *Hunt v. Atchison, T. & S. F. Ry. Co.* (Tex. Civ. App.), 28 S. W. 460. See also *Miller v. Texas & N. O. R. Co.*, 83 Tex. 518, 18 S. W. 954; *Gulf, C. & S. F. Ry. Co. v. State*, 72 Tex. 404, 1 L. R. A. 849, 13 Am. St. Rep. 815, 10 S. W. 81.

⁶⁹ That there are no interurban electric railroads in the state not having a terminus in a city. *Watkins v. Detroit United Ry.*, 155 Mich. 440, 119 N. W. 447; *Halladay v. Detroit United Ry.*, 155 Mich. 436, 119 N. W. 445, 15 Det. L. N. 1050.

⁷⁰ Of a town having a certain name. but not of a railroad station of such

continental lines in the United States.⁷¹ The location of a land grant with relation to a rail route may be noticed.⁷² Notice has been extended to the physical structures of their lines and the relative volume of traffic on them⁷³ but in another case the court refused to take notice that roads in a system were physically connected so as to admit of continuous traffic.⁷⁴ Generally known and practiced methods of doing corporate business in meetings and of recording transactions may be noticed,⁷⁵ but not what particular action was taken or who participated in a meeting or transaction.⁷⁶ And the general conditions of society affecting them, such for instance as the customs and regulations of labor unions,⁷⁷ or stock exchanges,⁷⁸ may also be noticed. Generality of knowledge or notoriety being the basis of all such notice, the courts will be careful not to extend it further,⁷⁹ and will not draw

name or that it is the only railway station at a certain place. *St. Louis & S. F. R. Co. v. Williams*, 25 Okla. 662, 107 Pac. 428.

Of the county in which known railroad stations or points on a railroad line at known distances from such stations are located. *Friday v. Santa Fé Cent. Ry. Co.*, 16 N. M. 434, 120 Pac. 316.

But, contra, in the absence of proof, the court has no means of knowing what the railway fare is from a certain town to another town or where towns other than the county seat are. *Missouri, K. & T. Ry. Co. of Texas v. Lightfoot*, 48 Tex. Civ. App. 120, 106 S. W. 395.

⁷¹ It is a matter of common knowledge that there is no strictly trans-continental line of railroad in this country, but that a person may cross by traveling over different lines of road. *Brian v. Oregon Short Line R. Co.*, 40 Mont. 109, 25 L. R. A. (N. S.) 459, 20 Ann. Cas. 311, 105 Pac. 489.

⁷² That certain lands conveyed to a railroad company by patent from the state under authority of an act of congress are within the limits of a permanently located route of such company. *Worden v. Cole*, 74 Kan. 226, 86 Pac. 464.

⁷³ As of tunnels of railroad com-

panies, and that the volume of travel through one of them is not as large as that of another, the population affected not being so large. *People v. State Board of Tax Com'rs*, 67 N. Y. Misc. 474, 123 N. Y. Supp. 609.

⁷⁴ *Georgia Pac. Ry. Co. v. Gaines*, 88 Ala. 377, 7 So. 382.

⁷⁵ *Norwich Ins. Co. v. Oregon R. Co.*, 46 Ore. 123, 78 Pac. 1025.

⁷⁶ *Dunlap v. Wilson*, 32 Ill. 517.

⁷⁷ Court will take judicial notice that labor unions have adopted and promulgated rules and regulations for the protection and guidance of labor which are carefully observed by the members. *Axton-Fisher Tobacco Co. v. Evening Post Co.*, 169 Ky. 64, L. R. A. 1916 E 667, 183 S. W. 269.

But not of the agreement, or its nature, or of the principles and tenets by which laborers belonging to a union are bound. *Birmingham Paint & Roofing Co. v. Crampton & Tharpe* (Ala.), 39 So. 1020.

⁷⁸ General nature of the stock exchange. *Dibert v. D'Arcy*, 248 Mo. 617, 154 S. W. 1116.

⁷⁹ *Miller v. Texas & N. O. Ry. Co.*, 83 Tex. 518, 18 S. W. 954.

Judicial notice is to be taken with caution, and every reasonable doubt as to the propriety of its exercise in a given case should be resolved against

on the personal knowledge of the judge as to the facts.⁸⁰ Notice does not extend beyond the general fact into the details of it, and for that reason it cannot be known that a particular parcel of land has been condemned for public use,⁸¹ or like details of place.⁸² It cannot be known that a route map of a railroad was not a map of the final location,⁸³ or what were the relations between known railroads,⁸⁴ or what lines are owned or operated by a party,⁸⁵ or whether any are owned within a given territory.⁸⁶ The internal administration and functions,⁸⁷ and the subordinate officers and their powers,⁸⁸ and the customary provisions of their contracts,⁸⁹ and the nature, laws or powers of the Roman Catholic church⁹⁰ and other churches⁹¹ were refused judicial notice.

it. *Baxter v. McDonnell*, 155 N. Y. 83, 40 L. R. A. 670, 49 N. E. 667.

⁸⁰ The court can indulge in no presumption as to facts not appearing of record, though it may have personal knowledge of the history of railroad lines operated by a defendant company. *Purdy v. Erie R. Co.*, 162 N. Y. 42, 48 L. R. A. 669, 56 N. E. 508.

⁸¹ Not of a particular parcel of land condemned for public use. *Chapman v. Pittsburg & S. R. Co.*, 18 W. Va. 184.

⁸² Cannot take judicial notice of the location of a tramway company, or where a block from "South Broadway by the car shops is." *Ingersoll v. Davis*, 14 Wyo. 120, 82 Pac. 867.

⁸³ *McKeoin v. Northern Pac. R. Co.*, 45 Fed. 464.

⁸⁴ Cannot judicially notice that a railroad owns lines of railroad extending into a certain city and other important business centers, and that another company desires to control and operate such lines. *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721, modifying 150 N. Y. App. Div. 715, 135 N. Y. Supp. 789.

In order to take judicial notice that a certain railroad is a part of a system of railroads, the court must be aware of the contract through which the system is created, and accordingly such notice cannot be taken. *Miller v.*

Texas & N. O. Ry. Co., 83 Tex. 518, 18 S. W. 954.

Cannot take judicial notice that a railroad company acquired by purchase or otherwise, the interest of another railroad in a strip of land. *Chapman v. Pittsburg & S. R. Co.*, 18 W. Va. 184.

⁸⁵ *George Muehlebach Brewing Co. v. Dunham* (Mo. App.), 177 S. W. 1067; *Reisenleiter v. United Rys. Co. of St. Louis*, 155 Mo. App. 89, 134 S. W. 11; *Mannion v. International R. Co.*, 66 N. Y. Misc. 420, 121 N. Y. Supp. 263.

⁸⁶ Will not take judicial notice that company owns no railroad in a county. *Indianapolis & C. R. Co. v. Stephens*, 28 Ind. 429.

⁸⁷ Substance of by-laws or customs as to the authority of officers of a private corporation. *Elkhart Hydraulic Co. v. Turner*, 170 Ind. 455, 84 N. E. 812.

⁸⁸ Duties of a superintendent of a division of a railroad. *Brown v. Missouri, K. & T. Ry. Co.*, 67 Mo. 122.

⁸⁹ Custom for notes of a corporation to contain a contract for the payment of attorney's fees in case of suit. *Thomas v. Wentworth Hotel Co.*, 16 Cal. App. 403, 117 Pac. 1041, 1046.

⁹⁰ *Baxter v. McDonnell*, 155 N. Y. 83, 40 L. R. A. 670, 49 N. E. 667; *Katzer v. Milwaukee* (Wis.), 79 N. W. 745.

⁹¹ Cannot take notice of the powers

Matters of geography, including political geography such as the location of towns and subdivisions of the state are noticed,⁹² and in that way railroad stations may be known⁹³ but not the presence or absence of banks or other corporations there.⁹⁴

§ 3090. Presumptions and burden of proof—In general. The same rules for the burden of proof and presumptions apply in corporation actions as in suits between natural persons.⁹⁵ Presumptions are mainly, if not entirely, reducible to words in which they might be stated so generally yet correctly, that everything about corporations would disappear. All there is about them of corporations is the application. Indeed, as Mr. Greenleaf points out, the doctrine of presumption is not peculiar to law but belongs to all departments of science operating by logic from the known or conceded to the questioned fact.⁹⁶ And as the same author explains,⁹⁷ the burden of proof (not that of meeting a *prima facie* case and overcoming it) is a similar rule that the affirmative must be proved by the person asserting it. This is capable of a similar reduction to generality leaving nothing peculiar to corporation actions. General treatises on evidence should be consulted as to all those matters which do not concretely apply to corporations as parties, and many of those which do so apply

of vestrymen of a church, including their power to bind the congregation or wardens by signing a note and mortgage. *Hill Estate Co. v. Whittlesey*, 21 Wash. 142, 57 Pac. 345. Or of the general organization of a Methodist Episcopal Church and its administration and control over local churches of that denomination, and their property. *Sarahass v. Armstrong*, 16 Kan. 192. But see *Malone v. Lacroix*, 144 Ala. 648, 143 Ala. 657, 41 So. 724, where a very extensive notice of the division of the Methodist Episcopal Church into two branches was taken as a historical fact.

That by-laws cannot be noticed, see *supra*, this section.

⁹² The relative locations of its towns. *Bartholomew v. First Nat. Bank*, 18 Wash. 683, 52 Pac. 239.

County seat of a county and its location therein. *Missouri, K. & T.*

Ry. Co. of Texas v. Lightfoot, 48 Tex. Civ. App. 120, 106 S. W. 395.

⁹³ *Indianapolis & C. R. Co. v. Stephens*, 28 Ind. 429; *Indianapolis & C. R. Co. v. Case*, 15 Ind. 42.

⁹⁴ *Bartholomew v. First Nat. Bank*, 18 Wash. 683, 52 Pac. 239 (banks).

⁹⁵ *Stanton v. Baird Lumber Co.*, 132 Ala. 635, 32 So. 299; *Bates v. State Bank*, 2 Ala. 451.

⁹⁶ *Greenleaf on Evidence*, § 14 et seq. Thus the presumptions that the corporation was duly formed where it appears to have been acting as one, might be reduced to the presumption that all things are presumed to have been regularly and legally done; and the presumption of continued corporate existence once proved might be reduced to the presumption in general, that a state of facts existing is presumed to continue. See §§ 422, 424, *supra*, §§ 3091-3093, *infra*.

⁹⁷ *Greenleaf on Evidence*, § 74.

are more pertinent to other chapters herein than to this one.⁹⁸ Presumptions and burden of proof as to existence, powers, mode of action, and officers are discussed in the ensuing sections.⁹⁹

Every jurisdictional fact of residence, place of business, foreignness, and the like, when in issue, must be proved,¹ particularly where a limited jurisdiction is invoked.² The nonresidence of a plaintiff or other fact will not be presumed to oust jurisdiction over a foreign corporation, but must be proved as a fact,³ and it may be presumed that the domicile was at the only known agency in the state.⁴ Facts of the venue need ordinarily be proved only if put in issue by a plea in abatement or other proper pleading⁵ being presumed right in support of the judgment,⁶ but the defendant must prove the facts to sustain a claim of privilege of venue.⁷ Where the venue is jurisdictional of the case (not the person or the party), the burden is on plaintiff to establish it; and the case will fail of necessary proof unless it is established by proof.⁸

Though negative allegations need not be proven yet a negation which is essential in a right, title or affirmative defense must be proven by the alleging party, such as an allegation that some statutory condi-

⁹⁸ Consult the chapter herein dealing with the subject-matter of the particular presumption or burden.

⁹⁹ §§ 3091-3093, *infra*.

¹ Residence of plaintiff, being a jurisdictional fact under Code Civ. Proc. § 1780, where the corporation is foreign, must be proved if jurisdiction comes in question, whether pleaded or not. *O'Reilly v. New Brunswick, A. & N. Y. Steamboat Co.*, 28 N. Y. Misc. 112, 59 N. Y. Supp. 261, *rev'g* 26 N. Y. Misc. 195, 55 N. Y. Supp. 1133.

² The existence of a local place of business must be proved where the jurisdiction specially depends on that. *Consolidated Copalquin Mines Co. v. Broadway Realty Co.*, 31 N. Y. Misc. 783, 65 N. Y. Supp. 227.

³ *Gundlin v. Hamburg-American Packet Co.*, 8 N. Y. Misc. 291, 28 N. Y. Supp. 572.

⁴ *Hunt v. Atchison, T. & S. F. Ry. Co.* (Tex. Civ. App.), 28 S. W. 460.

⁵ *Snyder v. Philadelphia Co.*, 54 W. Va. 149, 63 L. R. A. 896, 102 Am. St.

Rep. 941, 1 Ann. Cas. 225, 46 S. E. 366.

Evidence to show agency held insufficient to sustain venue at place of alleged agency. *Cannel Coal Co. v. Luna*, — Tex. Civ. App. —, 144 S. W. 721.

⁶ Venue will be presumed right to support judgment and jurisdiction. *Zindorf v. Western American Co.*, 26 Wash. 695, 67 Pac. 355.

So on writ of prohibition. *State v. Superior Court of Pierce County*, 14 Wash. 203, 44 Pac. 131. See also § 3125, *infra*.

⁷ *Houston Rice Milling Co. v. Wilcox & Swinney*, 45 Tex. Civ. App. 303, 100 S. W. 204; *Mangum v. Lane City Rice Milling Co.* (Tex. Civ. App.), 95 S. W. 605.

⁸ *Tatum v. Seaboard Air-Line Ry.*, 128 Ga. 813, 58 S. E. 465; *Atlantic Coast Line R. Co. v. Du Pont*, 122 Ga. 251, 50 S. E. 103; *Southern Ry. Co. v. Brock*, 115 Ga. 721, 42 S. E. 65.

tion has not been met by the corporation.⁹ The nonperformance of such a condition to maintenance of suit, though in form a negative fact, must be proved by defendant pleading it defensively, where the evidence thereof is of public record accessible to both sides.¹⁰ It is presumed of a foreign corporation suing as plaintiff that it has complied with all conditions required to entitle it to do so,¹¹ and the want of it must be proved as a defense,¹² although this, of course, will greatly depend on the form and interpretation of the statutes regulating such admission to do business in the state.¹³ The making of an official certificate permitting the corporation to engage in a line of business is presumed to have been regularly done,¹⁴ and a foreign corporation conducting all its activities within the state is presumably domesticated.¹⁵

The name of the corporation is not a fact of such nature as readily can be presumed, if at all, but it may be a fact from which other presumptions spring; thus it may be presumed from identity of names that the corporation was the same,¹⁶ and the fact of incorporation may be presumed or implied from a name such as commonly imports it.¹⁷

When a seal is attached to an instrument it is presumed to be the corporate seal authoritatively affixed, and that a consideration existed for the contract, but not that the contract was conclusively legal or intra vires.¹⁸ It also imports authority of the executing officer.¹⁹

⁹ Under Code Civ. Proc. § 1869, it is not incumbent on the corporation to show payment of license tax as a condition precedent to suing. Defendant has the burden, it being a negative fact in the defense. *Alaska Salmon Co. v. Standard Box Co.*, 158 Cal. 567, 112 Pac. 454.

¹⁰ The burden of showing whether a certificate, required as a condition of maintaining suit, has or has not been obtained is on defendant pleading that it has not. *Northrup v. A. G. Wills Lumber Co.*, 65 Kan. 769, 70 Pac. 879.

¹¹ *T. H. Rogers Lumber Co. v. McRea*, 7 Indian T. 468, 104 S. W. 803.

Performance of conditions precedent to doing of business by plaintiff's indorser, a foreign corporation, is presumed. *Williams v. Cheney*, 3 Gray (Mass.) 215.

¹² A defendant pleading as a special

defense that a nonresident insurance company has not complied with state laws has the burden of showing the fact. *Creditors' Union v. Lundy*, 16 Cal. App. 567, 117 Pac. 624.

¹³ See chapter on Foreign Corporations, *infra*.

¹⁴ *Commonwealth Bonding & Casualty Ins. Co. v. Hill*, — Tex. Civ. App. —, 184 S. W. 247.

¹⁵ *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202.

¹⁶ When there is no suggestion of two similarly named corporations, identity is presumed from identity of names. *Campbell & Zell Co. v. American Surety Co.*, 129 Fed. 491, *aff'd* 138 Fed. 531.

¹⁷ As implied in pleading, see § 3043, *supra*.

¹⁸ §§ 758, 759, *supra*.

¹⁹ §§ 1943, 1944, *supra*.

In suits on a contract with the corporation the adverse party plaintiff will have to prove, if disputed, that it entered into the contract and executed the same by proper corporate action and agencies and within its powers,²⁰ and the other facts will be governed usually by ordinary rules having no special application to any particular kind of parties.²¹ Hence on its part, too, the corporation must prove the facts essential to a contract relied on²² and the defenses, such as rescission, which it relies on.²³ If the name be variant in the contract sued on there should be an offer of explanatory proof by the corporation to identify itself with the contracting party.²⁴ If a predecessor's liability is sued on, the assumption of it or succession to liability in some legal manner must be proved by plaintiff.²⁵ The burden is on the corporation suing on a subscription contract to show formation and organization of the corporation and compliance with every condition precedent to the liability asserted.²⁶ A book of rules for the government of the employees of the corporation will be taken as *prima facie* proof of them.²⁷ Knowledge of what appears on corporate books accessible to the person imputed with knowledge may be presumed.²⁸

Many presumptions arise between the corporation and its stockholders relating to the issue and the holding of the stock, among the principal of which are: that of subscription from the appearance of the name on the books of subscription, and the converse from its

²⁰ See §§ 3091-3093, *infra*.

²¹ Consult general treatises on Contracts; Sales; etc.

²² A corporation suing on a guaranty of the price of goods sold and delivered has the burden of proving sale and delivery, when denied. *Eaton Chemical Co. v. Doherty*, 31 N. D. 175, 153 N. W. 966.

²³ A corporation relying upon forfeiture of an insurance policy as a defense to an action on it has the burden of proof. *Dial v. Valley Mt. Life Ass'n of Virginia*, 29 S. C. 560, 8 S. E. 27.

²⁴ *Peake v. Wabash R. Co.*, 18 Ill. 88.

Plaintiff must prove allegations of a change of name. *Atlantic Coast Line R. Co. v. Waycross Elec. Light & Power Co.*, 123 Ga. 613, 51 S. E. 621.

²⁵ *Goldmark v. Magnolia Metal Co.*,

44 N. Y. App. Div. 35, 60 N. Y. Supp. 425, *aff'd* 170 N. Y. 579, 63 N. E. 1117. See also as to liability for predecessor's debts and liabilities, §§ 150 et seq., 375 et seq., *supra*, chapters on Consolidation and Merger; Reorganization, *infra*.

²⁶ See § 660, *supra*.

²⁷ In the absence of anything to the contrary in the record, the supreme court will presume that regulations of a railroad are contained in its book of rules. *McCoy v. Atlantic Coast Line R. Co.*, 84 S. C. 62, 65 S. E. 939. As to this and for further precedents, see general treatises on Negligence; Master and Servant.

²⁸ So held for the purpose of affording a basis for ratification. *Deposit Bank of Carlisle v. Fleming*, 19 Ky. L. Rep. 1947, 44 S. W. 961; *Racine County Bank v. Lathrop*, 12 Wis. 466.

absence;²⁹ that it was free from fraud;³⁰ that a person whose name appears on the books as such is a stockholder;³¹ that the value rendered for stock was adequate, where it was paid for with property or services, unless there was gross overvaluation apparent;³² that the possessor of a certificate in his name is the holder of the stock, and entitled to all the incidents, rights and liabilities thereof, and that one who produces a certificate properly transferred otherwise is entitled to a transfer on the corporate books.³³ The presumptions between creditors or other strangers and the officers or stockholders are not within the scope of this chapter, and may be consulted elsewhere.³⁴

§ 3091. — As to corporate existence, formation and powers. Incorporation may be presumed as a fact on the basis of numerous other facts, such as user, conduct, recognition, or name importing it, if it points only to incorporation and not as well to some other associated dealings; and by some, but not all, authorities use of a name importing incorporation will support a like presumption.³⁵ The preliminary proceedings, acceptance and other acts and conditions which are prerequisite may be presumed to have been done when it appears that the corporation has acted as such and exercised corporate powers and attributes,³⁶ or from the fact that it was beneficial.³⁷ The same facts

²⁹ § 569, *supra*.

³⁰ § 610, *supra*.

³¹ Chapter on Stock and Stockholders, *infra*. See also *Semple v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, 6 So. 46.

³² See chapter on Stock and Stockholders, subd. Fictitious and Watered Stock, *infra*, and see the following: *Davis v. Montgomery Furnace & Chemical Co.*, 101 Ala. 127, 8 So. 496; *American Tube & Iron Co. v. Baden Gas Co.*, 165 Pa. St. 489, 30 Atl. 940; *Carr v. Le Fevre*, 27 Pa. St. 413; *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 26 L. R. A. 509, 45 Am. St. Rep. 700, 28 S. W. 668; *Kelley v. Fletcher*, 94 Tenn. 1, 28 S. W. 1099.

³³ See chapter on Stock and Stockholders, *infra*.

³⁴ *Supra*, Chap. 42 and chapter on Stock and Stockholders, *infra*.

³⁵ §§ 422, 423, *supra*.

Presumption of law that prescrip-

tive corporation had charter, see 1 Kyd, Corporations, 40; 1 Bl. Comm. 473.

Name as importing incorporation in pleading, see § 3043, *supra*.

Presumable from name. *Seymour v. Thomas Harrow Co.*, 81 Ala. 250, 1 So. 45.

³⁶ §§ 430, 436, *supra*. The so-called presumption of acceptance and organization is technically rather an implication than a presumption in the cases where there has been a user under the charter. In that case the user is itself an acceptance regardless of any other facts, and ordinarily there would be an estoppel. See § 343, *supra*.

³⁷ *Bangor, O. & M. R. Co. v. Smith*, 47 Me. 34; *Charles River Bridge v. Warren Bridge*, 7 Pick. (Mass.) 344, *aff'd* 11 Pet. (U. S.) 420, 9 L. Ed. 773, 938; *Astor v. New York Arcade Ry. Co.*, 48 Hun (N. Y.) 562, 568,

support a presumption that an amendment of the charter was accepted.³⁸ As against the subscriber it may be presumed from proof of the minutes.³⁹ Incorporation implied or inferable from the name may be rebutted.⁴⁰

The burden of proof of the corporate existence is on the party asserting it as affirmative or defensive matter, subject to exceptions in quo warranto, and perhaps other actions of a peculiar nature, and subject to the distinction that because of estoppel or the like or because of presumptions no affirmative evidence to sustain the burden may be needful,⁴¹ especially if the corporation was foreign;⁴² but an estoppel to deny it may prevent there being such an issue or may supply the requisite proof.⁴³ In some cases the fact of incorporation, or at least the charter specially granted, is judicially known thereby making any proof unnecessary.⁴⁴

aff'd 113 N. Y. 93, 2 L. R. A. 789, 20 N. E. 594; *Taylor v. Newberne*, 55 N. C. 141, 146, 64 Am. Dec. 566.

³⁸ *Maine*. *Lincoln & K. Bank v. Richardson*, 1 Greenl. 79, 10 Am. Dec. 34.

³⁹ *Ohio*. *Cincinnati, H. & D. R. Co. v. Cole*, 29 Ohio St. 126, 23 Am. Rep. 729.

⁴⁰ *Pennsylvania*. *Com. v. Cullen*, 13 Pa. St. 133, 53 Am. Dec. 450.

⁴¹ *Texas*. *San Antonio v. Jones*, 28 Tex. 19.

⁴² *Vermont*. *Vermont & C. R. Co. v. Vermont Cent. R. Co.*, 34 Vt. 1.

See also chapter on Amendment and Repeal of Charter, *infra*.

³⁹ *Ryder v. Alton & S. R. Co.*, 13 Ill. 516.

⁴⁰ *Hubbard v. Chappel*, 14 Ind. 601.

⁴¹ *United States*. *Campbell & Zell Co. v. American Surety Co.*, 129 Fed. 491, aff'd 138 Fed. 531.

⁴² *Kentucky*. *Pike, Morgan & Co. v. Wathen*, 25 Ky. L. Rep. 1264, 78 S. W. 137.

⁴³ *Louisiana*. *Granite Ins. Co. v. Pralton*, 10 La. Ann. 22.

⁴⁴ *Massachusetts*. *Gott v. Adams Exp. Co.*, 100 Mass. 320.

⁴⁵ *New York*. *Methodist Episcopal Union Church v. Pickett*, 23 Barb. 436, aff'd 19 N. Y. 482.

See Chap. 14, § 421 et seq., *supra*.

Under private act must be proved. *Charleston & J. Turnpike Co. v. Wiley*, 16 Ind. 34.

When tried without pleadings the burden is on corporation asserting the fact. *Central Land Co. v. Calhoun*, 16 W. Va. 361.

To sustain suit by an assignee the assignor's corporate existence need not be proved if the assignment is proved. *Pacific Drug Co. v. Hamilton*, 71 Wash. 469, 128 Pac. 1069.

⁴² *Savage v. Russell*, 84 Ala. 103, 4 So. 235.

Plaintiff corporation must prove its foreign incorporation, since there was no common-law mode of forming corporations on which a presumption may rest. *Florsheim & Co. v. Fry*, 109 Mo. App. 487, 84 S. W. 1023.

⁴³ See Chap. 11, *supra*.

⁴⁴ See §§ 428, 3088, *supra*.

That it need not be proved where judicial notice of charter is taken, see *Anderson v. Kerns Draining Co.*, 14 Ind. 199, 77 Am. Dec. 63; *Agnew v. Bank of Gettysburg*, 2 Harr. & G. (Md.) 478, distinguishing *Whittington v. Farmers' Bank*, 5 Harr. & J. (Md.) 489.

As this burden requires issue on that fact, the real question is whether it is in issue, which question was discussed in the preceding subdivision of this chapter.⁴⁵ There seems to be no conflict or diversity of doctrine as to the burden of proof, but, as will be seen in the sections last referred to, there is much diversity in the rules of practice by which such an issue is arrived at. The overwhelming majority, if not all, of the states now require that the issue be made up explicitly either by affirmative allegations which may be denied directly or by requiring some form of special plea or its equivalent to make the issue. The practitioner will, of course, have consulted the local rules of pleading before coming to the burden of proof. A few illustrative cases are given below.⁴⁶ Once sustaining the burden on a preliminary plea to the corporate existence is enough, and on the main trial it, being a foreign corporation, need not repeat the proof by establishing the foreign law in addition to proving admission to do business in the state.⁴⁷ If the suit sounds in the names of the trustees and they hold

⁴⁵ §§ 3043, 3073, 3086, *supra*.

⁴⁶ Under the plea nul tiel corporation the charter and user under it must be proven; but under the general issue existence is admitted. *Ramsey v. Peoria Marine & Fire Ins. Co.*, 55 Ill. 311; *Stone v. Great Western Oil Co.*, 41 Ill. 85; *Sprey v. Garfield Lodge No. 1 of United Slavonian Benev. Society*, 117 Ill. App. 253.

Even under general issue burden is on corporation unless judicially known. *McKim v. Odom*, 3 Bland (Md.) 407.

The old rule in New York was that plaintiff as part of proof of its title to the cause of action must prove its incorporation. *Bank of Auburn v. Weed*, 19 Johns. (N. Y.) 300.

On plaintiff when well denied. *Davis v. Nebraska Nat. Bank*, 51 Neb. 401, 70 N. W. 963; *Yankton Nat. Bank v. Benson*, 33 S. D. 399, Ann. Cas. 1916 B 1011, 146 N. W. 582; *Kilpatrick-Koch Dry-Goods Co. v. Box*, 13 Utah 494, 45 Pac. 629.

When the instrument sued on involves an admission of plaintiff's existence and capacity it need not be

proved. *Grover v. Muralt*, 23 N. D. 576, 137 N. W. 830.

On plaintiff corporation when put in issue by notice of defense. *First Universalist Society v. Currier*, 3 Mete. (Mass.) 417; *Christian Society v. Macomber*, 3 Mete. (Mass.) 235.

Burden is on plaintiff when affidavit of denial is filed. *White v. Bellefontaine Lodge I. O. O. F.*, 30 Mo. App. 682.

If there is no allegation of corporate existence, the defendant must take up the burden of proving non-existence. *Boyce v. Augusta Camp No. 7429 Modern Woodmen of America*, 14 Okla. 642, 78 Pac. 322.

On a contract of subscription towards a corporation to be formed, the plaintiff corporation must prove its formation and existence. *Wert v. Crawfordsville & A. Turnpike Co.*, 19 Ind. 242.

If the subscription regards the corporation as formed the estoppel would operate against the subscriber. § 659, *supra*.

⁴⁷ *Galveston Land & Improvement*

the title as technical trustees for the corporation, they may maintain ejectment without proving its charter; otherwise where the suit is in its name.⁴⁸ It is presumed that the incorporation was under general laws rather than under a special charter if nothing is offered thereon.⁴⁹ Incorporation under a particular law must be proved by plaintiff suing the corporation by a proceeding allowed only by that law.⁵⁰ In ordinary cases the making of a *prima facie* case is enough to shift the burden,⁵¹ being supported by the presumption that all conditions not made precedent by law were performed.⁵² The presumption of regularity is illustrated in presuming that a proven organization was regular.⁵³ The presumption of continuance of a status once established also applies to corporations⁵⁴ and a corporation will be presumed to have continued from the earliest known day of its existence for the full period during which by law it is to continue.⁵⁵ When incorporation has been proved or established, the burden, so-called, of proving dissolution shifts to the other side.⁵⁶

In *quo warranto*, where the attack is direct, the burden of showing a legal incorporation is on the respondent corporation.⁵⁷ The corporation to prevail must prove a *de jure* existence. A *de facto* one is not enough.⁵⁸

Co. v. Perkins (Tex. Civ. App.), 26 S. W. 256.

⁴⁸ Wolf v. Goddard, 9 Watts (Pa.) 544.

⁴⁹ Wisconsin River Improvement Co. v. Pier, 137 Wis. 325, 21 L. R. A. (N. S.) 538, 118 N. W. 857.

⁵⁰ Where the power to sue stockholders and the corporation jointly depends on being incorporated under a particular general law such incorporation must be proved. Gay v. Keys, 30 Ill. 413.

⁵¹ After *prima facie* existence is shown by putting in evidence the articles or a certified copy (B. & C. Comp. § 5054, as amended. Laws 1905, p. 111), the burden shifts. Pioneer Hardware Co. v. Farrin, 55 Ore. 590, 107 Pac. 456.

Under plea *nul tiel* the burden on plaintiff corporation does not require proof of *de jure* incorporation. A *prima facie* case is made by proving *de facto* existence, whereupon the burden shifts. Concord Apartment

House Co. v. Alaska Refrigerator Co., 78 Ill. App. 682.

Sufficiency of *prima facie* showing, see § 3106, *infra*.

⁵² It is presumed that defendant sued as a corporation complied with all the conditions of organization and plaintiff need not prove them, where they are not plainly conditions precedent. Narragansett Bank v. Atlantic Silk Co., 3 Metc. (Mass.) 282.

⁵³ Selma & T. R. Co. v. Tipton, 5 Ala. 787, 39 Am. Dec. 344.

⁵⁴ Presumed to continue. Beaver v. Hartsville University, 34 Ind. 245.

⁵⁵ National bank presumed to continue for 20 years after date shown to have existed. Yankton Nat. Bank v. Benson, 33 S. D. 399, Ann. Cas. 1916 B 1011, 146 N. W. 582.

⁵⁶ United States Elec. Lighting Co. v. Leiter, 8 Mackey (D. C.) 575.

⁵⁷ See Chap. 14, *supra*, and chapter on *Quo Warranto*, *infra*.

⁵⁸ See chapter on *Quo Warranto*, *infra*.

The powers of the corporation are not usually in issue in ordinary actions, unless made so by a plea of *ultra vires* which presents a defensive burden on the party asserting it,⁵⁹ and, no such issue being made, the bare fact of incorporation being proved would imply all the powers generally inherent in corporations without any proof of them.⁶⁰ The only remaining way in which an issue of power could arise with a corresponding burden would be where some particular power was alleged, necessarily or not, to support the cause of action.⁶¹ The powers of a corporation are not presumed in particular, but it may be presumed that all things were regularly done; and hence that a contract emanating from the corporation was *intra vires*.⁶² By this rule it is presumed that the corporation had the power to do a given act, if it is one that under some circumstances might have been authorized,⁶³ such as a contract⁶⁴ or the taking of stock in another corporation,⁶⁵ and that property was held or transferred or alienated for an authorized rather than an unauthorized purpose.⁶⁶ Any

⁵⁹ § 811, *supra*.

⁶⁰ § 783 et seq., *supra*.

⁶¹ As to necessity of such allegations, see § 3054, *supra*.

⁶² § 811, *supra*.

⁶³ **Alabama.** Alabama Gold Life Ins. Co. v. Central Agricultural & Mechanical Ass'n, 54 Ala. 73.

Illinois. McIntire v. Preston, 10 Ill. 48, 48 Am. Dec. 321.

Indiana. International Building & Loan Ass'n No. 2 v. Wall, 153 Ind. 554, 55 N. E. 431.

Iowa. West v. Averill Grocery Co., 109 Iowa 488, 80 N. W. 555.

Michigan. Harrison Wire Co. v. Moore, 55 Mich. 610, 22 N. W. 62.

New Hampshire. Downing v. Mt. Washington R. Co., 40 N. H. 230.

New York. De Groff v. American Linen Thread Co., 21 N. Y. 124; Chautauqua County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347.

England. Scottish Northeastern Ry. Co. v. Stewart, 3 Macq. H. L. Cas. 382.

Ultra vires is not presumed. Touart v. Jett Bros. Contracting Co., 169 Ala. 638, 53 So. 751.

⁶⁴ **United States.** Ohio & M. R. Co.

v. McCarthy, 96 U. S. 258, 267, 24 L. Ed. 693.

Indiana. International Building & Loan Ass'n No. 2 v. Wall, 153 Ind. 554, 55 N. E. 431.

Iowa. West v. Averill Grocery Co., 109 Iowa 488, 80 N. W. 555.

New Jersey. Ellerman v. Chicago Junction Railways & Union Stockyards Co., 49 N. J. Eq. 217, 23 Atl. 287.

Wisconsin. Howard v. Boorman, 17 Wis. 459.

England. Shrewsbury & B. Ry. Co. v. Northwestern Ry. Co., 6 H. L. Cas. 113, 125; Scottish Northeastern Ry. Co. v. Stewart, 3 Macq. H. L. Cas. 382.

⁶⁵ Evans v. Bailey, 66 Cal. 112, 4 Pac. 1098; Ryan v. Leavenworth, A. & N. R. Co., 21 Kan. 365; In re Rochester, H. & L. R. Co., 110 N. Y. 119, 17 N. E. 678.

⁶⁶ **California.** Stockton Sav. Bank v. Staples, 98 Cal. 189, 32 Pac. 936; People v. La Rue, 67 Cal. 526, 8 Pac. 84.

Illinois. McIntire v. Preston, 10 Ill. 48, 48 Am. Dec. 321.

Kentucky. Kentucky Lumber Co. v. Green, 87 Ky. 257, 8 S. W. 439.

extraordinary or unusual power must be proven if asserted, especially where the charter is not before the court and it proceeds on the bare fact of incorporation.⁶⁷ And where a corporation would justify an entry of land otherwise a trespass, it must show a lawful authority and justification for it.⁶⁸ That the character of the corporation is known with its object and general scope of business brings in many implications of particular powers as incidental to its general nature and purpose. This is not technically a process of presumption so much as it is one of legal implication.⁶⁹ If by agreement the corporation was limited in the creation of the indebtedness sued on, that defense is its burden when so pleaded.⁷⁰

§ 3092. — As to the fact and mode of corporate action. As will be seen hereafter the minutes and records are the best evidence of corporate action taken, or else the writing of a contract or conveyance,⁷¹ but when the minutes are proved it is presumed that the facts occurred as therein recited,⁷² and if they are not recorded the burden

Michigan. Regents of University of Michigan v. Detroit Young Men's Society, 12 Mich. 138.

New York. Yates v. Van de Bogert, 56 N. Y. 526; Wood v. Wellington, 30 N. Y. 218; Chautauqua County Bank v. Risley, 19 N. Y. 369, 75 Am. Dec. 347, rev'g 4 Den. 480; Farmers' Loan & Trust Co. v. Curtis, 7 N. Y. 466.

North Carolina. Mallett v. Simpson, 94 N. C. 37, 55 Am. Rep. 595.

It is presumed that a mortgage and note taken by a life insurance and investment company and sued on in the suit was taken in pursuance of its lawful powers. Farmers' Loan & Trust Co. v. Perry, 3 Sandf. Ch. (N. Y.) 339.

⁶⁷ Victor v. Louise Cotton Mills, 148 N. C. 107, 16 L. R. A. (N. S.) 1020, 16 Ann. Cas. 291, 61 S. E. 648.

Defendant sued by name importing a corporation must prove the particular contract to be ultra vires if the charter is not before the court. Quitman Oil Co. v. McRee, 18 Ga. App. 128, 88 S. E. 921.

Power of foreign corporation to make a particular contract is not pre-

sumed. Phenix Bank v. Curtis, 14 Conn. 437, 36 Am. Dec. 492.

⁶⁸ In an action against a railroad for trespass where the plaintiff proves his title and the entry by defendants who construct the railroad, the defendants must justify by showing that the land is covered by the authorized location of their road. Hazen v. Boston & M. R. R., 2 Gray (Mass.) 574.

⁶⁹ See generally Chapters 22-34 inclusive, supra.

Bank may presumably have power to loan money, but insurance company has not. Frye v. Bank of Illinois, 10 Ill. 332.

⁷⁰ Is on corporation pleading as defense against action on notes by one party to an agreement limiting new indebtedness, to show that they represented new indebtedness. King County Land & Live Stock Co. v. Thomson, 21 Tex. Civ. App. 473, 51 S. W. 890.

⁷¹ §§ 3097, 3098, *infra*.

⁷² Shelby v. New York Steam Co., 121 N. Y. Supp. 619.

But a bare resolution is not evidence that an employment of an officer on a contract resulted. Kalamazoo Nov-

of proving them rests on the person asserting the fact.⁷³ The burden is on the plaintiff to prove the terms of a resolution relied on, even though it is in possession of the defendant.⁷⁴ The burden of proving enactment of a by-law is on the person asserting it.⁷⁵ The presumption of due and regular action has been applied often and variously in corporation actions, among other facts to conditions precedent to incorporation, such as notices and publication, subscriptions, and eligibility of officers chosen,⁷⁶ compliance with statutes in consolidating,⁷⁷ adoption of by-laws,⁷⁸ notice of meetings of stockholders,⁷⁹ receipt of notice sent by mail,⁸⁰ place of meetings,⁸¹ conduct of meeting in compliance with law,⁸² the execution and validity of proxies voted at a meeting,⁸³ regularity and lawfulness of meetings of direc-

elty Mfg. Works v. Macalister, 40 Mich. 84.

⁷³ Where a minute book does not show a declaration of a dividend, the plaintiff has the burden of proving such declaration though not recorded. *Shelby v. New York Steam Co.*, 121 N. Y. Supp. 619.

⁷⁴ Plaintiff suing under a contract conditioned on action taken by resolution must show what the resolutions were. *Alabama & T. Rivers R. Co. v. Nabors & Gregory*, 37 Ala. 489.

⁷⁵ See § 488, supra.

In a suit on a fraternal benefit certificate, the burden of proving the enactment of a by-law reducing benefits on the case of suicide was on the defendant. *Herman v. Supreme Lodge K. of P.*, 66 N. J. L. 77, 48 Atl. 1000. And see *Miller v. Johnston*, 71 Ark. 174, 72 S. W. 371; *Supreme Lodge Knights of Pythias v. Robbins*, 70 Ark. 364, 67 S. W. 758.

⁷⁶ See Chap. 14, supra.

⁷⁷ See chapter on Consolidation and Merger, infra. See also *Lewis v. Clarendon*, 5 Dill. 329, Fed. Cas. No. 8,320; *Swartwout v. Michigan Air Line R. Co.*, 24 Mich. 389.

⁷⁸ §§ 487, 488, supra, and see *Marsh v. Mathias*, 19 Utah 350, 56 Pac. 1074.

⁷⁹ § 1654, supra. See also in this connection the following decisions:

Illinois. *Cushman v. Illinois Starch*

Co., 79 Ill. 281; *Forest Glen Brick & Tile Co. v. Gade*, 55 Ill. App. 181, appeal dismissed 158 Ill. 39, 42 N. E. 65, aff'd 165 Ill. 367, 46 N. E. 286.

Louisiana. *Dunn v. New Orleans Bldg. Co.*, 8 La. 483.

Massachusetts. *Wallace v. First Parish in Townsend*, 109 Mass. 263 (parish meeting); *Sargent v. Webster*, 13 Mete. 497, 46 Am. Dec. 743.

Michigan. *Wells v. Rodgers*, 60 Mich. 525, 27 N. W. 671.

New York. *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380.

Vermont. *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274.

⁸⁰ *Ashley Wire Co. v. Illinois Steel Co.*, 164 Ill. 149, 56 Am. St. Rep. 187, 45 N. E. 410, aff'g 60 Ill. App. 179.

⁸¹ *McDaniel v. Flower Brook Mfg. Co.*, 22 Vt. 274.

⁸² *Brackett v. Persons Unknown*, 53 Me. 228 (time of posting and publishing notice); *Blanchard v. Dow*, 32 Me. 557 (vote by ballot); *Wallace v. First Parish in Townsend*, 109 Mass. 263 (parish meeting); *McDaniels v. Flower Brook Mfg. Co.*, 22 Vt. 274 (change of place for meeting).

⁸³ See § 1695, supra, and see also *People v. Crossley*, 69 Ill. 195; *White v. New York State Agr. Society*, 45 Hun (N. Y.) 580.

tors⁸⁴ and notice thereof,⁸⁵ presence of a quorum of directors,⁸⁶ appointment and election of officers,⁸⁷ and removal of officers or vacancies.⁸⁸ The presumption attending a record does not, however, go beyond the making to other facts, and hence it will not make a *prima facie* showing that a contract resulted with a person as authorized.⁸⁹ The presumption of regularity also includes presumption of corporate power duly possessed to make a contract or perform an act in proof,⁹⁰

⁸⁴ § 1891, *supra*. And see *Jones v. Hilldale Cemetery Society*, 23 Ky. L. Rep. 1486, 65 S. W. 838.

Where proceedings of trustees are established by competent proof, the general presumption in favor of the regularity of acts of public officers applies to them. *Hayward v. Pilgrim Society*, 21 Pick. (Mass.) 270.

⁸⁵ *California*. *Balfour-Guthrie Inv. Co. v. Woodworth*, 124 Cal. 169, 56 Pac. 891; *Barrell v. Lake View Land Co.*, 122 Cal. 129, 54 Pac. 594; *Stockton Combined Harvester & Agricultural Works v. Houser*, 109 Cal. 1, 41 Pac. 809; *Granger v. Original Empire Mining & Milling Co.*, 59 Cal. 678.

Connecticut. *Chase v. Tuttle*, 55 Conn. 455, 3 Am. St. Rep. 64, 12 Atl. 874; *Lane v. Brainerd*, 30 Conn. 565.

Iowa. *Hardin v. Iowa Ry. & Const. Co.*, 78 Iowa 726, 6 L. R. A. 52, 43 N. W. 543.

Louisiana. *Ross v. Crockett*, 14 La. Ann. 811.

Massachusetts. *Sargent v. Webster*, 13 Metc. 497, 46 Am. Dec. 743.

Minnesota. *Fletcher v. Chicago, St. P., M. & O. Ry. Co.*, 67 Minn. 339, 69 N. W. 1085.

Missouri. *Chouteau Ins. Co. v. Holmes' Adm'r*, 68 Mo. 601, 30 Am. Rep. 807.

Utah. *Singer v. Salt Lake City Copper Mfg. Co.*, 17 Utah 143, 70 Am. St. Rep. 773, 53 Pac. 1024; *Leavitt v. Oxford & G. Silver Min. Co.*, 3 Utah 265, 1 Pac. 356. See § 1891, *supra*.

⁸⁶ See § 1891, *supra*. See also in this connection the following decisions:

Iowa. *Rollins v. Shaver Wagon & Carriage Co.*, 80 Iowa 380, 20 Am. St. Rep. 427, 45 N. W. 1037 (vote of silent member).

Maryland. *Baile v. Calvert College Educational Society*, 47 Md. 117.

Massachusetts. *Hayward v. Pilgrim Society*, 21 Pick. 270.

Minnesota. *Heintzelman v. Druids' Relief Ass'n*, 38 Minn. 138, 36 N. W. 100.

New Hampshire. *Dispatch Line of Packets v. Bellamy Mfg. Co.*, 12 N. H. 205, 37 Am. Dec. 203.

But see *Van Hook v. Somerville Mfg. Co.*, 5 N. J. Eq. 137.

⁸⁷ See § 1768, *supra*, and see *Beardsley v. Johnson*, 121 N. Y. 224, 24 N. E. 380.

A resolution entered in the corporate books showing the employment of a superintendent is *prima facie* an authentic act and record of the proceedings of the directors. *Kalamazoo Novelty Mfg. Works v. Macalister*, 40 Mich. 84. See also § 3093, *infra*.

⁸⁸ *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265.

As affecting service of process on officer after term or alleged resignation, see § 3002, *supra*.

⁸⁹ A resolution employing a superintendent is a declaration of the company and may be withdrawn or altered before acceptance, wherefore it is not *prima facie* a contract. *Kalamazoo Novelty Mfg. Works v. Macalister*, 40 Mich. 84.

⁹⁰ § 3091, *supra*.

and the making and keeping of records required by law.⁹¹ Likewise the public filing of an instrument presumes the doing by the corporation of the acts evinced thereby.⁹² If the corporation denies regularity, it must prove the irregularity.⁹³

§ 3093. — As to officers and agents and their authority. It will be presumed that persons in office are rightfully there,⁹⁴ and have accepted the office,⁹⁵ and have acted regularly in the performance of official and representative duties and functions;⁹⁶ that the executing officer had authority if the instrument is sealed with the corporate seal and otherwise ordinarily not.⁹⁷ For this reason the burden of proving authority to bind the corporation is on the opposing party, as an incident of proving execution by it of the contract;⁹⁸ but it may be met by producing a contract germane to the corporate business and within the implication of official authority, and if the contract is not such the authority must be first proved.⁹⁹ If a *prima facie* authority appears the burden of overthrowing it is on the corporation.¹

⁹¹ Under L. O. L. § 6691, requiring directors to appoint a secretary who shall keep a record of official business of the corporation, it will be presumed that a resolution which is passed is entered of record. *Graham v. Coos Bay, R. & E. R. & Nav. Co.*, 71 Ore. 393, 139 Pac. 337.

⁹² The filing of a map in the office of a secretary of state by order of the board of directors of a railroad company is *prima facie* proof of the adoption of a survey, so as to make it a location. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co.*, 57 W. Va. 641, 50 S. E. 890.

⁹³ Irregularity of directors' meeting. *Barrell v. Lake View Land Co.*, 122 Cal. 129, 54 Pac. 594.

⁹⁴ § 1768, *supra*, and see *Selma & T. R. Co. v. Tipton*, 5 Ala. 787, 39 Am. Dec. 344; *Susquehanna Bridge & Bank Co. v. General Ins. Co.*, 3 Md. 305, 56 Am. Dec. 740; *Burgess v. Pue*, 2 Gill (Md.) 254, 287; *Lucky Queen Min. Co. v. Abraham*, 26 Ore. 282, 38 Pac. 65.

⁹⁵ § 1785, *supra*, and see *Halpin v. Mutual Brewing Co.*, 20 N. Y. App.

Div. 583, 47 N. Y. Supp. 412; *Lockwood v. Mechanics' Nat. Bank*, 9 R. I. 308, 11 Am. Rep. 253.

⁹⁶ § 3092, *supra*.

⁹⁷ §§ 1943, 1944, *supra*.

Seal imports proper authority to make contract bearing it. *Solomon's Lodge No. 1 A. F. M. v. Montmollin*, 58 Ga. 547.

A deed having been made by the corporation and bearing signatures of officers will be presumed to have been signed by them by authority. *St. Andrews Bay Land Co. v. Mitchell*, 4 Fla. 192, 54 Am. Dec. 340.

⁹⁸ *Mobile, J. & K. C. R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37; *Extension Gold Mining & Milling Co. v. Skinner*, 28 Colo. 237, 64 Pac. 198; *Blue Island Brewing Co. v. Fraatz*, 123 Ill. App. 26.

One suing on note has burden of proving it authorized. *Star Mills v. Bailey*, 140 Ky. 194, 140 Am. St. Rep. 370, 130 S. W. 1077.

⁹⁹ *Broadway Theatre Co. v. Dessau Co.*, 45 N. Y. App. Div. 475, 61 N. Y. Supp. 335.

¹ *Norman v. Loomis-Manning Filter*

A member asserting an excess of official authority to support his rescission of a contract has the burden of it.² These doctrines have already been fully treated in their proper connection.³ It will be presumed that the contract, e.g., a negotiable instrument, was made in relation to corporate business only,⁴ and that money received by an officer on such paper went to corporate benefit or for corporate account.⁵ Fraud in dealings with officers will not be presumed if reasonably avoidable by other explanation.⁶

§ 3094. Admissibility, introduction and sufficiency of evidence. It is impossible to state in a general way the rules of admissibility and sufficiency of evidence as applied in corporation actions. All that can be done is to illustrate them, starting with the assumption that all the general law of evidence applies except when changed by statute or inherently inapplicable.⁷ The evidence ought to be confined to the issues, and when by admission the existence of the corporation is established evidence thereof ought to be excluded,⁸ though a corporate plaintiff would not be heard to object to such evidence ordinarily.⁹ If the character of the corporation is established by means of the pleadings and the settlement of the issues thereby it is

Co., 123 N. Y. App. Div. 739, 108 N. Y. Supp. 261; *Karsch v. Pottier & Szymus Manufacturing & Improvement Co.*, 82 N. Y. App. Div. 230, 81 N. Y. Supp. 782; *Russell v. B. Schade Brewing Co.*, 49 Wash. 362, 95 Pac. 327.

² Suing to recover money paid in as on a contract rescinded for breach. *Supreme Ruling of Fraternal Mystic Circle v. Ericson* (Tex. Civ. App.), 131 S. W. 92.

³ §§ 1943, 1944, *supra*.

⁴ Presumed that its check was issued on corporate business only. *Ferdinand Ehrlich, Inc. v. Levine*, 83 N. Y. Misc. 136, 144 N. Y. Supp. 818.

⁵ *Union Trust Co. of San Francisco v. Ensign-Baker Refining Co.*, 29 Cal. App. 641, 157 Pac. 613.

⁶ *Niles v. United States Ozocerite Co.*, 38 Utah 367, 113 Pac. 1038.

⁷ "The same rules of evidence are applicable" as to a natural person. *Johnson v. Butte & S. Copper Co.*, 41

Mont. 158, 48 L. R. A. (N. S.) 938, 108 Pac. 1057.

⁸ Where corporate existence is admitted in open court as well as distinctness of two corporations, their charters (copies) are properly excluded. *Armour Packing Co. of Louisiana v. Vietch-Young Produce Co.* (Ala.), 39 So. 680.

Where it is alleged that defendant is a corporation duly organized and existing and such is also agreed in a statement of facts evidence as to a *de facto* existence is immaterial. *Grand Rapids Furniture Co. v. Grand Hotel & Opera House Co.*, 11 Wyo. 128, 72 Pac. 687, 70 Pac. 838.

⁹ The allowance in evidence of a certified copy of articles of incorporation of a plaintiff cannot be objected to by the plaintiff when the fact of incorporation is pleaded in the declaration. *Great Western Tel. Co. v. Mears*, 154 Ill. 437, 40 N. E. 298, *aff'g* 54 Ill. App. 667.

conclusive. No other character can be imparted to it by proof.¹⁰ For a cognate reason evidence to prove some other kind of a contract than that which the pleadings put in issue is excluded.¹¹ While issues involving the rights of parties dependent on corporate relations with predecessors and other corporations permit a very extensive scope of inquiry and a liberal rule of relevancy,¹² even including transactions themselves barred as causes of action,¹³ it is not proper to go into corporate dealings beyond the necessities of proof.¹⁴ Evidence tending merely to show a change of name will not be admitted on an issue of nonexistence or extinction.¹⁵

The corporate charter, records, books and papers as documentary evidence or admissions by the corporation of the facts shown by them will be considered in another place.¹⁶ On the issue of existence of the defendant as a corporation plaintiff cannot object to its own charter as evidence, if probative of the issue.¹⁷ The charter or articles, books, and records may be admitted on the question of corporate powers, incidents and agents, and on the question of corporate existence, being ordinarily the best evidence thereof as to all persons bound by the entries and recitals.¹⁸ Even abortive and unfilled articles may be admissible to rebut a charge of bad faith in failing to incorporate.¹⁹

¹⁰ A corporation sued as a "life insurance company" and answering by general denial establishes that defendant is such and is not a fraternal society. *Stork v. Supreme Lodge Knights of Pythias of World*, 113 Iowa 724, 84 N. W. 721.

¹¹ In a common-law action of covenant the contract if not executed under seal is inadmissible. *Randel v. Chesapeake & D. Canal*, 1 Harr. (Del.) 233.

¹² On issue as to value given for stock it was proper to consider the relations of two corporations which might give it a special value in connection with other property. *Joseph Bancroft & Sons Co. v. Bloede*, 106 Fed. 396, 52 L. R. A. 734.

¹³ Acts of a partnership formed into defendant corporation may be shown as bearing on intent and plan though in themselves as causes of action barred by limitations. *Racine Paper*

Goods Co. v. Dittgen, 171 Fed. 631.

¹⁴ The whole range of corporate records, papers and dealings cannot be dragged in on accounting under a single written contract (oil lease). *Doddridge County Oil & Gas Co. v. Smith*, 154 Fed. 970.

¹⁵ Evidence tending only to show change of name and nationalization of a bank is inadmissible on an issue of nul tiel corporation. *Michigan Ins. Bank v. Eldred*, 143 U. S. 293, 36 L. Ed. 162.

¹⁶ §§ 3101, 3102, *infra*.

¹⁷ *San Antonio & G. S. R. Co. v. San Antonio & G. R. Co.* (Tex. Civ. App.), 76 S. W. 782.

¹⁸ See §§ 3096-3106, *infra*.

¹⁹ Articles of association, signed and acknowledged before a notary public, but not recorded in the recorder's office as required by statute. *Warren v. Syfers*, 23 Ind. App. 167, 55 N. E. 103.

By-laws, too, are admissible to show whether a contract was one which the corporation could have made or was one that must have been an individual's because the corporation could not have made it,²⁰ or when by reference in the contract they have become a part of its terms,²¹ also to show authority of the officers and agents.²² An ignorance of by-laws limiting an officer's authority cannot be shown, by one who was bound to know them, for the purpose of proving that the corporation was bound by the contract.²³

Whenever properly in issue or involved as part of an issue the facts of agency or office and the authority of the agent or officer are admissible and provable in the same way as with principals and agents generally, but of course an officer's character and capacity resting in resolution must be proved thereby.²⁴

²⁰ By-laws evincing power to bind the corporation are admissible to show whether a note was a corporate or an individual one. *Miers v. Coates*, 57 Ill. App. 216.

As to the mode of proof of by-laws, see §§ 3096, 3101, *infra*.

²¹ *Tustin Fruit Ass'n v. Earl Fruit Co.*, 121 Cal. XVIII, 53 Pac. 693 (no opinion).

²² Rejection of by-laws to show general authority of president held not reversible error in view of admitted agency and issue only as to particular authority or ratification. *Georgia Engineering & Construction Co. v. Horton & Smith*, 135 Ga. 58, 68 S. E. 794.

On a simple issue whether a contract signed by the president bound the corporation, its by-laws are admissible for the purpose of showing that it was not executed as required. *Northwestern Packing Co. v. Whitney*, 5 Cal. App. 105, 89 Pac. 981.

²³ By-law disabling the president to make a certain contract, where it was such a contract as required the party to know the by-laws before making it. *Canadian Long Distance Tel. Co. v. Seiber*, — Tex. Civ. App. —, 159 S. W. 897.

²⁴ See generally §§ 1755, 1943, 1944, *supra*.

As to the mode of forming such an issue, see § 3084, *supra*.

As to best evidence and mode of proof, see §§ 3098, 3101, 3105, *infra*.

And see *A. D. Farmer & Son Type-Founding Co. v. Humboldt Pub. Co.*, 27 N. Y. Misc. 314, 57 N. Y. Supp. 821.

The Negotiable Instruments Act (Rev. Codes 1905, § 6321) providing that an agent's authority to issue negotiable paper may be established as in other cases of agency, permits proof of ostensible authority of the agent, but what shall constitute sufficient proofs of such authority is left to the common law. *Grant County State Bank v. Northwestern Land Co.*, 28 N. D. 479, 150 N. W. 736.

The issuance of checks and other obligations by a corporation's treasurer held admissible as proof of ostensible authority in such treasurer to issue negotiable paper. *Grant County State Bank v. Northwestern Land Co.*, 28 N. D. 479, 150 N. W. 736.

Where the corporate existence of a company is not put in issue, it is immaterial what the names of the trustees are. *Wiles v. Philippi Church*, 63 Ind. 206.

Authority may be shown by a course of dealings recognizing author-

Admissions or declarations by a corporation against its interest,²⁵ and those of its officers and agents binding on it,²⁶ may be received against it; and this includes its pleadings containing such admissions, whether they be good pleadings or bad,²⁷ and though made in another case.²⁸ The admissibility and effect of answers to interrogatories on a bill for discovery or on examinations under the statute of similar nature will be considered elsewhere.²⁹

It is necessary that the evidence be offered to the court and introduced, notwithstanding it is, as in case of the charter or articles, attached to the pleadings and as such before the court for that purpose.³⁰ The evidence ought to be introduced in due order³¹ with all prerequisite facts first put in evidence.³² This does not require that proof of organization should always precede proof of other facts evincive of incorporation.³³ It is not necessary to introduce all of

ity. *Smith v. Bank of New England*, 72 N. H. 4, 54 Atl. 385.

²⁵ Books and records as dis-serving declarations and admissions, see § 3102, *infra*.

²⁶ § 3104, *infra*.

²⁷ Admission contained in an answer filed by the corporation may be given in evidence, though contained in a special defense, accompanying a general denial and other inconsistent defenses. *Johnson v. Butte & S. Copper Co.*, 41 Mont. 158, 48 L. R. A. (N. S.) 938, 108 Pac. 1057.

²⁸ An answer of the corporation in chancery is evidence (as an admission) in another case although not under oath. *Randel v. Chesapeake & D. Canal*, 1 Harr. (Del.) 233.

²⁹ §§ 3110, 3111, *infra*.

³⁰ A paper attached to the plea purporting to be defendant's charter is not evidence unless introduced. *Quitman Oil Co. v. McRee*, 18 Ga. App. 128, 88 S. E. 921.

³¹ If the correctness of minutes is attacked it is necessary to first offer them for that purpose. *Durbrow v. Hackensack Meadows Co.*, 77 N. J. L. 89, 71 Atl. 59.

Where the corporation is sued on an indorsement of a note made by its

president as an individual and indorsed by it by the hand of the secretary, the genuineness of the president's signature might be shown, next the indorsement, and then the authority of the secretary, to make a *prima facie* case. *Karsch v. Pottier & Sty-mus Manufacturing & Improvement Co.*, 82 N. Y. App. Div. 230, 81 N. Y. Supp. 782.

³² Officer's authority, when not implied, should be proved before offering contract. *Broadway Theatre Co. v. Dessau*, 45 N. Y. App. Div. 475, 61 N. Y. Supp. 335.

Where validity of the corporation is well pleaded and the issue is sustained by the evidence, a foundation is laid for oral testimony as to what steps were taken towards organization and construction of the road and toll gates in an action to recover tolls. *Walker v. Shelbyville & R. Turnpike Co.*, 80 Ind. 452.

Laying foundation for secondary evidence, see § 3099, *infra*.

³³ Evidence of meetings in proof of incorporation should not be rejected because an organization was not first shown. *Stone v. Congregational Society*, 14 Vt. 86.

the minutes, or any more than is relevant to the issues.³⁴ The name of the corporation, as changed, may be proved at the time a document under the old name is introduced.³⁵

The general rules as to the sufficiency of a preponderance of the evidence in civil actions and those governing the credibility of the evidence and the witnesses are unquestioningly applied to corporation actions as appears in innumerable cases.³⁶

§ 3095. Best and secondary rule—In general. The rule that the best evidence must be produced, if available, is of great importance in corporations' actions because of the general commitment of their doings to writing.³⁷ Therefore on all direct issues such evidence if extant and available must be produced to prove corporate organization and existence, the charter, the by-laws,³⁸ the corporate acts minuted or recorded,³⁹ and the corporate doings and contracts evinced by writing,⁴⁰ except where the statutes have provided other modes of proving those facts;⁴¹ and subject also to the usual exceptions where the fact is only collaterally in issue or where other equally good and legal evidence of the facts may be had,⁴² or where the opposite party or a third person not bound by the corporate records makes the proof.⁴³ The rule does not exclude admissions of the same fact.⁴⁴ It does not require that

³⁴ *Fouche v. Merchants' Nat. Bank of Rome*, 110 Ga. 827, 36 S. E. 256.

³⁵ Where the corporate name of a mortgagee had been changed it is competent in action on the mortgage to introduce it in connection with proof of the change of name. *Lomb v. Pioneer Savings & Loan Co.*, 106 Ala. 591, 671, 17 So. 670.

³⁶ Instances where it has been done may be found, §§ 3105, 3106, *infra*.

³⁷ Books of a bank should furnish a full and complete record of its transactions, the issuance of stock, its assignment or transfer, subscriptions to stock and generally of all proceedings of the concern. *Hinecks v. Converse*, 38 La. Ann. 871.

³⁸ § 3096, *infra*.

³⁹ § 3097, *infra*.

⁴⁰ § 3098, *infra*.

⁴¹ This section, *infra*.

⁴² The rule applies only where there is primary and also secondary evidence of the fact; hence if the offered

evidence does not appear to be secondary but equal and co-ordinate it may be received. *Greenleaf on Evidence*, § 84 et seq. See also §§ 3098, 3105, 3106, *infra*. The original recorded articles are admissible and a duly certified copy of the statutory filed copy would also be. *James v. Greensboro & N. J. Turnpike Co.*, 47 Ind. 379.

⁴³ The opposite party may prove corporate transactions by oral evidence without having first given notice to produce corporate books. *Gaines v. Tombeckbee Bank*, Minor (Ala.), 50.

Plaintiff may testify that he delivered goods to the corporation though it kept books showing such facts. *Cochrane v. National Elevator Co.*, 20 N. D. 169, 127 N. W. 725. See also *Kalamazoo Novelty Mfg. Works v. Macalister*, 40 Mich. 84.

⁴⁴ *Clarke v. Warwick Cycle Mfg. Co.*, 174 Mass. 434, 54 N. E. 887.

the doing of corporate acts must be proved by record, when the oral evidence is offered to show that the corporation acted as such and not to show the facts for which the records were designed to be the memorial,⁴⁵ and not where the fact is a physical one, such as the location of the principal office,⁴⁶ or location of the corporate properties,⁴⁷ both of which may be proved orally. Although the principal place of business may be a matter established in writing, parol evidence is admissible to show where the principal office is, they not being necessarily the same.⁴⁸ Furthermore, statutes in some states have provided for proving record facts by other means as well, frequently by certified copy from the public officials or like copy from corporate officials; and such statutory proof is itself primary evidence.⁴⁹ The admissibility of such books and records against third persons is quite

⁴⁵ Parol evidence of corporate acts and meetings not professing to state the contents of any writing is admissible to show de facto existence. *Johnson v. Okerstrom*, 70 Minn. 303, 73 N. W. 147. Thus proof of a contract may be made by parol where a resolution on the same subject does not contain the elements of a contract. *Kalamazoo Novelty Mfg. Works v. Macalister*, 40 Mich. 84.

⁴⁶ Oral evidence is admissible on a plea in abatement to show where the defendant's principal office is situated. *Red River, S. & W. R. Co. v. Blount*, 3 Tex. Civ. App. 282, 22 S. W. 930.

⁴⁷ Evidence of a witness that tracks of a railroad company were in a certain street is not improper as being a conclusion of the witness, or on the ground that it is secondary evidence, and that the records of the city are the best evidence. *International & G. N. R. Co. v. Morin*, 53 Tex. Civ. App. 531, 116 S. W. 656. See § 3098, *infra*, for further illustrations of this rule.

⁴⁸ *Mason & Hanger Co. v. Sharon*, 231 Fed. 861.

⁴⁹ Code Civ. Proc. § 1918, subd. 6, requires documents or copies to be certified by the legal keeper thereof and if not so certified they are inad-

missible. *Nixon v. Goodwin*, 3 Cal. App. 358, 85 Pac. 169.

A duly certified abstract from a minute book of a corporation, complying with Civ. Code, § 5236, is admissible in lieu of the book itself. *Maynard v. Interstate Building & Loan Ass'n*, 112 Ga. 443, 37 S. E. 741.

Corporate acts and records may be proven by a sworn copy thereof (*Burns' Ann. St.* 1914, § 489). *Supreme Tribe of Ben Hur v. Kraft*, 183 Ind. 427, 109 N. E. 403.

Section 15 of chapter 51 of the statutes (*J. & A. Ann. St.* ¶ 5532) as to the admissibility of copies of records of a corporation makes such copies original evidence. *Chicago, B. & Q. R. Co. v. Weber*, 219 Ill. 372, 4 L. R. A. (N. S.) 272, 76 N. E. 489, *rev'g* 121 Ill. App. 455; *Mandel v. Swan Land & Cattle Co., Ltd.*, 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, *rev'g* 51 Ill. App. 204.

Where a statute points out a mode of proving acts of a corporation, such mode should be followed or some legal excuse shown for not following it. *Indianapolis & C. R. Co. v. Jewett*, 16 Ind. 273. See also §§ 3105, 3106, *infra*.

a distinct thing, and they are not admissible against third persons usually, unless under the *res gestae* rule or the documentary evidence rule or the like.⁵⁰ Secondary evidence by copy or oral testimony will be received according to usual rules, if the best evidence is for any of the legal reasons not available, such reasons being shown as a foundation for the admission of the other.⁵¹

§ 3096. — Organization, objects, charter and by-laws and personnel. The general rule is that on proper objection made the best evidence of the corporate existence will be required and oral or other inferior evidence will be rejected in all civil actions where that is one of the direct issues.⁵² The certificate, charter or articles are ordinarily the best evidence of the fact of incorporation,⁵³ and, of course, of their own contents,⁵⁴ such, for instance, as the rights of the members therein set forth,⁵⁵ the objects of incorporation as distinguished from the plans and purposes entertained by it or the incorporators,⁵⁶ and the personnel of the incorporators.⁵⁷ By-laws must be proved by the

⁵⁰ Consult general works on Evidence, and see illustrative cases, § 3105, *infra*.

⁵¹ § 3099, *infra*.

⁵² § 425, *supra*.

Oral testimony is not the best evidence when a direct issue is made by plea nul tiel. *American Ins. Co. of Newark, New Jersey v. McClelland*, 184 Ill. App. 381.

Incorporation cannot be proved by parol in the case of a bank. *Hallett v. Harrower*, 33 Barb. (N. Y.) 537.

Parol evidence is not admissible to show that a company is a foreign corporation authorized to do business in the state. *Pattison v. Gulf Bag Co.*, 116 La. 963, 114 Am. St. Rep. 570, 41 So. 224.

In absence of objection that the articles or the official certificate is the best evidence, direct testimony by an officer to the fact of incorporation is sufficient. *Stanford Land Co. v. Steidle*, 28 Wash. 72, 68 Pac. 178.

⁵³ *Creditors' Union v. Lundy*, 16 Cal. App. 567, 117 Pac. 624; *Dick v. State*, 107 Md. 515, 68 Atl. 286 (criminal case).

⁵⁴ *Creditors' Union v. Lundy*, 16

Cal. App. 567, 117 Pac. 624.

⁵⁵ A constitution which authorizes a policyholder to change the beneficiary is the best evidence of such fact. *Masons' Union Life Ins. Ass'n v. Brockman*, 20 Ind. App. 206, 50 N. E. 493.

⁵⁶ *Connecticut*. *New York, N. H. & H. R. Co. v. Offield*, 78 Conn. 1, 60 Atl. 740.

Illinois. *Central Inv. Co. v. Mellick*, 162 Ill. App. 474.

Michigan. *Kalamazoo v. Kalamazoo Heat, Light & Power Co.*, 124 Mich. 74, 82 N. W. 811, 7 Det. L. N. 115.

Texas. *First State Bank & Trust Co. of Hereford v. Southwestern Engineering & Construction Co.*, — Tex. Civ. App. —, 153 S. W. 680.

Utah. *Gitzhoffer v. Sisters of Holy Cross Hospital Ass'n*, 32 Utah 46, 8 L. R. A. (N. S.) 1161, 88 Pac. 691.

⁵⁷ Where the minutes show who is the secretary, they are the best evidence, but parol evidence is admissible to show who is a *de facto* secretary. *New Iberia Sugar Co. v. Lagarde*, 130 La. 387, 58 So. 16.

Testimony of a witness that he

kept records thereof,⁵⁸ though printed or written copies thereof circulated among the members will suffice on some issues as between them and the corporation.⁵⁹ The charter or constitution and by-laws are the best evidence as to the officers and their duties and authority,⁶⁰ together with resolutions of directors thereupon.⁶¹ If by-law or resolution or charter proof of authority is not called for, it may be proved by any evidence which the nature of the contract or transaction will permit.⁶² When there is no better evidence incorporation may be proved by parol, though there is some division of opinion as to whether direct testimony to the fact is admissible over an objection that it constitutes a conclusion or an opinion.⁶³ Existence of a foreign corporation is best proved by proving the foreign law under which it was formed and in connection with that the articles or the certificate of incorporation, or a copy of it officially made, and authenticated according to the act of congress; but there are numerous other ways of proving it by documents supplemented with parol proof.⁶⁴ The books are the best evidence of an acceptance of the charter if they show that fact.⁶⁵ Parol evidence is inadmissible to prove that the corporation is in liquidation,⁶⁶ and an officer should not testify

never saw the papers drawn up as to the consolidation of two companies, but that it was naturally assumed that such companies belonged to the same people held incompetent. *Dallas Electric Co. v. Mitchell*, 33 Tex. Civ. App. 424, 76 S. W. 935.

⁵⁸ *Supreme Lodge Knights of Pythias v. Robbins*, 70 Ark. 364, 67 S. W. 758.

⁵⁹ §§ 3101, 3105, *infra*.

⁶⁰ Of what the duties of a general manager are, wherefore the testimony of such officer is improper. *Greene v. Hereford*, 12 Ariz. 85, 95 Pac. 105.

The provisions of a constitution and by-laws of a fraternal society as to the duties of committees and boards are the best evidence thereof and oral evidence as to such duties is properly excluded. *Chambers v. Great State Council I. O. R. M.*, 76 W. Va. 614, 86 S. E. 467.

⁶¹ Records of a meeting of directors and by-laws are the best evidence of actual authority of officers, and the testimony of other officers, being mere-

ly their conclusions, as to the authority of a certain official, is improper. *Grant County State Bank v. Northwestern Land Co.*, 28 N. D. 479, 150 N. W. 736.

⁶² *Rumbough v. Southern Improvement Co.*, 106 N. C. 461, 11 S. E. 528, where the officer who made an unsealed contract was allowed to state that he had authority.

An answer of a witness that he was the treasurer and manager of the company at a certain time will not be stricken on the ground that the fact can only be proved by the corporate records. *Empire Smelting Co. v. Gardner, Worthen & Goss Co.*, 10 Ariz. 117, 85 Pac. 729. See also § 3098, *infra*.

⁶³ §§ 425, 427, *supra*.

Parol evidence is not admissible to show the merger of two companies. *Pattison v. Gulf Bag Co.*, 116 La. 963, 114 Am. St. Rep. 570, 41 So. 224.

⁶⁴ § 437, *supra*.

⁶⁵ § 430, *supra*.

⁶⁶ *Pattison v. Gulf Bag Co.*, 116

or depose to the facts shown by his records concerning the extinction of a corporation, but the record or a copy of it is the best evidence of the fact.⁶⁷ The proper officers should be called to prove the absence of any record of the corporation in a public office, and a private person should not be allowed to testify to that fact; but he may state whether he knows of existence of the corporation, that being the issue.⁶⁸

§ 3097. — Corporate acts and resolutions. The same means of proof are available as will prove individual acts,⁶⁹ bearing in mind, however, the necessary and common practices of keeping corporate records in writing, and the different rules when the acts are in issue collaterally from those which govern when they are directly in issue between the parties to them.⁷⁰ As to the matters recorded and minuted, the records are the best evidence of what was done or resolved;⁷¹ and

La. 963, 114 Am. St. Rep. 570, 41 So. 224.

⁶⁷ *Smith v. Briggs-Weaver Machinery Co.*, 63 Tex. Civ. App. 285, 132 S. W. 954.

⁶⁸ In a case to which the corporation was not a party such a witness was held incompetent to state that he found no record of incorporation in the office of the secretary of state. *Cobb v. Bryan*, 37 Tex. Civ. App. 339, 83 S. W. 887.

Revocation by parol of a formal order entered on the minutes can be proved by parol. *Whittington v. Farmers' Bank*, 5 Harr. & J. (Md.) 489.

⁶⁹ "The acts of corporations may be proved in the same way as the acts of individuals." *Moss v. Averell*, 10 N. Y. 449.

⁷⁰ See generally chapter on Corporate Books and Records, *infra*, and see § 3105, *infra*.

⁷¹ *Colorado*. *Hendrie & Bolthoff Co. v. Collins*, 29 Colo. 102, 67 Pac. 164.

Idaho. *Corcoran v. Sonora Mining & Milling Co.*, 8 Idaho 651, 71 Pac. 127.

Kentucky. *Bastin v. Givens' Adm'r*, 170 Ky. 201, 185 S. W. 835.

New Jersey. *Durbrow v. Hacken-*

sack Meadows Co., 77 N. J. L. 89, 71 Atl. 59.

New York. *Mengis v. Fifth Ave. Ry. Co.*, 81 Hun 480, 30 N. Y. Supp. 999, 24 Civ. Proc. 131.

Oregon. *Norwich Ins. Co. v. Oregon R. Co.*, 46 Ore. 123, 78 Pac. 1025.

Rhode Island. *Dennis v. Joslin Mfg. Co.*, 19 R. I. 666, 61 Am. St. Rep. 805, 36 Atl. 129.

Tennessee. *Page v. Knights & Ladies of America* (Tenn. Ch. App.), 61 S. W. 1068.

Notice imparted by the minute book of a corporation tending to show that certain stock did not belong to a person. *Spangenberg v. Nesbitt*, 22 Cal. App. 274, 134 Pac. 343.

Authority conferred on manager. *Hurd v. Hotchkiss*, 72 Conn. 472, 45 Atl. 11.

Resolution fixing salary of an officer. *Graham v. Coos Bay, R. & E. R. & Nav. Co.*, 71 Ore. 393, 139 Pac. 337. To the same effect, see the following cases of public corporate boards. *Birmingham v. Chestnutt*, 161 Ala. 253, 49 So. 813; *People v. Illinois Cent. R. Co.*, 266 Ill. 636, 107 N. E. 803; *People v. Schenck*, 252 Ill. 441, 96 N. E. 864.

Original minutes of a corporation

where the act can only be done by resolution,⁷² or where the statute requires a record to be kept,⁷³ they are exclusive evidence. Even if not made in the statutory way they may still be the best evidence of their contents.⁷⁴ If no records were kept, or the proceeding in question was not recorded, parol proof of the resolution and the vote thereon is admissible.⁷⁵ Parol evidence of a contract of which the

can be used to prove a corporate meeting but not the secretary's certified copy. In *re Mandelbaum*, 80 N. Y. Misc. 475, 141 N. Y. Supp. 319, decree aff'd 159 N. Y. App. Div. 909, 144 N. Y. Supp. 1128.

Records of a lodge are the best evidence of resolutions adopted by such lodge. *Swisher v. Fidelity & Deposit Co. of Maryland*, 164 Ill. App. 243.

Fraternal beneficiary association records and by-laws are to be proved like those of any other private corporation. *Yonda v. Royal Neighbors of America*, 96 Neb. 730, 148 N. W. 926.

⁷² Any act of a corporation which must necessarily be performed by a board of trustees duly organized and a record thereof kept cannot be proved by parol evidence in the absence of proof of nonexistence or nonaccessibility of the record. *Beeler v. Highland University Co.*, 8 Kan. App. 89, 54 Pac. 295.

The declaration of a dividend should appear of record and cannot be proved by a stockholder by parol. *Dennis v. Joslin Mfg. Co.*, 19 R. I. 666, 61 Am. St. Rep. 805, 36 Atl. 129. See also *American Wire Nail Co. v. Gedge*, 96 Ky. 513, 29 S. W. 353.

⁷³ Kirby's Dig. § 944, providing that it shall be the duty of the clerk or secretary of a mutual aid association to keep a record of the proceedings of such corporation, is designed to perpetuate such proceedings and relieve them of the uncertainty of human memory, and members of such corporations impliedly agree that the

records, fairly kept, shall be exclusive evidence of their proceedings. *Beasely v. Mutual Aid Ass'n*, 94 Ark. 499, 127 S. W. 974.

Where a statute requires a record of what transpires at a meeting (W. Va. Code, c. 53, § 52), oral evidence as to who of incorporators were present and who were elected officers is inadmissible. *Ramsdell v. National Rivet & Novelty Co.*, 104 Fed. 16.

Unless a statute in express terms provides that no other evidence is admissible, parol evidence may be received when no record is kept or the proceedings have not been recorded. *Zalesky v. Iowa State Ins. Co.*, 102 Iowa 512, 71 N. W. 433, 70 N. W. 187.

⁷⁴ Records of a corporation verified by the oath of the clerk of the corporation at the trial are the best evidence of its proceedings and votes, although a statute requiring the clerk to be sworn (St. 1808, c. 65) is disregarded and they have been made without such qualifying oath. *Stebbins v. Merritt*, 10 Cush. (Mass.) 27.

⁷⁵ *Birmingham Ry. & Elec. Co. v. Birmingham Traction Co.*, 128 Ala. 110, 29 So. 187; *Candell v. Athens Sav. Bank*, 140 Ga. 713, 79 S. E. 776; *Zalesky v. Iowa State Ins. Co.*, 102 Iowa 512, 70 N. W. 187, on rehearing 71 N. W. 433; *Union Bank v. Ridgely*, 1 Harr. & G. (Md.) 324.

Parol evidence of a decision of directors is proper where the records do not purport to contain the complete minutes. *Housley v. Feilchenfeld Co.*, 152 Ill. App. 68.

resolution does not contain the elements does not offend the rule.⁷⁶ Although the charter objects must be proved by the charter or articles,⁷⁷ parol evidence may be received as to what is planned in the future, even though a resolution authorizing it may exist.⁷⁸ For a like reason a contract may be proved by parol though made pursuant to an authorizing resolution.⁷⁹

§ 3098. — Corporate doings and contracts. Just as with natural persons a corporate contract⁸⁰ or other transaction in writing⁸¹ will be proved best thereby as against it and other parties to the writing, and as against all persons if the law requires written evidence or some other specific kind of evidence to the exclusion of all other evidence.⁸² Where a copy stands as the best evidence in lieu of the original, oral testimony is excluded.⁸³ The rule does not apply if the offered evidence, in the absence of such a legal requirement, suggests the existence of no higher evidence and tends to prove the fact in issue,⁸⁴ or

⁷⁶ Kalamazoo Novelty Mfg. Works v. Macalister, 40 Mich. 84.

⁷⁷ § 3096, *supra*.

⁷⁸ It is unnecessary to show a recorded vote of the directors authorizing improvements, as the rule as to parol evidence does not apply respecting action of a corporation to be taken in the future. New York, N. H. & H. R. Co. v. Offield, 78 Conn. 1, 60 Atl. 740.

⁷⁹ Young v. United States Mortgage & Trust Co., 214 N. Y. 279, 108 N. E. 418, *rev'g* judgment 156 N. Y. App. Div. 515, 141 N. Y. Supp. 364.

⁸⁰ Greenleaf on Evidence, § 87.

⁸¹ Greenleaf on Evidence, § 82 *et seq.*

⁸² Greenleaf on Evidence, § 86.

Books of a corporation established for public purposes are the best evidence of its acts. Penobscot & K. R. Co. v. Dunn, 39 Me. 587.

⁸³ Copy of written report of the accident to the company. McCarthy v. Consolidated R. Co., 79 Conn. 73, 63 Atl. 725.

⁸⁴ Greenleaf on Evidence, §§ 84, 90 *et seq.* Payment may be shown by parol evidence although the payment may have been made by a check which

is not produced. Armour & Co. v. Bluthenthal & Bickart, 9 Ga. App. 707, 72 S. E. 168.

A cashier of a bank may testify that money paid over was credited to a certain person, without being required to produce the books. Smith v. First Nat. Bank of Flatonia, 43 Tex. Civ. App. 495, 95 S. W. 1111.

Oral testimony as to the amount of sales was proper, although duplicate sales slips existed showing such amount, but if the inquiry had been what the duplicate slips showed, they would have been the best evidence of the fact. Missouri Glass Co. v. Roberts, — Tex. Civ. App. —, 137 S. W. 433.

Testimony from personal knowledge as to the cost and selling price of a product is competent although books and records kept by witness contain written statements of the same facts. Foster Mfg. Co. v. Cutter-Tower Co., 215 Mass. 136, 101 N. E. 1083.

As to proof of preparation of subscriber to pay for stock, see *State v. Hancock*, 2 Pennew. (Del.) 252, 45 Atl. 851.

Maps and records of a city are not the best evidence of the actual loca-

where the writing or other fact is collateral to the issue and not directly in dispute.⁸⁵ Primary evidence is dispensed with when it cannot be conveniently produced because it is a public record, or imponderable, or too voluminous, or needless because the fact stands admitted, or for other reason is not available. The rule does not apply to facts evidenced only in part by written or otherwise superior evidence, or equally by both written and oral evidence.⁸⁶ According to statutes proof by copy under the hand of a corporate officer is admissible to prove a contract or instrument to which it is a party.⁸⁷

A witness will not ordinarily be permitted to state his summarizing or conclusions as to what the books show,⁸⁸ but it is permissible where

tion of a street but only serve as a guide to such location. *International & G. N. R. Co. v. Morin*, 53 Tex. Civ. App. 531, 116 S. W. 656.

⁸⁵ Greenleaf on Evidence, § 89 et seq.

A subscription as well as a contract collateral thereto may be proved by other than corporate books as between third persons. Therefore the treasurer may testify that he is such and also what were the terms on which a subscription was made, the action being on a contract collateral to the subscription. *Jones v. Florence Wesleyan University*, 46 Ala. 626.

Parol is admissible to prove execution by corporation of a power of attorney on which main contract is founded. *Sales-Davis Co. v. Henderson-Boyd Lumber Co.*, 193 Ala. 166, 69 So. 527.

See also § 3099, *infra*.

⁸⁶ Greenleaf on Evidence, § 90 et seq.

The rule of evidence that no evidence shall be received where there is better evidence to be had, is intended to prevent fraud, but not to prevent the administration of justice where all the evidence is produced by the party of which the case is reasonably susceptible. *Louisville Bridge Co. v. Louisville & N. R. Co.*, 116 Ky. 258, 25 Ky. L. Rep. 405, 75 S. W. 285.

⁸⁷ Copies of contracts of a corpo-

ration with another corporation or person, when certified by the secretary of such corporation, are admissible as against a third party. Rev. St. c. 51, §§ 15, 16 (*J. & A. Ann. St. ¶¶ 5532, 5533*). *Chicago, B. & Q. R. Co. v. Weber*, 121 Ill. App. 455.

A lease is such an instrument as is contemplated by section 15 of chapter 51 of the statutes (*J. & A. Ann. St. ¶ 5532*) and a copy is admissible when properly certified. *Chicago, B. & Q. R. Co. v. Weber*, 219 Ill. 372, 4 L. R. A. (N. S.) 272, 76 N. E. 489, rev'g 121 Ill. App. 455. See also §§ 3105, 3106, *infra*.

⁸⁸ Objection to the offer in evidence of "a drawn off statement from the stock book" was properly sustained where the witness had the original stock book in his possession. *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 So. 410.

A court's exercise of discretion in allowing expert testimony as to what profits books and invoices show, without seeing the same, is clearly wrong. *Cox v. Philadelphia City Pottery Co.*, 38 Pa. Super. Ct. 545.

Books of a corporation and not the deductions of a receiver as to their contents are the best evidence. *Philadelphia & G. S. S. Co. v. Clark*, 59 Pa. Super. Ct. 415.

Testimony of a president as to what the records show is admissible to show

the primary evidence is voluminous, especially if produced or offered for inspection;⁸⁹ and such a statement has been held admissible where an officer testified that he had personal knowledge of all the facts shown by it and that it was correct, it not being in respect to matters required to be of record.⁹⁰ Corporate intentions, plans and purposes resting in parol must necessarily be provable by oral testimony of officers who know them.⁹¹ It must be remembered that the best and secondary rule is not to be confused with those by which a writing may be admissible to prove a fact because it is documentary evidence, or an admission, or for some other reason relevant and competent. In such cases there is no ruling on the best evidence principle and consequently no doctrine on it.⁹²

Authority of an officer may be proved by parol testimony, where

that authority to a person to purchase stock was or was not given, but not as a conclusive circumstance on that issue. *W. R. Case & Sons Cutlery Co. v. Folsom*, — Tex. Civ. App. —, 170 S. W. 1066.

⁸⁹ In an action by a railroad company to recover excessive tolls charged for the use of a bridge, a statement of tolls paid made out from way-bills of the railroad was admissible when offered for examination by the adverse party, and where the original way-bills were produced. *Louisville Bridge Co. v. Louisville & N. R. Co.*, 116 Ky. 258, 25 Ky. L. Rep. 405, 75 S. W. 285.

Statements or tables of the tolls paid prepared from such way-bills are not properly speaking evidence at all but exhibits of the facts shown by the evidence. *Louisville Bridge Co. v. Louisville & N. R. Co.*, 116 Ky. 258, 25 Ky. L. Rep. 405, 75 S. W. 285.

In view of the impossibility of examining all the way-bills, covering tolls paid for several years, there was no abuse of discretion in admitting the statements of such tolls. *Louisville Bridge Co. v. Louisville & N. R. Co.*, 116 Ky. 258, 25 Ky. L. Rep. 405, 75 S. W. 285.

Where 800 deeds and contracts of water companies were before the

court, it was a permissible saving of time for a witness to state the general result of his examination of these contracts and deeds, the copies being before the court. *New La Junta & Lamar Canal Co. v. Kreybill*, 17 Colo. App. 26, 67 Pac. 1026.

A witness in charge of subscription books may state his conclusion as to the amount subscribed, where, owing to the magnitude of the documentary evidence, opportunity to have it produced was declined by objector and in consequence it was not produced. *Louisiana Purchase Exposition Co. v. Kuenzel*, 108 Mo. App. 105, 82 S. W. 1099.

⁹⁰ A statement taken from the books of a company, showing sales of fish and the net proceeds thereof, held admissible where the manager of a company testified that he had personal knowledge of all the items of the statement and that they were correct. *Carlisle Packing Co. v. Deming*, 62 Wash. 455, 114 Pac. 172.

⁹¹ Officers of a corporation actually in charge of its affairs may testify to the acts, purposes and intentions of such corporation. *Lawson v. Port Arthur Canal & Dock Co.*, — Tex. Civ. App. —, 185 S. W. 600.

⁹² See cases illustrating this, §§ 3105, 3106, *infra*.

the form or nature of the contract is not such as to require a higher authority,⁹³ and there is no written authority or appointment,⁹⁴ and where it is not suggested that the charter and by-laws and resolutions fix it.⁹⁵

Applying the foregoing principles the following have been held to be best evidence, with such exceptions and qualifications as are mentioned in the footnotes: membership records in fraternal societies,⁹⁶ stock and bond books and the certificates, bonds or coupons,⁹⁷ papers

⁹³ Authority of a president and general manager to enter into a contract may be so shown. *Columbia River & P. S. Nav. Co. v. Vancouver Transp. Co.*, 32 Ore. 532, 52 Pac. 513.

Where the corporation was foreign and the contract therefor correct in form without seal or formal authority to execute it, a general manager may testify that he had authority to execute it. *Rumbough v. Southern Improvement Co.*, 106 N. C. 461, 11 S. E. 528.

Authority from a board to an executive officer to execute a deed or mortgage can be shown by parol. *McCartney v. Clover Valley Land & Stock Co.*, 232 Fed. 697.

Purchases and payments by committees to raise a resulting trust must be shown by record evidence to have been authorized. *Methodist Chapel Corporation v. Herrick*, 25 Me. 354.

⁹⁴ A writing of appointment of an agent is best evidence of his agency. *Kennebeck Purchase v. Call*, 1 Mass. 483.

In the absence of objection a copy is admissible. *Topeka Capital Co. v. March*, 10 Kan. App. 40, 61 Pac. 876.

⁹⁵ See § 3097, *supra*.

⁹⁶ In mutual and fraternal benefit associations and in similar orders, the relation of the corporation to its members, especially where a right is asserted by the corporation against a member, can be shown only by the official records properly authenticated, except where upon proof of loss or inaccessibility secondary evidence is

admissible. *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265.

⁹⁷ *Vaughan's Seed Store v. Stringfellow*, 56 Fla. 708, 48 So. 410.

Parol evidence of written subscription of stock without any excuse for the absence of the original and without any attempt to produce a certified copy from the books of the corporation, is error. *Cincinnati, P. & C. R. Co. v. Cochran*, 17 Ind. 516.

Books of a corporation are evidence of the ownership of its stock. *Hincks v. Converse*, 38 La. Ann. 871, 37 La. Ann. 484.

Parol testimony as to the issuance of stock to a person is improper, as the stock itself is the best evidence of its issuance and existence. *Commonwealth Bonding & Casualty Ins. Co. v. Hill*, — Tex. Civ. App. —, 184 S. W. 247.

Delivery of a certificate of stock may be shown by parol. *Commonwealth Bonding & Casualty Ins. Co. v. Hill*, — Tex. Civ. App. —, 184 S. W. 247.

Books of a company furnish precise and accurate evidence as to who actually funded coupons and received bonds for which such funded coupons were issued and such books are better and more conclusive evidence than is furnished from mere possession of the coupons. *Hand v. Savannah & C. R. Co.*, 17 S. C. 219.

Evidence of a witness that he prepared to pay for capital stock subscribed for is admissible, although the fact might be proved by the pro-

showing a subscription,⁹⁸ contracts,⁹⁹ letters to or from the corporation or its agents,¹ writings to give notice to the corporation,² books of account,³ records relating to insurance and insurance

duction of the books. *State v. Hancock*, 2 Pennew. (Del.) 252, 45 Atl. 851.

⁹⁸ A paper showing subscription to stock held competent as evidence of a subscription by a defendant as against the objection that the books of subscription opened by the commissioners named in the charter, were the best evidence. *Stuart v. Valley R. Co.*, 32 Gratt. (Va.) 146.

Testimony of a person that he was appointed commissioner to procure subscriptions to stock, and that he did not procure the subscription of defendant, held irrelevant and hearsay, and also objectionable on the ground that it was not shown that such person was appointed by the plaintiff corporation. *Stuart v. Valley R. Co.*, 32 Gratt. (Va.) 146.

⁹⁹ *Kitza v. Oregon Short Line R. Co.*, 169 Ill. App. 609.

Contract for the sale of a stock subscription in writing. *Barbour v. Cantrell*, 193 Ala. 154, 69 So. 67.

Subscriptions to a college. *Beeler v. Highland University Co.*, 8 Kan. App. 89, 54 Pac. 295.

A written agreement between the defendant and a bank whereby the bank was to pay rent at a certain time was sufficient to prove such fact. *D. A. Enslow & Son v. Ennis*, 155 Iowa 266, 135 N. W. 1105.

On such issue, evidence as to whether the bank entered as a tenant under a compromise agreement, what was said at the time and what was the result of the delay, was properly excluded. *D. A. Enslow & Son v. Ennis*, 155 Iowa 266, 135 N. W. 1105. Many other illustrations will be found in general treatises.

¹ Letters written by a claim agent. *Vaillancourt v. Grand Trunk Rail-*

road Co., 82 Vt. 416, 74 Atl. 99.

Suspension of work performed by a corporation and length of time of such cessations are facts resting in parol and properly provable by such evidence, although letters might show more particularly the authority of an architect to order suspensions. *Leiter v. Dwyer Plumbing Co.*, 66 Ore. 474, 133 Pac. 1180.

² *Royal Lumber Co. v. Elsberry*, 185 Ala. 462, 64 So. 71.

³ *Eaton Chemical Co. v. Doherty*, 31 N. D. 175, 153 N. W. 966.

Showings in the books of a cotton oil mill as to the market price of cotton seed. *Houston & T. C. R. Co. v. Washington*, 60 Tex. Civ. App. 391, 127 S. W. 1126.

Books of account are the best evidence as to whether a corporation has earned dividends. *Shelby v. New York Steam Co.*, 121 N. Y. Supp. 619.

Books of a bank are better and more competent evidence to show whether money received was not entered as a time deposit, than the testimony of the president of such bank, or the cashier. *Baldwin State Bank v. National Bank of Athens*, 144 Ga. 181, 86 S. E. 538; *Boyd's Ex'r v. First Nat. Bank of Williamsburg, Kentucky*, 32 Ky. L. Rep. 1323, 108 S. W. 360.

In an action against a bank to recover money not accounted for, where the bank pleaded a settlement, pass books turned over to the plaintiff were admissible as a part of that transaction, but possibly such books might not be considered to establish the debits of plaintiff's account, the best evidence being the checks in the plaintiff's hands. *Richey v. Farmers' & Merchants' Sav. Bank of Lone Tree (Iowa)*, 121 N. W. 2.

policies,⁴ shipping records and invoices,⁵ way-bills and freight papers,⁶ dispatchers' records of train movements,⁷ other records relating to

Books, such as the company's pay roll or ledger, do not constitute such a record as to exclude evidence of facts of which a witness has independent knowledge, such as the time when an employee went to the mine, and such testimony is not analogous to parol evidence of what the books contain. *Stewart v. Sloss-Sheffield Steel & Iron Co.*, 170 Ala. 544, Ann. Cas. 1912 D 815, 54 So. 48.

⁴*Spencer v. Travelers' Ins. Co.*, 112 Mo. App. 86, 86 S. W. 899.

Entry of forfeitures of insurance policies on the corporate books. *Dial v. Valley Mut. Life Ass'n of Virginia*, 29 S. C. 560, 8 S. E. 27.

⁵*Corona Kid Co. v. Lichtman*, 84 N. J. L. 363, 86 Atl. 371.

Where an officer had no personal knowledge of shipments of goods, his testimony thereto was not admissible on the theory that the books of the company were mere memoranda to refresh the memory of the witness, the books not being produced in court and the entries therein not having been made by the officer or under his direction. *Eaton Chemical Co. v. Doherty*, 31 N. D. 175, 153 N. W. 966.

Conclusions of an officer of a corporation as to the value and delivery of goods, based upon alleged entries against a defendant in the company's books, are incompetent where the books are not produced or offered in evidence though in the possession of the plaintiff. *Eaton Chemical Co. v. Doherty*, 31 N. D. 175, 153 N. W. 966.

An opinion of a witness as to the shortage of weight of coal shipped is properly excluded because it is not the best evidence, where the testimony shows the weighing of such coal, and there is no attempt to account for the records taken of such weights. *Richard Cocke & Co. v. Big Muddy Coal*

& Iron Co., — Tex. Civ. App. —, 155 S. W. 1019.

Evidence of a plaintiff's shipping clerk that he shipped goods to the defendant was not objectionable on the grounds that the firm's records were the best evidence, as the records were not shown to exist and in any event the witness might testify as to what he personally knew. *W. D. Schmidt & Co. v. Lightner*, 185 Mo. App. 546, 172 S. W. 483.

In an action for the conversion of grain delivered to an elevator company, the plaintiff was not restricted to the defendant's books in proving delivery of the grain; his own testimony as to delivery being competent. *Cochrane v. National Elevator Co.*, 20 N. D. 169, 127 N. W. 725.

⁶Original way-bills of the railroad were the best evidence of the tolls paid. *Louisville Bridge Co. v. Louisville & N. R. Co.*, 116 Ky. 258, 25 Ky. L. Rep. 405, 75 S. W. 285.

Paper or receipt, showing delivery of goods to a railroad. *Evans v. St. Louis, I. M. & S. R. Co.*, 149 Mo. App. 166, 129 S. W. 1050.

In an action for damages by a shipper, because of the failure to furnish cars to transport live stock, where the shipper has made a written order for cars in the book required by law to be kept for such purpose, proof as to the date of the order and the time when the cars were to be furnished should be confined to his written order. *Anderson v. Chicago & N. W. R. Co.*, 88 Neb. 430, 129 N. W. 1008.

⁷Testimony of a train dispatcher as to the number of cars at certain points at a certain time, as shown by his records, held properly excluded where the witness could not give the number accurately from memory but had to depend on the record which

cars,⁸ records of inspections and reports of like nature,⁹ rules for employees,¹⁰ the rules for transportation of goods,¹¹ and the established rates for public service.¹² Land ownership by the corporation is directly provable by the title papers and records,¹³ or by occupancy

was not produced though easily accessible, no excuse being given for non-production. *Texas & P. Ry. Co. v. Smith & White*, 34 Tex. Civ. App. 571, 79 S. W. 614.

⁸ Report cards indicating that some cars had been weighed at a station. *Joynes v. Pennsylvania R. Co.*, 234 Pa. 321, 83 Atl. 318.

In an action for death under the Federal Employers' Liability Act, a conductor may testify as to the train being made up partly of foreign cars, and there is no presumption against the plaintiff for not producing the defendant's records to prove such fact. *Devine v. Chicago, R. I. & P. R. Co.*, 266 Ill. 248, Ann. Cas. 1916 B 481, 107 N. E. 595, aff'g 185 Ill. App. 488.

That such records are also admissible to show interstate transportation, see *Trowbridge v. Kansas City & W. B. Ry.*, 192 Mo. App. 52, 179 S. W. 777.

⁹ Reports as to a plant being in operation. *Home Ins. Co. v. North Little Rock Ice & Electric Co.*, 86 Ark. 538, 23 L. R. A. (N. S.) 1201, 111 S. W. 994.

Report of accident to the company is the best evidence of its contents. *Savannah Elec. Co. v. Crawford*, 130 Ga. 421, 60 S. E. 1056.

Accumulation of gas in a mine as shown by a book kept for that purpose. *Conover v. Harrisburg & S. Coal Co.*, 161 Ill. App. 74.

Record of inspections of engines. *Cleveland, C. C. & St. L. R. Co. v. Brown*, 53 Ill. App. 227; *St. Louis Southwestern R. Co. v. Miller*, 27 Tex. Civ. App. 344, 66 S. W. 139. Civil Code 1913, § 3768, requiring section foremen to keep a record of live stock killed by trains does not make

such record evidence in judicial proceedings, and the best or primary evidence of the fact would be the testimony of witnesses who saw the killing, etc. *Atchison, T. & S. F. R. Co. v. Carrow*, 18 Ariz. 92, 156 Pac. 965.

¹⁰ *Alabama*. *Georgia Pac. Ry. Co. v. Propst*, 90 Ala. 1, 7 So. 635.

Illinois. *Bennett v. Chicago City R. Co.*, 243 Ill. 420, 90 N. E. 735; *St. Louis, A. & T. H. R. Co. v. Bauer*, 156 Ill. 106, 40 N. E. 448.

Kentucky. *Louisville & N. R. Co. v. Pearcy*, 140 Ky. 677, 131 S. W. 1036, — Ky. L. Rep. —, 121 S. W. 1037.

Maryland. *Maryland, D. & V. R. Co. v. Brown*, 109 Md. 304, 71 Atl. 1005.

Michigan. *Barschow v. Lake Shore & M. S. R. Co.*, 147 Mich. 226, 110 N. W. 1057, 13 Det. L. N. 1060.

New York. *Devoe v. New York Cent. & H. River R. Co.*, 174 N. Y. 1, 66 N. E. 568; *Goodman v. New York Rys. Co.*, 88 Misc. 95, 150 N. Y. Supp. 702.

Testimony of a train master as to the precautions the plaintiff should have taken was properly excluded. *Missouri, K. & T. R. Co. of Texas v. Pawkett*, 28 Tex. Civ. App. 583, 68 S. W. 323.

¹¹ Orders as to baggage, if contained in a book of regulations of a railroad company, are the best evidence of such rules. *McCoy v. Atlantic Coast Line R. Co.*, 84 S. C. 62, 65 S. E. 939.

¹² Rates established by the interstate commerce commission. *Chicago, R. I. & P. R. Co. v. Champlin Lumber Co.*, 47 Okla. 430, 149 Pac. 119.

¹³ Opinion should not have been admitted. *Lawson v. Port Arthur Canal & Dock Co.*, — Tex. Civ. App. —, 185 S. W. 600.

except as against a claimant by title paramount.¹⁴ It will be understood that the foregoing are but a few of the cases illustrating the application of the best and secondary rule. They suffice to explain the rule as so applied, and more exhaustive collections of precedents must be sought in treatises on evidence.

§ 3099. — Laying foundation; secondary evidence; copies. Although there may be better evidence of the fact to be proved resting in the corporate records and writings, yet on a showing of notice by the other party to produce the best evidence, it being in corporate custody, and a refusal,¹⁵ or on a showing by either party that it is lost or destroyed and not producible¹⁶ after a search in the probable keeping place,¹⁷ secondary evidence will be receivable to prove the contents of such writing; and without the required showing it cannot be received.¹⁸ Objection to secondary evidence must be made season-

¹⁴ *Pittsburgh, C. & St. L. R. Co. v. Wilson*, 46 Ind. App. 444, 91 N. E. 725. And see *Coltrain v. Dennis Simmons Lumber Co.*, 165 N. C. 42, 80 S. E. 895, where the area covered by a deed required proof by it.

¹⁵ *Missouri, K. & T. Ry. Co. v. Elliott*, 102 Fed. 96; *Indianapolis & C. R. Co. v. Jewett*, 16 Ind. 273; *Thayer v. Middlesex Mut. Fire Ins. Co.*, 10 Pick. (Mass.) 326; *Bank of Utica v. Hillard*, 5 Cow. (N. Y.) 153.

Secondary evidence of the contents of a minute book is not to be received unless the trial judge is satisfied that notice to produce has been given and that production is refused in answer to that notice. *Tobin v. Roaring Creek & C. R. Co.*, 86 Fed. 1020.

¹⁶ *Blanton v. Kentucky Distilleries & Warehouse Co.*, 120 Fed. 318, aff'd 149 Fed. 31.

Where slips of paper containing a record of the names of laborers, hours of work performed, and wages earned and paid were lost, and a clerk testified that he had correctly recorded the facts contained in such slips, in the regular course of business, the record was admissible on the same principles that books of account are admissible. *Pacific Telephone & Tele-*

graph Co. v. Huetter, 68 Wash. 442, 123 Pac. 607.

If a witness has actual knowledge that a company owns stock of another corporation, he may so testify, especially where it is not shown that a stock book is in existence, or was required by statute, and where it also appears that a person having possession of the records is beyond the jurisdiction of the court. *First State Bank & Trust Co. of Hereford v. Southwestern Engineering Construction Co.*, — Tex. Civ. App. —, 153 S. W. 680.

Testimony of a witness that he was the president and that another person was the secretary was proper. *Kneeland Inv. Co. v. Berendes*, 81 Wash. 372, 142 Pac. 869.

¹⁷ In an action where a religious corporation claims title to land, proof should be obtained directly from the corporate office, in which the corporate deeds and records are kept. *Probst v. Trustees, etc., of Presbyterian Church*, 3 N. M. (Gild.) 373, 5 Pac. 702.

¹⁸ *Aetna Ins. Co. of Hartford, Connecticut v. Bank of Brunson*, 194 Fed. 385; *Caudell v. Athens Sav. Bank*, 140 Ga. 713, 79 S. E. 776; *Soldiers' Orphans' Home v. Shaffer*, 63 Ill. 243;

ably¹⁹ and the objection should point out that there is better evidence in the books and records of the corporation.²⁰ The party offering the secondary evidence must prove the foundation when objection is made,²¹ and the showing must be sufficient to satisfy the court.²² The secondary evidence of a writing preferably should be by copy if available, rather than oral,²³ but any competent evidence may be received.²⁴

Swisher v. Fidelity & Deposit Co. of Maryland, 164 Ill. App. 243.

Since Civ. Code 1913, § 3768, requires section foremen to keep a record of live stock killed by trains, the record itself should be produced or its loss or destruction accounted for before parol evidence of the contents is permitted. *Atchison, T. & S. F. R. Co. v. Carrow*, 18 Ariz. 92, 156 Pac. 965.

Oral evidence of the contents of a paper accessible to both parties is properly excluded. *Wilson v. Savannah Baseball Ass'n*, 139 Ga. 170, 76 S. E. 998.

The fact that an original bill of lading is in possession of a defendant does not warrant secondary evidence of an indorsement thereon without laying foundation for such evidence. *Columbus & W. R. Co. v. Tillman*, 79 Ga. 607, 5 S. E. 135.

Semble, secondary evidence of contents of minute book is proper where witness having custody has been subpoenaed to produce writing and has failed to do so. *Tobin v. Roaring Creek & C. R. Co.*, 86 Fed. 1020.

¹⁹ Introducing a corporate license as original without objection precludes later objection that the evidence was secondary. *Stone v. Great Western Oil Co.*, 41 Ill. 85.

²⁰ Objection should show that the resolution had been reduced to writing and a record made of it. *Flakne v. Minnesota Farmers' Mut. Ins. Co.*, 105 Minn. 479, 117 N. W. 785.

A party must place his objection specifically on such ground. *St. Louis, A. & T. H. R. Co. v. Bauer*, 156 Ill. 106, 40 N. E. 448.

²¹ The plaintiff was bound to prove the nonexistence of a rate book before oral testimony of the amount of indemnity orally agreed by the officers to be paid was admissible. *National Benev. Society v. Oldham*, 70 Kan. 79, 78 Pac. 163.

²² The question of the loss of a subscription book must be ascertained and decided by the court. *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. St. 489.

Evidence of loss held enough to support secondary evidence of minutes. *Partridge v. Badger*, 25 Barb. (N. Y.) 146.

A statement of an officer that a subscription was lost was prima facie sufficient to permit oral proof of its contents. *Indianapolis & C. R. Co. v. Jewett*, 16 Ind. 273.

So when a secretary swears that he had control of the books and papers of a company, that he has made diligent search and inquiry for a subscription book and cannot find it. *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. St. 489.

So where a witness testifies that original itemized statements are lost or destroyed. *Corona Kid Co. v. Lichtman*, 84 N. J. L. 363, 86 Atl. 371.

²³ *Supreme Lodge Knights of Pythias v. Robbins*, 70 Ark. 364, 67 S. W. 758.

Secondary evidence by copy, or by a recital of its contents in some authentic document, or by the recollection of a witness, is admissible. *Creditors' Union v. Lundy*, 16 Cal. App. 567, 117 Pac. 624.

²⁴ *Graham v. Coos Bay, R. & E. R. & Nav. Co.*, 71 Ore. 393, 139 Pac. 337.

A copy which is incomplete in a particular may be supplemented by other proof, as where a copy of a mortgage record lacking the corporate seal was supplemented by proof of a ratifying resolution under such seal.²⁵ If the secondary evidence is a copy, it must be sufficiently proven to be a correct unofficial copy,²⁶ such as a printed copy of by-laws proved to be correct,²⁷ or be under an official certificate serving to authenticate it as an official copy according to the statutory requirements.²⁸

§ 3100. Parol evidence rule. By the expression "parol evidence rule" is meant that by which extraneous evidence tending to vary or contradict a writing in evidence is excluded. The rule that parol or oral evidence may be received secondarily when better evidence of the same facts is not to be had is a distinct one, or at least will be so regarded here without attempting any consideration of their juristic

²⁵ *Purser v. Eagle Lake Land & Irrigation Co.*, 111 Cal. 139, 43 Pac. 523.

²⁶ An examined copy of books, uncorroborated by any other evidence whatever, is not admissible. *Ridgway v. Farmers' Bank*, 12 Serg. & R. (Pa.) 256, 258, 14 Am. Dec. 681.

Where a witness testifies that certain papers are true copies of lost original statements, and that such copies were made by him, they are admissible. *Corona Kid Co. v. Lichtman*, 84 N. J. L. 363, 86 Atl. 371.

Sworn copy of charter by witness who had compared it is admissible though not certified so as to be admissible as an official copy. *Society for Propagating the Gospel v. Young*, 2 N. H. 310.

Where loss of original articles was proved, a certified copy of the record of the copy filed with the recorder was admissible on proof that the record was a true copy of the copy. *Washer v. Allensville, C. S. & V. Turnpike Co.*, 81 Ind. 78; *Walker v. Shelbyville & R. Turnpike Co.*, 80 Ind. 452.

²⁷ If the books of a fraternal beneficiary association cannot for good reason, or conveniently, be produced, a printed copy duly authenticated by

one who has compared it with the original may be received. *Knights & Ladies of America v. Weber*, 101 Ill. App. 488; *Yonda v. Royal Neighbors of America*, 96 Neb. 730, 148 N. W. 926.

²⁸ Whether a "deputy secretary of state" could authenticate a certified copy of the charter, questioned, but not decided. *Mobile & O. R. Co. v. Postal Tel. Cable Co.*, 120 Ala. 21, 24 So. 408.

In a certified copy by the secretary of state the corporate seal may be indicated by the word "seal"; it is not necessary to make a facsimile. *Anthony v. International Bank*, 93 Ill. 225.

Under the full faith and credit clause, a foreign charter when authenticated according to act of congress must be admitted but it may be admitted if authenticated in some other manner which satisfies the laws of the forum. *Taylor v. Bank of Illinois*, 7 T. B. Mon. (Ky.) 576, 584.

The authenticating officer need not certify his want of a seal if he has none in making an authentication under the act of congress. *Waterville Mfg. Co. v. Brown*, 9 How. Pr. (N. Y.) 27.

natures.²⁹ Parol evidence will not be received to show any different corporate nature or object than that shown by the charter or organic articles.³⁰ The rule as applied to matters ordinarily of corporate record is like that applying to other private writings.³¹ Parol is receivable to explain them in so far as they may be ambiguous or not self explanatory,³² or to supplement or complete them.³³ There must be a showing of omission or error to admit such evidence of a resolution not appearing in the minutes.³⁴ In order to show that a resolution was fraudulent or unlawful,³⁵ or untrue or incorrect in fact,³⁶ resort

²⁹ See § 3099, *supra*, as to secondary evidence.

³⁰ *Kalamazoo v. Kalamazoo Heat, Light & Power Co.*, 124 Mich. 74, 82 N. W. 811, 7 Det. L. N. 115; *Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n*, 32 Utah 46, 8 L. R. A. (N. S.) 1161, 88 Pac. 691. They are the best and only evidence of it. § 3096, *supra*.

³¹ The general rule that acts of a corporation may be shown like acts of an individual is applied where there is no record made where such record shows incompleteness on its face, or where there is fraud, oversight, omission or mistake shown. *R. T. Davis Mill Co. v. Bennett*, 39 Mo. App. 460.

³² Minutes may be orally explained but not varied. *Indian Refining Co. v. Buhrman*, 220 Fed. 426; *Saulsbury v. American Vulcanized Fibre Co.*, 5 Boyce (Del.) 182, 91 Atl. 536; *Gould v. Norfolk Lead Co.*, 9 Cush. (Mass.) 338, 57 Am. Dec. 50.

Where there is no imperfection or ambiguity in the language of a vote, parol evidence is inadmissible. *Peterborough R. Co. v. Wood*, 61 N. H. 418.

Oral testimony as to the purpose of a resolution held incompetent. *Dusenberry v. Sagamore Development Co.*, 164 N. Y. App. Div. 573, 150 N. Y. Supp. 229.

Resort may be had to the circumstances under which it was passed, the situation of the company, the object of the resolution and the meeting at

which it was passed, and the conduct of the corporate authorities in respect to the resolution. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co.*, 57 W. Va. 641, 50 S. E. 890.

³³ *Rose v. Independent Chevra Kadisho*, 215 Pa. 69, 64 Atl. 401.

Where the minutes are silent as to a transaction claimed to have occurred oral evidence is admissible. *Ehrlich v. Chevra Agudas Achin Aushi Wizna*, 86 N. Y. Supp. 820.

Where minutes introduced to show election of secretary did not show any formal ballot it may be proved. *State v. Guertin*, 106 Minn. 248, 130 Am. St. Rep. 610, 119 N. W. 43.

It is competent to prove an unrecorded resolution by the persons who attended the meeting when it was passed. *Hendrie & Bolthoff Mfg. Co. v. Collins*, 29 Colo. 102, 67 Pac. 164.

Admissible in applying descriptive terms. *Chesapeake & O. Ry. Co. v. Deepwater Ry. Co.*, 57 W. Va. 641, 50 S. E. 890.

³⁴ *Ehrlich v. Chevra Agudas Achin Aushi Wizna*, 86 N. Y. Supp. 820.

³⁵ Evidence of what took place when resolutions were adopted held proper. *Bedford R. Co. v. Bowser*, 48 Pa. St. 29.

³⁶ *California*. *Gilson Quartz Min. Co. v. Gilson*, 51 Cal. 341.

Idaho. *Just v. Idaho Canal & Improvement Co.*, 16 Idaho 639, 133 Am. St. Rep. 140, 102 Pac. 381.

Illinois. *Forest Glen Brick & Tile*

may be had to extraneous evidence.³⁷ Unless others have acted on the strength of them,³⁸ or the record is conclusive because required by statute or by-law, the corporation is not concluded to deny their truth.³⁹ A resolution of which the other party keeps the evidence in his custody may be impeached by oral evidence that it was later rescinded.⁴⁰

Contracts of the corporation with its members⁴¹ or others⁴² are subject to the usual rules, as illustrated in the cases cited, and the seal may be shown not to have been affixed as it appears;⁴³ but there is a distinction between a resolution and a contract, in that the resolution may be varied by parol by the party not bound by it.⁴⁴ The rule against

Co. v. Gade, 55 Ill. App. 181, appeal dismissed 158 Ill. 39, 42 N. E. 65, aff'd 165 Ill. 367, 46 N. E. 286.

Minnesota. Northland Produce Co. v. Stephens, 116 Minn. 23, 133 N. W. 93.

Tennessee. Page v. Knights & Ladies of America (Tenn. Ch. App.), 61 S. W. 1068.

³⁷ To impeach a record of a transaction, other genuine record books of that time not containing any such record may be received. Goodwin v. United States Annuity & Life Ins. Co., 24 Conn. 591.

³⁸ Where strangers or innocent third parties have acted on the faith and belief in the statements contained in the records and minutes of a corporation, the corporation itself is generally estopped to question the correctness of such record. Barrell v. Lake View Land Co., 122 Cal. 129, 54 Pac. 594; Just v. Idaho Canal & Improvement Co., 16 Idaho 639, 133 Am. St. Rep. 140, 102 Pac. 381.

³⁹ A recital of adjournment to one day may be contradicted by showing that in fact it was to another day. Goodwin v. United States Annuity & Life Ins. Co., 24 Conn. 591.

⁴⁰ Goodwin v. United States Annuity & Life Ins. Co., 24 Conn. 591.

⁴¹ Contract to advance money as capital. Snyder v. Lindsey, 157 N. Y. 616, 52 N. E. 592.

Stock subscriptions. Briggs v. Reynolds, 176 Ill. App. 420.

Statutory stock book cannot be varied as to amount subscribed. State v. Hancock, 2 Pennw. (Del.) 252, 45 Atl. 851.

Verbal agreement that the stockholders should not become liable for the corporate debts was inadmissible. Oswald v. Minneapolis Times Co., 65 Minn. 249, 68 N. W. 15.

That a subscription was not bona fide and absolute cannot be shown by parol. Newmann v. Sexton, 156 Ill. App. 517.

⁴² Contract for sale of patent rights. Rochester Folding Box Co. v. Browne, 55 N. Y. App. Div. 444, 66 N. Y. Supp. 867, appeal dismissed 166 N. Y. 635, 60 N. E. 1120.

Railroad ticket as part of contract. Leyser v. Chicago, B. & Q. R. Co., 138 Mo. App. 34, 119 S. W. 1068.

Contract of sale of coal or a del credere agency contract. Carterville Coal Co. v. Covey-Durham Coal Co., 186 Ill. App. 163.

⁴³ Evidence held conclusive that the corporate seal was not lawfully affixed where unimpeached witnesses testified it was not put on at the time of signing and the custodian was not then present and did not afterwards affix it. Koehler v. Black River Falls Iron Co., 2 Black (U. S.) 715, 17 L. Ed. 339.

⁴⁴ A resolution employing a superin-

collateral attack on corporate existence or on title to office by parol evidence contradictory of the records is really a question of the right to make such an attack, and other portions of this work are devoted to such matters.⁴⁵ Oral evidence may be relevant in proof of any fact and admissible unless excluded by terms of an unambiguous writing or by the best evidence rule, and illustrations of the purposes for which it may be received in corporation actions will be collected in an ensuing section.⁴⁶

§ 3101. Books and records as documentary evidence. That the charter, articles, books, records, writings and other papers of the corporation are documentary evidence of the things they were constituted to memorialize is not debatable. The first mentioned ones are the evidence of the corporate formation and existence as has been seen⁴⁷ and also of their powers.⁴⁸ The minute or record books are the evidence of the corporate acts, resolves and by-laws of the corporation⁴⁹ and of the election of officers.⁵⁰ The subscriptions are provable by the corporate records⁵¹ and also the calls for payment on them.⁵² The stock book or ledger and the certificates of stock are evidence of stock-holdings.⁵³ Written or printed books of by-laws are documents subject

tendent is not *prima facie* a contract, and the rule preventing oral evidence does not apply. *Kalamazoo Novelty Mfg. Works v. Macalister*, 40 Mich. 84.

The general rule is that corporate records are not binding on the other party to a contract evinced thereby. § 3101, *infra*.

⁴⁵ See Chapters 10, 11, 14, *supra*, as to corporate existence, and Chap. 42, *supra*, as to corporate offices.

⁴⁶ §§ 3105, 3106, *infra*.

⁴⁷ § 431 *et seq.*, *supra*, and § 3096, *supra*, and see also *Peake v. Wabash R. Co.*, 18 Ill. 88; *Buncombe Turnpike Co. v. McCarson*, 18 N. C. 306.

⁴⁸ § 811, *supra*.

⁴⁹ § 488, *supra*, and chapter on Corporate Books and Records, *supra*.

A minute book properly proved is evidence of its contents. *Shelby v. New York Steam Co.*, 121 N. Y. Supp. 619.

Admissibility of by-laws as tending

to prove issues, see also § 3094, *supra*.

⁵⁰ In an action on a subscription the books and records are admissible to show organization and election of directors. *Washer v. Allensville, C. S. & V. Turnpike Co.*, 81 Ind. 78.

⁵¹ § 569, *supra*.

⁵² § 682, *supra*. See also *Hamilton & D. Plank Road Co. v. Rice*, 7 Barb. (N. Y.) 157.

⁵³ In *re Election of Directors of St. Lawrence Steamboat Co.*, 44 N. J. L. 529.

Stock ledger is admissible against the stockholder. *Macon & A. R. Co. v. Vason*, 57 Ga. 314.

A stock certificate book cannot be regarded as a stock transfer book, such as is required to be kept by certain corporations and which is made competent evidence against stockholders (*L.* 1875, p. 759, c. 611, § 17). *Geneva Mineral Spring Co. v. Steele*, 111 N. Y. App. Div. 706, 97 N. Y. Supp. 996.

to the ordinary rules.⁵⁴ Contracts and conveyances to which the corporation is a party are the evidence of the terms thereof, for example, a mortgage made by it,⁵⁵ this, however, is an instance of an ordinary private writing constituting a document and invokes no rule which is peculiar even in form to corporations.⁵⁶ All of these are primary evidence by which to prove these matters⁵⁷ though by no means the only proof which primarily may be adduced for that purpose, since inherently and also by statute other means of proof may exist of the same matters.⁵⁸ Neither are they evidence as to all persons, for some are not bound by them.⁵⁹ One corporation using the property (railroad tracks) of another may by that privity be bound by the former's records as evidence.⁶⁰ In order to be admitted as such the corporate documents must be proved to be authentic⁶¹ unless produced and offered on the demand of the adverse party;⁶² or if proved secondarily by copy it must be proved correct,⁶³ and like other documents they may be explained or supplemented by extraneous proofs.⁶⁴ The record will be excluded if not the true and authentic document of the corporation.⁶⁵

But the books and records of a corporation are unlike contracts and other bipartite writings in that they were and are not constituted to memorialize a transaction between the two signatories or consenting persons; but in some matters are memorials as to all persons, in others as to the corporation and the members, and in others as to the corporation alone and not to the particular member. And a distinct class is that where the record was not one required to be made by statute or by internal regulations of the corporation, and which

See chapter on Corporate Books and Records, *supra*; chapter on Stock and Stockholders, *infra*.

⁵⁴ *Knights & Ladies of America v. Weber*, 101 Ill. App. 488.

⁵⁵ § 1382, *supra*.

⁵⁶ A memorandum and writing made by an agent of the parties and at their request is evidence for or against them, and for and against all persons claiming under them. *New England Mfg. Co. v. Vandyke*, 9 N. J. Eq. 498.

⁵⁷ §§ 3095-3099, *supra*.

⁵⁸ §§ 3105, 3106, *infra*.

⁵⁹ See this section, *infra*.

⁶⁰ A railroad company operating its trains upon the tracks of another company becomes subject to the rules and

regulations governing the operation of trains of the latter company, and train records made in the ordinary course of business which are competent evidence against the latter are competent against the former. *Pridmore v. Chicago, R. I. & P. R. Co.*, 192 Ill. App. 446.

⁶¹ § 3103, *infra*.

⁶² If called for and produced but not inspected, the books should be admitted only when otherwise admissible and competent. *Penobscot Boom Corporation v. Lamson*, 16 Me. 224, 33 Am. Dec. 656.

⁶³ § 3099, *supra*.

⁶⁴ § 3100, *supra*.

⁶⁵ § 3103, *infra*.

therefore is a voluntary writing. Neither is it at all proper to regard corporate records as admissible on the grounds that admit public official records as against all persons; for they have no official quality except in those relatively few instances where the statute requires the keeping of certain records and thereby makes them evidence as records kept by command of the law.⁶⁶ The general rule is that records are documentary evidence against third persons only to show the proceedings had by it and its organization and existence,⁶⁷ but they may be evidence against others when kept in accordance with requirement of a statute⁶⁸ and testimony of a witness that they are correct may make them admissible like other writings.⁶⁹ When made in such manner and at such time as to be within the *res gestae* rule, and when properly verified by oath, its book entries are admissible in its favor.⁷⁰ If the entry is narrative of a past transaction or fact, and self-serving, it cannot be admitted in proof thereof.⁷¹ Entries are evidence against

⁶⁶ In *Jones on Evidence*, § 516 (528) this distinction is pointed out with a caution and with the words: "The records of private corporations cannot be deemed public records; and therefore quite different rules govern their reception as evidence."

⁶⁷ *Coosaw Min. Co. v. Carolina Min. Co.*, 75 Fed. 860, appeal dismissed 82 Fed. 1000 (mem. dec.); *Jones v. Florence Wesleyan University*, 46 Ala. 626; *Mayor & Aldermen of Tuscaloosa v. Wright*, 2 Port. (Ala.) 230; *Carey v. Philadelphia & C. Petroleum Co.*, 33 Cal. 694.

Books and minutes are evidence of the proceedings of the corporation as against third persons. *North River Meadow Co. v. Christ Church at Shrewsbury*, 22 N. J. L. 424, 53 Am. Dec. 258; *New England Mfg. Co. v. Vandyke*, 9 N. J. Eq. 498.

At most they are only *prima facie* against third persons. *Northland Produce Co. v. Stephens*, 16 Minn. 23, 133 N. W. 93. See § 431, *supra*, as to proving existence by records.

Not to prove contracts made as against them. *Oregon & C. R. Co. v. Grubissich*, 206 Fed. 577.

Books kept by a corporation solely for its own purposes and the adminis-

tration of its internal affairs cannot be competent to prove isolated facts between a corporation and a stranger. *Eureka Hill Min. Co. v. Bullion Beck & Champion Min. Co.*, 32 Utah 236, 125 Am. St. Rep. 835, 90 Pac. 157. And see other cases, this section, *infra*. See chapter on Corporate Books and Records, *supra*, as to nature of such records.

⁶⁸ Under Montana Civ. Code, § 540 (Rev. Codes, § 3902), requiring corporations for profit to keep a record of all their business transactions, such books are admissible in evidence, and the entries therein are presumed rightly made. *Smith v. Moore*, 199 Fed. 689.

⁶⁹ *Hayden v. Williams*, 96 Fed. 279.

⁷⁰ An entry in the books of a corporation which is part of a transaction and in accordance with the course usually pursued in such cases, when properly verified, is competent evidence in its favor. *Ganther v. Jenks & Co.*, 76 Mich. 510, 43 N. W. 600; *Schell v. Second Nat. Bank*, 14 Minn. 43.

⁷¹ An entry in a corporation's record book showing the acceptance of assets of a partnership turned over to it, is a recital of a past transaction. *Norman*

the corporation.⁷² Thus books and records may be proved to show that the corporation was in business at a time when claimed to have been out of business.⁷³ A fact of negative form cannot be proved by the silence of the minutes, if it did not need to be recorded,⁷⁴ but when books of account are proved to have been regularly and completely kept, the absence of an entry is of evidential value.⁷⁵ The absence of a resolution from concededly genuine records may afford evidence that it was not passed as contended.⁷⁶ The record must be relevant to the issue, but if it shows a fact relevant because presumably continuing or because otherwise connected with the issues in time, it is admissible.⁷⁷ In condemnation proceedings the subscription books have been held admissible to prove that the requisite amount of stock has been subscribed to the petitioner,⁷⁸ and to show a corporate claimant's chain of title but not the value of the land.⁷⁹

As between the corporation and its members the books and records regularly kept and ordained for that purpose are evidence of the things they show, such as subscriptions and calls, and assessments,⁸⁰

Printers' Supply Co. v. Ford, 77 Conn. 461, 59 Atl. 499.

Records of the doings of a corporation in regard to property cannot be received in its favor, as where such corporation is demandant in a writ of entry. *Old South Society v. Wainwright*, 156 Mass. 115, 30 N. E. 476.

⁷² § 3102, *infra*.

⁷³ To show that during all of a certain time a business was conducted in its name, the contention being that at time of a sale it was not in business. *Ogden Packing & Provision Co. v. Tooele Meat & Storage Co.*, 41 Utah 92, 124 Pac. 333.

⁷⁴ A minute book is not admissible in behalf of a corporation to show that there was no resolution authorizing a plaintiff's employment. *Legrand v. Manhattan Mercantile Ass'n*, 44 N. Y. Super. Ct. 562, *aff'd* 80 N. Y. 638.

⁷⁵ *E. B. Martin & Sons v. Bank of Leesburg*, 137 Ga. 285, 73 S. E. 387.

⁷⁶ *Goodwin v. United States Annuity & Life Ins. Co.*, 24 Conn. 591.

⁷⁷ Production of books under notice does not affect the right of the party against whom the paper is offered to

object to its introduction in evidence on account of irrelevancy. *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265.

Records showing that a person was president are admissible, though the question involved relates to his being president two years later, it appearing that he acted as president at such later time by other evidence also. *Clarke v. Warwick Cycle Mfg. Co.*, 174 Mass. 434, 54 N. E. 887.

⁷⁸ *State v. Superior Court Clarke Co.*, 44 Wash. 108, 87 Pac. 40.

⁷⁹ *North Shore R. Co. v. Pennsylvania Co.*, 251 Pa. 445, 96 Atl. 990.

⁸⁰ Original book entries being made by the commissioners in the course of their duty are admissible against a subscriber to stock. *Wood v. Coosa & C. R. R. Co.*, 32 Ga. 273.

Subscription books of a railroad are in the nature of official registers and they may be introduced in an action against a subscriber to show how much per mile has been subscribed. *Monroe v. Ft. Wayne, J. & S. R. Co.*, 28 Mich. 271, 272.

Proper against member to show that

the establishment of offices and the duties and emoluments pertaining to them,⁸¹ and transactions in general to which they were parties.⁸² The books are said to be *prima facie* evidence of who are the stockholders,⁸³ but in numerous cases, most of them being suits to enforce

assessment was proper and legally made. *Abernethy v. Society of Church of Puritans*, 3 Daly (N. Y.) 1.

Records are competent to prove assessments made upon shares of a deceased stockholder, one of the original grantees of the charter and also a director. *White Mountains R. R. v. Eastman*, 34 N. H. 124.

Amount of instalments to be paid for stock, as well as calls may be so proved. *Bavington v. Pittsburgh & S. R. Co.*, 34 Pa. St. 358.

In an action for a subscription to a seminary, taken under the Act of March 12, 1800, as to the establishment of a seat of justice of a county on condition that certain amounts were subscribed to a seminary, the subscription book signed by the defendant was evidence against him. *Davis v. Meade*, 13 Serg. & R. (Pa.) 281.

⁸¹ To show the emoluments attached to the office. *Frazier v. Virginia Military Institute*, 81 Va. 59.

A memorandum of duties assigned known and assented to but not voted on is evidence. *Bank of State v. Comegys*, 12 Ala. 772, 46 Am. Dec. 278.

The record (of a resolution to employ plaintiff) does not suffice to prove the facts therein as against the opposite party who is not bound by it. *Kalamazoo Novelty Mfg. Works v. Macalister*, 40 Mich. 84.

⁸² In general books and minutes of a corporation are evidence of its acts and proceedings if there is nothing to render them suspicious, and they may be referred to to show the regularity and legality of its proceedings. *Hayden v. Williams*, 96 Fed. 279; *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 17 Am. Rep. 540; *Abernethy v. Society of Church of Puritans*, 3 Daly (N.

Y.) 1; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29; *Graff v. Pittsburgh & S. R. Co.*, 31 Pa. St. 489; *Com. v. Woelper*, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

With respect to the corporators, books of a corporation are public records of the acts and proceedings. *Hatch v. City Bank*, 1 Rob. (La.) 470.

To show the acceptance of a conveyance to the corporation by the stockholders and for their benefit. *Brewer v. Stone*, 11 Gray (Mass.) 228.

Books and records of the lodge, when properly identified, are receivable in evidence against the members of the lodge and their privies. *Union Pacific Lodge No. 17 A. O. U. W. v. Bankers' Surety Co.*, 79 Neb. 801, 113 N. W. 263.

Books of a banking corporation are admissible against a stockholder. *Brown v. Ellis*, 103 Fed. 834; *Merchants' Bank v. Rawls*, 21 Ga. 289.

Books of a mutual insurance company are evidence against a member and policyholder of the company. *Protection Life Ins. Co. v. Dill*, 91 Ill. 174; *Diehl v. Adams County Mut. Ins. Co.*, 58 Pa. St. 443, 98 Am. Dec. 302.

If the resolution of employment does not of itself contain the elements of a contract parol evidence thereof is not excluded. *Kalamazoo Novelty Mfg. Works v. Macalister*, 40 Mich. 84.

⁸³ *Macon & A. R. Co. v. Vason*, 57 Ga. 314. See also *Turnbull v. Payson*, 95 U. S. 418, 24 L. Ed. 437 (a suit to enforce liability), criticised in *Morawetz, Priv. Corp.* § 76. Explained and qualified in *Carey v. Williams*, 79 Fed. 906, also a liability suit.

Books of a corporation are *prima facie* evidence that a person named

a stockholder's liability, this doctrine has been criticised and repudiated, seemingly with the same undue latitude of language as that which evoked the criticism.⁸⁴ There seems no reason to doubt that the books are evidence between the corporation and its members as to its general personnel apart from the adverse party.⁸⁵ Such books have been admitted as evincive of reliance by the corporation on the subscription list as containing the names of the actual subscribers.⁸⁶ Receipts for payments on stock are admissible as bearing on stock ownership, even if they also include other payments for other things.⁸⁷ Where the member deals with the corporation as a distinct third person the books are not admissible against him as to that transaction.⁸⁸

therein as such is a stockholder, and they are stronger evidence, when the relation is admitted, to show the amount paid on the stock. *Louisville & N. R. Co. v. Hart County*, 25 Ky. L. Rep. 1152, 77 S. W. 361, 25 Ky. L. Rep. 395, 75 S. W. 288.

Such records are competent and sufficient evidence of membership in a suit on assessments. *Penobscot R. Co. v. White*, 41 Me. 512, 66 Am. Dec. 257; *Penobscot R. Co. v. Dummer*, 40 Me. 172, 63 Am. Dec. 654.

⁸⁴ An emphatic repudiation is found in *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711. See also chapter on Stock and Stockholders, *infra*.

It is not permissible to attempt in this connection any analysis of these cases dealing with this question as it arises in suits to enforce the liability of a stockholder; but it is permissible to suggest that the issue in such cases is somewhat more than a simple issue of stockholder or not a stockholder. It also involves the issue of liability to the corporation and through it to the creditors or the liquidator. If, therefore, the well-established rule that the books are not evidence to establish liability of the defendant alleged stockholder to the corporation be applied, many cases may be taken out of apparent conflict. If, also, the nature of the book and the constituted necessity of keeping it as a record of

the very fact is given the same force as other like books kept in the regular course of business have, no good reason appears why such a book might not be *prima facie* evidence like properly proven books of account are, or other corporate records so kept. The cases must be limited in doctrine to the facts considered, and it would certainly be open to criticism to lay down a rule that corporate books are not admissible to show the personnel of the corporation against the stockholder who was one of the component persons.

⁸⁵ See the cases preceding, and § 3096, *supra*, for cases holding that they are the best evidence thereof.

⁸⁶ A ledger, shareholder's list and a memorandum book held admissible on behalf of a corporation, as such evidence together with the original subscription list tended to show that the plaintiff relied on the subscription and acted upon it. *Stuart v. Valley R. Co.*, 32 Gratt. (Va.) 146.

⁸⁷ In an action for damages for the refusal to transfer stock, official receipts showing payments to officers of an association are admissible even though they embraced sums paid for fines, and interest upon the debt due, as well as instalments upon the stock. *North American Bldg. Ass'n v. Sutton*, 35 Pa. St. 463, 78 Am. Dec. 349.

⁸⁸ *Hayden v. Williams*, 96 Fed. 279; *Rudd v. Robinson*, 126 N. Y. 113, 12

Operating records, such as car records and train registers,⁸⁹ and freight records,⁹⁰ are admissible, when properly authenticated, as exceptions to the hearsay rule to prove the facts shown by them; but inspection records⁹¹ and working rules⁹² have been rejected. A declarative report, which might be either *res gestae* or an admission by an agent binding the corporation, cannot be one or the other if not made in the line of his duty.⁹³ A statute requiring a record to be kept may render the record admissible as evidence of the entries so made.⁹⁴

L. R. A. 473, 22 Am. St. Rep. 816, 26 N. E. 1046.

Officers and bookkeepers are not agents of the member and he has no control over their acts so as to be bound. *Rudd v. Robinson*, 126 N. Y. 113, 12 L. R. A. 473, 22 Am. St. Rep. 816, 26 N. E. 1046.

Books of a corporation are not admissible in favor of the corporation unless authenticated as against any other stranger as books of account. *Trainor v. German-American Savings, Loan & Building Ass'n*, 204 Ill. 616, 68 N. E. 650, rev'g 102 Ill. App. 604.

A paper containing an account of payments made on stock and a loan, and credits, accompanied by an affidavit of a secretary of the corporation that such account was true and correct held not admissible. *Coppes v. Union Nat. Savings & Loan Ass'n*, 33 Ind. App. 367, 69 N. E. 702.

Books of a bank are not evidence to establish its acquisition of the interests of members in a former concern. *Hineks v. Converse*, 37 La. Ann. 484.

⁸⁹ *United States. Chesapeake & O. Ry. Co. v. Stojanowski*, 191 Fed. 720.

Illinois. Pridmore v. Chicago, R. I. & P. R. Co., 192 Ill. App. 446.

Kentucky. Louisville, H. & St. L. R. Co. v. Hall, 29 Ky. L. Rep. 584, 94 S. W. 26.

Michigan. Modern Match Co. v. Baltimore & O. R. Co., 140 Mich. 570, 104 N. W. 19, 12 Det. L. N. 269.

Missouri. Big River Lead Co. v. St.

Louis, I. M. & S. R. Co., 123 Mo. App. 394, 101 S. W. 636.

Contra, holding a register of trains is not of a public or quasi public character. *Pittsburgh & L. E. R. Co. v. Cunningham*, 39 Ohio St. 327.

⁹⁰ Where an entry on a card showing the weight of goods shipped by a railroad was inaccessible, having been destroyed, an entry on the corporate books, made from the card on the regular course of business, was admissible. *Meyer v. Brown*, 130 Mich. 449, 90 N. W. 285.

⁹¹ Inspection record is not a book of account. *Baltimore & O. S. W. Ry. Co. v. Tripp*, 175 Ill. 251, 51 N. E. 833.

Such record is not a public record. *Illinois Cent. R. Co. v. Barret*, 23 Ky. L. Rep. 1755, 66 S. W. 9.

⁹² Rules of a railroad company merely intended as private instructions to its employees are not admissible in its behalf as against a plaintiff not shown to have contracted with reference thereto, or to have had knowledge thereof. *Central Railroad & Banking Co. v. Skellie*, 90 Ga. 694, 16 S. E. 657.

⁹³ A declaration of a mine examiner as to gas in an entry, not made while in the discharge of his duties is not competent either as an admission or a part of the *res gestae*. *Conover v. Harrisburg & S. Coal Co.*, 161 Ill. App. 74.

⁹⁴ Civ. Code, § 377, requires a minute book of directors to be kept, and when the book is identified by the secretary, and the minutes showing the execution of a promissory note as evidence of a

§ 3102. Books and records as disserving declarations and admissions. A corporate record or book entry or writing by it or resolution adopted may amount to an admission by it and be evidence as such,⁹⁵ but the entries must be ascribable to the corporation⁹⁶ and be such as to evince action or admission of a fact.⁹⁷ Under this rule the books may be evidence of credits entered⁹⁸ of the receipt of goods or money,⁹⁹ of the settlement of an account,¹ of an investigation of the facts acted on,² of the employment and salary of one as an agent

loan are identified by the president, the book is admissible. *Union Trust Co. of San Francisco v. Dickinson*, 30 Cal. App. 91, 157 Pac. 615.

⁹⁵ *Oregon & C. R. Co. v. Grubissich*, 206 Fed. 577; *Clark v. Warwick Cycle Mfg. Co.*, 174 Mass. 434, 54 N. E. 887.

Books of a building and loan association are evidence against such association, as admissions, as between it and its stockholders. *Columbus Building & Loan Ass'n v. Kriete*, 87 Ill. App. 51.

⁹⁶ Books of account will not prove an account therein against the corporation if they appear to have been used by others before the corporation with no evidence to attribute the items in question to the corporation. *Bludwine Bottling Co. v. Crown Cork & Seal Co.*, 14 Ga. App. 285, 80 S. E. 853.

A minute book kept by a subordinate lodge containing entries required to be made by it in the performance of its agency for the society is competent where it contains relevant admissions against such society. *Platt-deutsche Grot Gilde von de Vereenigten Staaten von Nord Amerika v. Ross*, 117 Ill. App. 247.

In a suit to recover for live stock killed by a train, where it appears that there is in existence a statute requiring railroad companies to require their section foremen to keep a record showing any live stock killed by trains, and describing such animals (Civ. Code 1913, § 3768), the acts of the section foremen in preparing such a

record are done in the line of their duty; wherefore the admissions of such employees in preparing the records may be considered as the admissions of their employers, the defendants, of one of the ultimate facts involved. *Achison, T. & S. F. R. Co. v. Carrow*, 18 Ariz. 92, 156 Pac. 965.

⁹⁷ A letter from the opposite party which the corporation by vote laid on the table is not admissible against it. *Robinson v. Fitchburg & W. R. Co.*, 7 Gray (Mass.) 92.

⁹⁸ Credit for the amount of stock subscribed by a defendant. *Buffington v. Turnpike Co.*, 3 Penr. & W. (Pa.) 71.

⁹⁹ Book entries made by the authorized agent of a railroad company, or under his direction, in due course of his agency, where the correctness of the entries are proved by the agent himself, constitute written admissions forming a part of the *res gestae* of the fact of delivery of goods, wherefore such entries are admissible to show receipt of merchandise by the railroad. *Louisville & N. R. Co. v. McGuire & Co.*, 79 Ala. 395.

¹ Minutes showing a report of a committee as to having settled an account may be proof against the corporation, but as against another party are only hearsay. *Cape Girardeau & S. L. R. Co. v. Kimmel*, 58 Mo. 83.

² A resolution of stockholders held admissible to show an examination of proceedings of trustees and officers which they professed to ratify. *Colorado Springs Co. v. American Pub. Co.*, 97 Fed. 843.

or officer of the corporation,³ of the officer's authority to make a contract,⁴ of the subscription of a person having been revoked and not recognized,⁵ of the location and condition of the corporate properties and structures.⁶ Even though minutes and records may not be evidence of the facts narrated, they may serve to show that there were meetings and that minutes were kept.⁷ Entries on corporate records may be admitted to show notice to it, when they would not be admissible as proof of the recited facts.⁸ Ownership as between the corporation and another may be shown by papers or minutes evincive of the way in which ownership was regarded.⁹

Publications, such as books of by-laws and books of rules,¹⁰ and

³ *Clarke v. Warwick Cycle Mfg. Co.*, 174 Mass. 434, 54 N. E. 887; *Kalamazoo Novelty Mfg. Works v. Macalister*, 40 Mich. 84.

A resolution providing that the salaries of officers "be fixed at the rates allowed during the past year, viz., president, \$150.00," is an admission of the directors that the salary was so fixed. *Smith v. Woodville Consol. Silver Min. Co.*, 66 Cal. 398, 5 Pac. 688.

⁴ Minutes are admissible to prove authority of officer to make a note. *Hayward v. Pilgrim Society*, 21 Pick. (Mass.) 270.

⁵ Extracts from minutes of proceedings of a corporation, tending to show that a defendant never became a legal subscriber to capital stock of the plaintiff, that his proposal to subscribe was revoked, and that the plaintiff refused to treat the defendant as a subscriber, held proper evidence to prove that such defendant was not a subscriber. *Stuart v. Valley R. Co.*, 32 Gratt. (Va.) 146. See also *Bailey v. New York Cent. & H. River R. Co.*, 22 Wall. (U. S.) 604, 22 L. Ed. 840; *North American Bldg. Ass'n v. Sutton*, 35 Pa. St. 463, 78 Am. Dec. 349, in which cases receipts and certificates were received as admissions of the right to stock or interests. See also generally chapter on Stock and Stockholders, *infra*.

⁶ To show that a hole in a road

whereby a plaintiff was injured, was within the bounds of the defendant's road. *Stillwater Turnpike Co. v. Coover*, 25 Ohio St. 558.

⁷ *State v. Manhattan Rubber Mfg. Co.*, 149 Mo. 181, 50 S. W. 321.

⁸ In an action for injuries sustained by a motorman in a collision of a street car with a train, an entry by such motorman in a book of the company made after a trip, as required, that the street car had "bad hand brakes" was admissible as showing notice of the defect but it was not competent evidence of the fact itself. *Brady v. North Jersey St. R. Co.*, 76 N. J. L. 744, 71 Atl. 238.

⁹ Minutes of a contract for construction and evincive of its subsisting at a certain time were held relevant to show that materials designed for the work were the property of the contractor rather than of the corporation. So held in replevin by it against an officer who levied on them as the contractor's. *Coos Bay R. Co. v. Siglin*, 34 Ore. 80, 53 Pac. 504.

¹⁰ Publications of the rules governing a defendant insurance company in the transaction of its business. *Walsh v. Aetna Life Ins. Co.*, 30 Iowa 133, 6 Am. Rep. 664. See also *Knights & Ladies of America v. Weber*, 101 Ill. App. 488, where such evidence was said to be "prima facie," evidence of by-laws.

public reports by the corporation are also competent as admissions.¹¹ Pleadings by the corporation in the same or another case may be taken as admissions by it.¹² A paper is admissible although it contains other matter which is not germane to the fact thereby admitted against interest.¹³

Corporate papers and writings noted thereon will not be competent in favor of the officer making them, if when made by him they were self-serving.¹⁴ Entries may be admissible as against officers charged with knowledge of them, or who made them,¹⁵ or against members, likewise charged.¹⁶ A resolution not minuted may be proved against one who heard it read and acted thereunder.¹⁷ They do not bind third persons as admissions unless proved to have been known to them or chargeable to their knowledge,¹⁸ but when made on information fur-

Rules for conduct of employees. *Lake Shore & M. S. R. Co. v. Ward*, 35 Ill. App. 423, aff'd 135 Ill. 511, 26 N. E. 520.

¹¹ *Leonard v. New York Cent. & H. River R. Co.*, 44 N. Y. Super. Ct. 575, aff'd 80 N. Y. 659.

¹² *Randel v. Chesapeake & D. Canal*, 1 Harr. (Del.) 233; *Johnson v. Butte & S. Copper Co.*, 41 Mont. 158, 48 L. R. A. (N. S.) 938, 108 Pac. 1057.

¹³ *North American Bldg. Ass'n v. Sutton*, 35 Pa. St. 463, 78 Am. Dec. 349, where a receipt for stock payments in a building association included also fines and interest.

¹⁴ Writings upon returned certificates of stock as to their sale and transfer to a president held made for such president's benefit, not in the performance of her duties as an officer and wholly self-serving. *Geneva Mineral Spring Co. v. Steele*, 111 N. Y. App. Div. 706, 97 N. Y. Supp. 996.

¹⁵ Evidence against one of the directors. *Gratz v. Redd*, 4 B. Mon. (Ky.) 178.

Books within an officer's knowledge are properly received in evidence as to the giving of a note. *First Nat. Bank v. Tisdale*, 84 N. Y. 655.

Entries made on books of a corporation by a deceased member, either as president or treasurer, or by one act-

ing under his direction, constitute a standing acknowledgment of his liabilities as an officer, as against his succession and legal representatives. *Southern Mut. Ins. Co. v. Pike*, 32 La. Ann. 483.

In an action for fraud against officers, directors and stockholders of a corporation, books of the company made by the secretary and agent of the corporation, and consequently by the agent of the defendants, are admissible. *Lederer v. Morrow*, 132 Mo. App. 438, 111 S. W. 902.

¹⁶ *Howard v. Glenn*, 85 Ga. 238, 21 Am. St. Rep. 156, 11 S. E. 610.

Admissions of a party against his interest, inscribed upon the books of a corporation and signed by him are competent and persuasive evidence against him as though they were written elsewhere. *Harrison v. Remington Paper Co.*, 140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314.

So held of an assessment book of an unincorporated association showing owner of a mining claim which is open to inspection of members. *Abernathie v. Consolidated Virginia Min. Co.*, 16 Nev. 260.

¹⁷ Appointment of person as clerk read in his presence. *Delano v. Smith Charities*, 138 Mass. 63.

¹⁸ *Harrison v. Remington Paper Co.*,

nished by the adverse party and known to him the entries may be admitted against him and in favor of the corporation.¹⁹ Such books may be admissible for one creditor as against another to show debts.²⁰ Corporate financial statements may also be admissible against the officers making them when sued as individuals.²¹

When an entry amounting to an admission is receivable all of it ought to be received which shows its meaning and extent.²²

§ 3103. Authentication of books and records for introduction. The record or book or other corporate writing must be proved to be authentic, or its authenticity conceded before it can go in as evidence,²³ and an instrument under the seal of the company is taken to be authentic as against it.²⁴ The former strictness in proving the corporate seal on a writing is relaxed and now it suffices generally to prove that it is the seal commonly used.²⁵ Even if authenticity is not question-

140 Fed. 385, 3 L. R. A. (N. S.) 954, 5 Ann. Cas. 314.

Accounts from a ledger book showing the corporation to be the debtor of a person held admissible where such person had examined the books, footed up the account, and made no denial that the corporation was his debtor. *Becker v. Donalson*, 138 Ga. 634, 75 S. E. 1122.

Testimony of a bookkeeper as to the mailing of statements of a balance due, and that it had never been denied, is admissible. *W. D. Schmidt & Co. v. Lightner*, 185 Mo. App. 546, 172 S. W. 483.

¹⁹ An entry of a secretary upon books of a corporation, as to a contract, is properly admitted in evidence when it appears that such entry was made upon information furnished by defendants and shown to them after it was made. *Rochester Folding Box Co. v. Browne*, 55 N. Y. App. Div. 444, 66 N. Y. Supp. 867.

²⁰ *New Orleans Canal & Banking Co. v. Leeds & Co.*, 49 La. Ann. 123, 21 So. 168.

²¹ Bank statement made by or under the direction of its president and general manager is competent evidence to prove the value of shares of stock.

Ludowese v. Amidon, 124 Minn. 288, 144 N. W. 965.

²² *Stillwater Turnpike Co. v. Coover*, 25 Ohio St. 558.

²³ *Goodwin v. United States Annuity & Life Ins. Co.*, 24 Conn. 591; *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265; *Shelby v. New York Steam Co.*, 121 N. Y. Supp. 619.

Where a minute book was never in the possession of a secretary, there being a dispute as to who was the lawful custodian of the book, and litigation thereto, but the fact that the book in question was the minute book was not denied, it was admissible. *Wyss-Thalman v. Beaver Valley Brewing Co.*, 219 Pa. 189, 68 Atl. 187.

Records and by-laws of a fraternal beneficiary association must be proved in the same manner as those of other private corporations. *Yonda v. Royal Neighbors of America*, 96 Neb. 730, 148 N. W. 926.

²⁴ Certificate of stock bearing a seal purporting to be the seal of the company, and issued and treated by the company and officers as the stock of the company. *Kneeland Inv. Co. v. Berendes*, 81 Wash. 372, 142 Pac. 869.

²⁵ "The earlier strictness of proof in this regard has been much abated

able the document may be excluded on objection for irrelevancy.²⁶ It is not necessary to show that an otherwise authentic document was spread on the records of the corporation, e. g., its constitution,²⁷ or that loose minutes were immediately spread on the corporate record book which is offered,²⁸ or, when acted on, that it was ever so spread.²⁹ The records or minutes are to be authenticated by testimony of the secretary or the acting secretary³⁰ or the officer under whose knowledge and direction they were made,³¹ who is not incompetent for this purpose because he is also a stockholder;³² and it is not essential that the writings so proved be proved by testimony of the officer who signed them,³³ or that they have been kept in his own hand.³⁴ If the keepers

by later decisions." The seal is proved by proof that it was commonly used as such. *Blood v. La Serena Land & Water Co.*, 113 Cal. 221, 45 Pac. 252, 41 Pac. 1017.

²⁶ *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265.

²⁷ *Tarbell & Whitham v. Gifford*, 82 Vt. 222, 17 Ann. Cas. 1143, 72 Atl. 921.

²⁸ Entries in the book not made until several months after the meeting. *Brower v. East Rome Town Co.*, 84 Ga. 219, 10 S. E. 629.

Records of a stockholders' meeting kept in a drawer for six months before being copied in a "record" book. *Vawter v. Franklin College*, 53 Ind. 88.

²⁹ Where a written memorandum of duties of officers is prepared under a resolution requiring a change of duties and is signed by nearly all the officers, and placed on the table of the board of directors while in session, it will be held that such board assented to and approved of the arrangement although no action was taken by the board. *Bank of State v. Comegys*, 12 Ala. 772, 46 Am. Dec. 278.

³⁰ *Bridges v. Southern Bell Telephone & Telegraph Co.*, 15 Ga. App. 291, 82 S. E. 925; *Stebbins v. Merritt*, 10 Cush. (Mass.) 27 (by the clerk); *Wyss-Thalman v. Beaver Valley Brewing Co.*, 219 Pa. 189, 68 Atl. 187; *Tarbell & Whitham v. Gifford*, 82 Vt. 222,

17 Ann. Cas. 1143, 72 Atl. 921.

The secretary or other person performing the duties of secretary who is usually the proper custodian of the minutes and records is generally the proper person by whom to prove their authenticity. *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265.

³¹ A record book of an officer of a fraternal insurance company, which by its terms is made prima facie evidence of the standing of a member, is admissible in evidence when duly proven by such officer to have been made with his knowledge and under his direction, although such entries may not be proved by the private secretary or assistant. *Chambers v. Great State Council, I. O. R. M.*, 76 W. Va. 614, 86 S. E. 467.

³² *Peake v. Wabash R. Co.*, 18 Ill. 88; *Morgan v. Lehigh Valley Coal Co.*, 215 Pa. 443, 64 Atl. 633.

³³ Official receipts in the book of a corporation, proved by a secretary are admissible. *North American Bldg. Ass'n v. Sutton*, 35 Pa. St. 463, 78 Am. Dec. 349.

³⁴ A resolution contained in a regular book of minutes kept by a secretary, its correctness being authenticated by the secretary whose signature is proved, is properly admitted in evidence, it not being necessary that the resolution should be in the secretary's

of the record are dead, proof of their handwriting suffices.³⁵ A foreign charter should be authenticated in the manner prescribed by act of congress, and if the laws of the forum admit of other modes of proving a copy of the charter, the proper official authentication of such copies must be attached.³⁶

Papers in the archives of the corporation and recognized as its constitution may be admitted as such on the testimony of a witness to the fact. Organic papers may be received on testimony of their origin, receipt and custody by the proper officer.³⁷ Ancient records will on common-law principles be admitted as self-proving.³⁸

Against the admission of a purported record it may be shown that it is not a true minute of any meeting, and that it is a self-serving declaration of the plaintiff or ascribable to him,³⁹ but this cannot be done by a corporation which has suffered the record to be relied on as correct;⁴⁰

own handwriting. *United Growers Co. v. Eisner*, 22 N. Y. App. Div. 1, 47 N. Y. Supp. 906.

³⁵ *National Exp. & Transp. Co. v. Morris*, 15 App. Cas. (D. C.) 262.

³⁶ See §§ 429, 3099, *supra*, also § 3106, *infra*. See also *Tarbell & Whitham v. Gifford*, 88 Vt. 222, 17 Ann. Cas. 1143, 72 Atl. 921.

³⁷ Minutes and entries made by officers of a corporation, if it appear that they have been kept in a proper place and by a proper person are admissible. *Fitch v. Pinckard*, 5 Ill. 69; *St. Louis & C. R. Co. v. Eakins*, 30 Iowa 279.

Records coming from its last secretary are competent to show organization of a cemetery corporation and user of the powers of such. *Packard v. Old Colony R. Co.* 168 Mass. 92, 46 N. E. 433.

Printed books of the constitution and laws of an order, proved to be genuine by the grand secretary of a state lodge who received them in due course of business from officers of the supreme lodge are presumed genuine, from their custody and origin. *Schubert Lodge No. 118, K. P. of New Jersey v. Schubert Kranken Unterstuetzungs Verein*, 56 N. J. Eq. 78, 38 Atl. 347.

³⁸ *Monumoi Great Beach v. Rogers*, 1 Mass. 159.

Where books of a company are more than thirty years old, and a witness testifies to their genuineness, and the custody of the books to the time of trial is shown, the books are conclusively presumed genuine, and are admissible without proving the handwriting. *National Exp. & Transp. Co. v. Morris*, 15 App. Cas. (D. C.) 262.

³⁹ Entries in a minute book of a corporation showing approval of a transaction and a purchase by a defendant corporation in the handwriting of an agent of the plaintiffs. *Davison v. West Oxford Land Co.*, 126 N. C. 704, 36 S. E. 162.

Evidence of defendants held to show that a book of proceedings of directors was spurious. *Goodwin v. United States Annuity & Life Ins. Co.*, 24 Conn. 591.

⁴⁰ Corporation cannot introduce proof that its record in evidence falsely recites a regular meeting. *Barrell v. Lake View Land Co.*, 122 Cal. 129, 54 Pac. 594. And see *Just v. Idaho Canal & Improvement Co.*, 16 Idaho 639, 133 Am. St. Rep. 140, 102 Pac. 381.

and as already stated the record may be impeached or error therein shown by extraneous evidence.⁴¹ Therefore, if the material portion is interlined and not proved to be authentic, it must be rejected;⁴² but a charter to a subordinate lodge is not made inadmissible by a slight and not misleading misnomer of the grand lodge which issues it.⁴³

By virtue of statutory provisions certified copies of the records or extracts therefrom are admissible in some states, but they must be authenticated as the statute requires.⁴⁴ When a copy is offered which is not admissible under a statute as self-proving by the certificate of the secretary, it may be proved by testimony of another credible witness to be true.⁴⁵

Among the documents to which the general rules as to the production and proof of documentary evidence applies in addition to the records and minutes proper are printed books of rules and by-laws,⁴⁶ reports and claims of loss,⁴⁷ shipping and weighing records,⁴⁸ and books of account. Where the corporate books of account are offered they must be proved as like books from any other party are proved.⁴⁹ This necessity is not dispensed with by a statute providing for proof of acts and proceedings by a copy of the corporate records sworn or

⁴¹ § 3100, *supra*.

⁴² Where a corporation attempts to prove a by-law by its minutes, and the material and controlling thing in the minutes is an interlineation not in the handwriting of the secretary, which the president as witness cannot explain, the evidence is properly rejected. *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265.

⁴³ *Burdine v. Grand Lodge of Alabama*, 37 Ala. 478.

⁴⁴ § 3095, *supra*.

⁴⁵ A copy of a record of directors certified by the secretary to be a true copy if not proved as required by Rev. St. c. 51, § 15 (J. & A. Ann. St. ¶ 5532), requiring a statement that the secretary is the keeper of the record, is admissible when proved by the testimony of a credible witness. *Cantwell v. Stockmen's Building, Loan & Savings Union*, 88 Ill. App. 247, *aff'd* 187 Ill. 275, 58 N. E. 414.

A general objection to such instrument offered in evidence raises ques-

tions of its relevancy and materiality only. *Cantwell v. Welch*, 187 Ill. 275, 58 N. E. 414.

⁴⁶ *Knights & Ladies of America v. Weber*, 101 Ill. App. 488; *Schubert Lodge No. 118, K. P. of New Jersey v. Schubert Kranken Unterstuetzungs Verein*, 56 N. J. Eq. 78, 38 Atl. 347.

⁴⁷ *Gwyn Harper Mfg. Co. v. Carolina Cent. R. Co.*, 128 N. C. 280, 83 Am. St. Rep. 675, 38 S. E. 894.

⁴⁸ In an action for damages to cattle shipped over a railroad, evidence that the cattle were weighed by some one and a record kept thereof was not admissible except to prove the fact of weighing, there being no showing to justify the admission of the record. *Gilbert Bros. v. Chicago, R. I. & P. R. Co.*, 156 Iowa 440, 136 N. W. 911.

⁴⁹ *Shelby v. New York Steam Co.*, 121 N. Y. Supp. 619.

Books of account of a corporation not authenticated by the clerk making the entries are not admissible, it appearing that such clerk was living

certified by the corporate officer in custody of the books.⁵⁰ Proof of a writing of receipt must be supported by proof of the signer's authority.⁵¹ The printed book of the internal laws of the corporation is not inadmissible because it does not show of itself that they emanated from proper resolution or vote⁵² but the fact that they are the by-laws or constitution must be proved by competent testimony⁵³ which is direct and not inferential.⁵⁴

The regular and ordinary authentication and proof of keeping is not required, when corporate book entries are not introduced to prove the fact exhibited or narrated, but as corroboration of an officer's testimony that he participated in the facts and transactions shown and that they are correctly entered,⁵⁵ or as proof of an element of an admission by the adverse party who knew of and did not dissent from such entries.⁵⁶

An objection for want of proper authentication and proof of genuineness should be specific, and is not covered by an objection that

and residing at the place of trial and was a competent witness. *Bartholomew v. Farwell*, 41 Conn. 107.

⁵⁰ *Burns' Rev. St.* 1901, § 474, providing that acts and proceedings of a corporation may be proved by a sworn copy of the records, was not intended to provide that books of account of a private corporation might be used in evidence in a different manner from books of natural persons. *Coppes v. Union Nat. Savings & Loan Ass'n*, 33 Ind. App. 367, 69 N. E. 702.

Books of a corporation are admissible against a member only when brought within the rule established by statute (*J. & A. Ann. St.* ¶ 5520) authorizing the admission of private books of account in evidence. *Trainor v. German-American Savings, Loan & Building Ass'n*, 204 Ill. 616, 68 N. E. 650, rev'g 102 Ill. App. 604.

Under § 3 of c. 51, *Rev. St.* 1899 (*J. & A. Ann. St.* ¶ 5520), books containing a list of members, and showing amounts due prepared by a secretary of a building association, were not admissible as evidence against a member, when not testified to as correct by the person making the entries. *Trainor v. German-American Savings,*

Loan & Building Ass'n, 204 Ill. 616, 68 N. E. 650, rev'g 102 Ill. App. 604.

⁵¹ A postal registry receipt purporting to have been signed by the corporation with an individual name beneath, must be supported by proof that some authorized person signed for the corporation. *Underwriter's Fire Ass'n v. Henry* (Tex. Civ. App.), 79 S. W. 1072.

⁵² Such fact may be shown notwithstanding its absence from a pamphlet. *Page v. Knights & Ladies of America* (Tenn. Ch. App.), 61 S. W. 1068.

⁵³ A by-law regulating members of an incorporated fraternal society cannot be proved by the testimony of a member that a printed book containing such by-law contained the laws of the order in force at a certain date. *Herman v. Supreme Lodge K. of P.*, 66 N. J. L. 77, 48 Atl. 1000.

⁵⁴ *Page v. Knights & Ladies of America* (Tenn. Ch. App.), 61 S. W. 1068.

⁵⁵ *Citizens' Sav. Bank & Trust Co. v. Fitchburg Mut. Fire Ins. Co.* (Vt.), 86 Atl. 1056.

⁵⁶ *Becker v. Donalson*, 138 Ga. 634, 75 S. E. 1122.

the records are self-serving.⁵⁷ The objection for irrelevancy is also a distinct and separate objection.⁵⁸

§ 3104. Admissions and declarations by officers, agents and stockholders. Admissibility of the declarations or statements of the officers or agents of the corporation to bind it is governed by the ordinary rule of evidence that they must have been made under express authority, or within the scope of the agency which the declarant at the time had for the principal to be bound, or have been ratified or adopted by adopting the act in the course of which they were made. The real question underlying is, therefore, as to the scope of the agency or the agent's authority, hence it is fully treated elsewhere.⁵⁹ An officer's declaration before the corporation came into legal existence⁶⁰ or that of one who afterwards helped form it does not bind that corporation which has not ratified or adopted it.⁶¹ Admissions and declarations of a member of a corporation, not made when he is acting as its authorized agent, are not evidence against it.⁶² A conversation may be admissible for other purposes than to bind the corporation by admissions, thus it may evince notice or knowledge or understanding.⁶³

§ 3105. Modes of proving particular facts—In general. In this section and the ensuing one are collected illustrative cases showing

⁵⁷ *Citizens' Sav. Bank & Trust Co. v. Fitchburg Mut. Fire Ins. Co. (Vt.)*, 86 Atl. 1056.

⁵⁸ *Fraternal Relief Ass'n v. Edwards*, 9 Ga. App. 43, 70 S. E. 265.

⁵⁹ See Chap. 42, §§ 2159-2176, *supra*.

⁶⁰ Letter of one who afterwards became president does not bind national bank which had not yet been authorized. *First Nat. Bank v. Armstrong*, 42 Fed. 193.

⁶¹ *Ganther v. Jenks & Co.*, 76 Mich. 510, 43 N. W. 600; *McCallum v. Pursell Mfg. Co.*, 1 N. Y. Supp. 428.

Effect of promoter's admissions to bind corporation, see Chap. 5, *supra*.

⁶² *Hartford Bank v. Hart*, 3 Day (Conn.) 495, 3 Am. Dec. 274.

Stockholder's admissions are not those of a party. *Fairfield County Turnpike Co. v. Thorp*, 13 Conn. 173.

Made after official character ceased. *Pollays v. Ocean Ins. Co.*, 14 Me. 141,

writ of error dismissed 13 Pet. (U. S.) 157, 10 L. Ed. 105.

What a third person represented to another about the amount of the corporate debts when selling the corporation is irrelevant on an issue whether the corporation assumed the payment of certain notes sued on. *Wilson v. Tyler Coffin Co.*, 28 Tex. Civ. App. 172, 66 S. W. 865.

⁶³ A conversation with an officer may be admitted to impute to the corporation through him knowledge that the other party expected to be paid for services rendered. *Trogon v. Hanson Sheep Co.*, 49 Mont. 1, 139 Pac. 792.

In an action for the value of services rendered and accepted by the company, the conversation of a director, who had the work done, about pay, was admissible to show that it was done by his authority and in expecta-

how or by what evidence given facts may be proved. The preceding sections have been devoted to admissibility and competency of offered evidence, while these treat of the probative fitness and sufficiency. Corporate acts and resolutions generally are best shown by the records thereof, and secondarily by copies or oral testimony based on a proper foundation; and such records are relevant and proper to show generally what were the corporate doings and resolutions,⁶⁴ but the other papers are probative when competent, including proved copies and copies certified according to statute.⁶⁵ Such officially certified copies are original and not secondary evidence.⁶⁶ A certificate from the proper officer, though irregular and subject to objection coming from the public, may still show admission of a foreign corporation to do business.⁶⁷ Irregularly kept records may be evidence of the corporate acts

tion of pay. *Huntington Fuel Co. v. McIlvaine*, 41 Ind. App. 328, 82 N. E. 1001.

⁶⁴*Booth v. Dexter Steam Fire Engine Co.*, 118 Ala. 369, 24 So. 405; *Jones v. Florence Wesleyan University*, 46 Ala. 626; *Ryder v. Alton & S. R. Co.*, 13 Ill. 516. See §§ 3095-3101, *supra*, as to competency as best evidence and as to competency as documents.

⁶⁵Records of directors may be proved by a duly certified copy, by a copy proven to be such by a credible witness and by the production of the original records. *Cantwell v. Stockmen's Building, Loan & Savings Union*, 88 Ill. App. 247, *aff'd* 187 Ill. 275, 58 N. E. 414.

A resolution adopted at a regular meeting which forms part of the minutes may be shown by a copy, unless a special reason for producing the original exists. *New Iberia Sugar Co. v. Lagarde*, 130 La. 387, 58 So. 16.

In an action to collect an insurance policy in a beneficial order, *Shannon's Code*, § 5569 (*Mill & V. Code*, § 4537), providing that a copy of proceedings of directors certified by the secretary shall be evidence, applies. *Page v. Knights & Ladies of America* (*Tenn. Ch. App.*), 61 S. W. 1068.

A paper purporting to contain ex-

tracts from the minutes, to which is attached an affidavit of a person stating that he was president of the corporation, and to the best of his knowledge and belief the said extracts were true extracts from the minutes, held not properly certified by the legal keeper thereof (*Code Civ. Proc.* § 1918, *subd.* 6, 7). *Nixon v. Goodwin*, 3 Cal. App. 358, 85 Pac. 169.

⁶⁶A statute making certified copies of book entries and records admissible when certified by the secretary or other keeper (*Hurd's Rev. St.* 1903, p. 937, § 15), makes such copies original and not secondary evidence. *Chicago, B. & Q. R. Co. v. Weber*, 219 Ill. 372, 4 L. R. A. (N. S.) 272, 76 N. E. 489, *rev'g* 121 Ill. App. 455; *Mandel v. Swan Land & Cattle Co., Ltd.*, 154 Ill. 177, 27 L. R. A. 313, 45 Am. St. Rep. 124, 40 N. E. 462, *rev'g* 51 Ill. App. 204.

⁶⁷A certificate of permission to a foreign corporation is not rendered inadmissible in a private suit because it authorizes acts which a foreign corporation cannot do within the state. Such question is solely for the state, and the certificate is evidence so far as powers are lawfully conferred. *Galveston Land & Improvement Co. v. Perkins* (*Tex. Civ. App.*), 26 S. W. 256.

and resolutions.⁶⁸ Corporate assent or dissent may be shown by circumstances just as in the cases of natural persons.⁶⁹ Under the rule that one cannot testify to his own motive or intent when that is the direct and one of the ultimate issues, an agent's testimony that he had no malice in instituting a prosecution has been excluded.⁷⁰ The subsequent rescission of a vote may help to show that the parties dissented from the vote.⁷¹

Subscriptions may be proved by the records, books and subscription papers subject to the ordinary rules as to secondary evidence and parol evidence, and are prima facie only that the persons named did subscribe. Official certificates may be conclusive evidence that the requisite amount was validly subscribed, but certificates or filings made without warrant of law are not receivable.⁷² The stock certificate book will not be regarded as the "stock transfer book," which under a statute is made admissible as evidence who are stockholders.⁷³ Books may be admissible to show when a conceded member participated in affairs of the corporation.⁷⁴ Existence of net earnings and of a right thereto may be shown by certificates reciting the holding of stock and of a right to share in such earnings, though made payable out of future earnings.⁷⁵

Directors' meetings and action taken thereat may be proved prima facie by minutes and records properly authenticated, subject to the rules of secondary and parol evidence. If their acts were not recorded

⁶⁸ A statute requiring corporations to choose a clerk who shall be sworn (St. 1808, c. 65), does not operate so that a corporation can have no records and prove no corporate acts unless its clerk is first sworn. *Stebbins v. Merritt*, 10 Cush. (Mass.) 27.

⁶⁹ *Chicago & G. W. R. Co. v. People*, 79 Ill. App. 529, aff'd 179 Ill. 441, 53 N. E. 986.

⁷⁰ *Birmingham Bottling Co. v. Morris*, 193 Ala. 627, 69 So. 85.

⁷¹ *Goodwin v. United States Annuity & Life Ins. Co.*, 24 Conn. 591.

⁷² See Chap. 17, §§ 660, 703, supra.

Name on stock book as evidence that person is stockholder, see chapter on Stock and Stockholders, infra.

Articles are prima facie evidence of full subscription. *McCoy v. World's Columbian Exposition*, 87 Ill. App. 605, aff'd 186 Ill. 356, 78 Am. St. Rep. 288,

57 N. E. 1043. See also § 3101, supra, as to effect of books to prove membership between corporation and member.

As to evidence in actions to enforce stockholders' liability, see chapter on Stock and Stockholders, infra.

⁷³ A stock certificate book with original certificates and also stubs showing surrender and reissue is not the stock transfer book within Laws 1875, c. 611, § 17. *Geneva Mineral Spring Co. v. Steele*, 111 N. Y. App. Div. 706, 97 N. Y. Supp. 996.

⁷⁴ To show a participation in the affairs of a bank after a time when he claimed he had withdrawn from the corporation. *Bradford v. National Ben. Ass'n*, 26 App. Cas. (D. C.) 268.

⁷⁵ *Bailey v. New York Cent. & H. River R. Co.*, 22 Wall. (U. S.) 604, 22 L. Ed. 840.

or minuted, parol evidence is admissible unless it was an act required to be recorded or written.⁷⁶ Irregular practices or methods or place of meeting may be considered as bearing on the legality of a meeting.⁷⁷ By-laws may be proved by the corporate books,⁷⁸ or by parol evidence if they were not recorded, or the books are not producible,⁷⁹ or by printed copies properly proved to be correct.⁸⁰

Appointment of officers and their emoluments may be proved by records which show the facts,⁸¹ or by parol,⁸² or by circumstances.⁸³ Since a person may be bound by an implied admission, contained in corporate books,⁸⁴ an employment may be shown as well by reading and approving a record of the election in the presence of the person elect as by the record of such election.⁸⁵ Unrecorded statements and discussions at directors' meetings may tend to prove a course of dealing evincive of authority.⁸⁶ Conformity of action to or deviation from by-law requirements may be considered as bearing on authority.⁸⁷

⁷⁶ See Chap. 42, §§ 1640, 1654, 1695, supra, also §§ 3097, 3098, supra.

⁷⁷ To show that a directors' meeting was clandestine and invalid, the testimony of witnesses that meetings were customarily held at another place is receivable. *Goodwin v. United States Annuity & Life Ins. Co.*, 24 Conn. 591.

⁷⁸ § 488, supra, and see also § 3101, supra. *Mayor & Aldermen of Tuscaloosa v. Wright*, 2 Port. (Ala.) 230; *Com. v. Woelper*, 3 Serg. & R. (Pa.) 29, 8 Am. Dec. 628.

⁷⁹ § 3097, supra. It is presumed that by-laws were regularly and duly adopted, where they have been acquiesced in and acted on. § 3092, supra. *Marsh v. Mathias*, 19 Utah 350, 56 Pac. 1074.

⁸⁰ *Knights & Ladies of America v. Weber*, 101 Ill. App. 488.

⁸¹ Records of the corporation are admissible to show what emoluments were given with the appointment of defendant as plaintiff's officer. *Frazier v. Virginia Military Institute*, 81 Va. 59. See also § 3101, supra.

⁸² Appointment of trustees may be proved by a writing showing it or by parol. *Wiles v. Philippi Church*, 63 Ind. 206.

⁸³ Authority of president to purchase goods may be proved by circumstances in absence of records and books of corporation. *Westcott v. Atlantic Silk Co.*, 3 Mete. (Mass.) 282, 290.

Election of officer and his attempted exercise of the powers of the office tends to show that he still held it. *Clarke v. Warwick Cycle Mfg. Co.*, 174 Mass. 434, 54 N. E. 887.

A formal acceptance of election as director is not essential. Tacit acceptance by acceptance of the service and by other acts evincive of official character suffice. *Danville & W. R. Co. v. Brown*, 90 Va. 340, 18 S. E. 278.

⁸⁴ See also § 3102, supra.

⁸⁵ Whether a clerk was chosen at a particular time is immaterial and the record in respect to time is also immaterial, where it clearly appears that the record stating his election was read and approved in his presence. *Delano v. Smith Charities*, 138 Mass. 63.

⁸⁶ *Smith v. Bank of New England*, 72 N. H. 4, 54 Atl. 385.

⁸⁷ As to probative tendency of by-laws, see also § 3094, supra.

On the question of authority to make oral contracts the by-laws governing written ones are not relevant.⁸⁸ If not objected to as secondary, a copy of the constitution and by-laws is evidence on the question of authority.⁸⁹ Any recognition by the corporation of it may prove an agency⁹⁰ or it may be proved by parol unless the charter requires a writing and the other party is chargeable with knowledge of such a requirement.⁹¹ And customary dealings may be evidence of an agent's authority.⁹²

The making and terms of a contract may be shown by records⁹³ or by a certified copy thereof made pursuant to statute by the proper corporate officer.⁹⁴ And to show that the corporation was party to a contract of sale, recitals in its certificate may be relevant.⁹⁵ A deed in the name of the corporation described as "incorporated" shows that it made the covenants therein.⁹⁶ Whether the contract is that of the corporation or of its officer or member is proved primarily by the name

⁸⁸ *E. W. McLellan Co. v. East San Mateo Land Co.*, 166 Cal. 736, 137 Pac. 1145.

⁸⁹ *Topeka Capital Co. v. March*, 10 Kan. App. 40, 61 Pac. 876.

⁹⁰ Authority of the agent may be proved by showing a contract by him "as agent" for the corporation and use and recognition by it as the real party in using the subject of the contract. *Tennessee River Transp. Co. v. Kavanaugh*, 93 Ala. 324, 9 So. 395.

Recognition of a contract of purchase by use of the chattel shows agency to purchase and ratification. *A. Meister & Sons Co. v. Wood & Tatum Co.*, 26 Cal. App. 584, 147 Pac. 981. See also *Mechem on Agency*; *Clark & Skyles on Agency*.

⁹¹ *Carey v. Philadelphia & C. Petroleum Co.*, 33 Cal. 694; *Richardson v. St. Joseph Iron Co.*, 5 Blackf. (Ind.) 146, 33 Am. Dec. 460.

Evidence held insufficient to show officer's authority to execute mortgage. *Leggett v. New Jersey Manufacturing & Banking Co.*, 1 N. J. Eq. 541, 23 Am. Dec. 728.

⁹² Evidence of the manner in which directors had commonly permitted officers to act for the company in general held sufficient to warrant a finding

of authorization of a certain contract. *Smith v. Bank of New England*, 72 N. H. 4, 54 Atl. 385.

⁹³ Resolution of directors authorizing the borrowing of money, and the execution of a promissory note as evidence of the loan. *Union Trust Co. of San Francisco v. Dickinson*, 30 Cal. App. 91, 157 Pac. 615.

⁹⁴ Under J. & A. Ann. St. ¶ 5532, providing that "papers, entries and records of any corporation * * * may be proved by a copy thereof, certified under the hand of the secretary * * * or other keeper of the same," a copy of a railroad lease so certified by the lessor's officers under the corporate seal is admissible as primary evidence. *Chicago, B. & Q. R. Co. v. Weber*, 219 Ill. 372, 4 L. R. A. (N. S.) 272, 76 N. E. 489, rev'g 121 Ill. App. 455.

⁹⁵ The certificate of incorporation mentioning certain assets is admissible on the question whether the corporation bought them or a partnership which it succeeded. *Nashua Iron & Brass Foundry Co. v. Chandler Adjustable Chair & Desk Co.*, 166 Mass. 419, 44 N. E. 348.

⁹⁶ *P. J. Willis & Bro. v. Smith*, 17 Tex. Civ. App. 543, 43 S. W. 325.

or way in which it is signed and worded as evincing one or the other,⁹⁷ aided by parol evidence as to the real fact,⁹⁸ and the knowledge of the other party or his privies is also a factor.⁹⁹ Identity of name alone is insufficient to prove a corporate liability.¹ Construction and existence of corporate works and properties may be proved by parol,² or by records, and the records may tend to prove rental, purchase, ownership, or sale of property, if otherwise competent.³ Whether or not the liabilities of a predecessor were assumed is ordinarily to be proved by the contract of succession and the subsequent action of the corporation in the light of the existing laws.⁴ The mere silence of the reorganization as to assumption, though making mention of other things pertaining to the predecessor, does not negative an assumption of its liabilities.⁵ Title to the property of predecessors is not suffi-

⁹⁷ See generally § 1469 et seq., supra.

⁹⁸ §§ 1492-1494, supra.

Evidence held to show indorsement as individuals where partnership had been recently incorporated. *Reedy Elevator Co. v. Silberstein & Silver, Inc.*, 117 N. Y. Supp. 245.

⁹⁹ Evidence held insufficient to show that a broker's contract for sale of property was made by corporation when one of the brokers knew it belonged to an officer individually. *McCorry v. John C. Wiarda & Co.*, 149 N. Y. App. Div. 863, 134 N. Y. Supp. 667.

¹ To show a corporation liable for a debt of a partnership or individual trading under such name previously. *Bludwine Bottling Co. v. Crown Cork & Seal Co.*, 14 Ga. App. 285, 80 S. E. 853.

For a case where evidence was insufficient to show that person as an individual was contracting party rather than corporation of his name, see *Bauch v. Whitehouse*, 28 S. D. 515, 134 N. W. 71.

² Parol proof is admissible to show that a boom was erected by the corporation plaintiff which was formed by legislative grant to him to be a corporation with his associates, and where he built the boom. *Penobscot Boom*

Corporation v. Lamson, 16 Me. 224, 33 Am. Dec. 656.

³ Record book of corporation held admissible to show rental of certain premises, and approval of conduct of president in leasing offices. *Howard Ins. Co. v. Hope Mut. Ins. Co.*, 22 Conn. 394.

A book of minutes identified as such by the officer having custody is admissible to prove a sale therein recited. *Bridges v. Southern Bell Telephone & Telegraph Co.*, 15 Ga. App. 291, 82 S. E. 925.

In proceedings to condemn a right of way, minutes of a railroad company introduced to show chain of title to the right of the way which is being taken are properly admitted for such purpose but not recitals therein of value which serve the declarant's claims. *North Shore R. Co. v. Pennsylvania Co.*, 251 Pa. 445, 96 Atl. 990.

⁴ See generally chapters on Consolidation and Merger; Reorganization, *infra*.

⁵ Articles of reorganization showing no assumption of liabilities do not prove that they were not assumed by the reorganization agreement, though the agreement is mentioned in stating the purposes of incorporation. *Klein v. East River Elec. Light Co.*,

ciently proved by the bare fact of succession or incorporation,⁶ but it and the delivery of the predecessors' property is enough.⁷

Payment of the statutory license fee or tax as a condition to suing or doing business may be proved by parol as well as by an official receipt or certificate, where the latter is not made by statute the exclusive means of proof.⁸

While not essentially pertaining to corporations, the question of admissibility of such records as those of train movements or car records arises almost invariably in connection with proving corporate doings, and perhaps in the great majority of cases the corporation is a party. The better rule is to admit them on the ground of convenience and necessity, and further support is found in the *res gestae* rule;⁹ and, even though a witness was on the stand who might have

90 N. Y. App. Div. 92, 86 N. Y. Supp. 164, rev'd 182 N. Y. 27, 74 N. E. 495.

⁶ Ownership of the property of a predecessor partnership is not shown by proof of organization without any formal transfer having yet been made. *Ruettell v. Greenwich Ins. Co.*, 16 N. D. 546, 113 N. W. 1029. See generally chapters on Consolidation and Merger; Reorganization, *infra*.

⁷ Title of plaintiff corporation as against dissenting members of the unincorporated association which preceded is shown by the admission implied in delivering the evidence of right to the property to the appropriate officer of the new corporation. *North St. Louis Christian Church v. McGowan*, 62 Mo. 279.

⁸ The statute making the certificate of payment *prima facie* evidence (*Rem. & Bal. Code*, §§ 3682, 3715) is not exclusive. *Eastman & Co. v. Watson*, 72 Wash. 522, 130 Pac. 1144; *Pacific Drug Co. v. Hamilton*, 71 Wash. 469, 128 Pac. 1069; *Miller & Sons v. Simmons*, 67 Wash. 294, 121 Pac. 462; *State v. Superior Court for Clallam Co.*, 62 Wash. 612, 114 Pac. 444.

⁹ A train dispatcher's record, called a "train sheet" or telegraphic register of trains showing the arrival and departure of all trains on a division of a railroad is admissible in evidence

for such purposes in an action for injuries sustained by an employee struck by a train. *Louisville & N. R. Co. v. Daniel*, 28 Ky. L. Rep. 1146, 3 L. R. A. (N. S.) 1190, 91 S. W. 691.

In *Louisville & N. R. Co. v. Daniel*, 122 Ky. 256, 28 Ky. L. Rep. 1146, 3 L. R. A. (N. S.) 1190, 91 S. W. 691, the court, in giving the reasons for the admission of such record, said: "Books of original entry, called shop-keeper's or parties' books, have for centuries been admitted as evidence in favor of the party keeping them.

* * * The rule itself has been subjected to not a few changes in judicial application, and to many more by legislative action. While very narrow originally, the tendency has been upon the whole to broaden its application, though it is believed that the first principles upon which it was founded are to be clearly recognized in every change that it has undergone. These are, in fine, that, as the courts require the production of the best evidence that the nature of the case admits of, necessity and circumstantial guaranty of trustworthiness of such entries may render them, not only the best, but the only reliable, evidence practicable to be obtained to establish the disputed fact. * * * That which is the final basis of action, of calcula-

testified to the same fact, their admission was approved.¹⁰ A similar record of accidents kept in obedience to statute was admitted.¹¹

By statutes making certified copies of public records admissible, any document or report made and filed by the corporation may be proved by copy from the public keeper when relevant.¹² Such a statute will

tion, reliance, investment, and general confidence in every business enterprise, may safely, in general, be resorted to to prove the main fact. The courts need not discredit what the common experience of mankind relies upon. Such is the use of books of record of original entries made under circumstances that are a guaranty of their trustworthiness. * * * To the objection that his (the train dispatcher's) record is not his own personal knowledge, the answer is that the intelligence transmitted to him by his subordinates is all of the same kind and grade as that recorded in his entries. Its trustworthiness is supported by the same considerations. It is at least as reliable as salesmen's, draymen's, porters' or wharfingers' information conveyed to a bookkeeper, who makes the original entries thereof. * * * If every telegraph operator along the line were to come into court, and all testify to their recollections of the position of trains at or near their stations at a given hour and day, the result would be neither more certain, nor the truth clearer, than by the use of the original record made at the time the events were happening. 'In addition, to call all these men away from their posts to the court, to bring a regiment of witnesses to prove minute details of a status more easily and truly shown by a contemporaneous record, would be to discard the better for the worse, and to trammel the administration of justice.'"

A street railway company may be permitted to show that it keeps transportation records, and that such records show the passage of a large number

of cars during a given time. *Capital Traction Co. v. Brinley*, 43 App. Cas. (D. C.) 430.

In an action for damages under the Federal Employers' Liability Act, for personal injuries received by a switchman, records of a railroad company showing that a car did not stop in Missouri, properly identified and with their correctness shown, were admissible. *Trowbridge v. Kansas City & W. B. Ry.*, 192 Mo. App. 52, 179 S. W. 777.

¹⁰ Where an agent of such railroad was on the stand to explain the records, at the time car records were introduced to show interstate transportation, such fact did not make the records inadmissible, their identity and correctness having been proved by another agent before. *Trowbridge v. Kansas City & W. B. Ry.*, 192 Mo. App. 52, 179 S. W. 777.

¹¹ Under Civ. Code 1913, § 3768, requiring section foremen to keep a record of live stock killed, such record would be competent evidence of the fact as a memorial of one of the ultimate facts. *Atchison, T. & S. F. R. Co. v. Carrow*, 18 Ariz. 92, 156 Pac. 965.

¹² A copy of a report of a railway company to a state engineer and surveyor in accordance with a statute (2 R. S. 6th Ed. p. 534, § 45, subd. 102) and duly certified (1 R. S. 6th Ed. p. 558, § 7; p. 415, § 7; Code Civ. Proc. § 993) is competent evidence of a material admission made by defendant corporation as to an injury. *Leonard v. New York Cent. & H. River R. Co.*, 44 N. Y. Super. Ct. 575, aff'd 80 N. Y. 659.

authorize authenticated copies only when the original is a lawfully filed public record in the certifier's office.¹³ Papers filed or returned may be admissible as fraudulent representations with other necessary proofs of the fraud.¹⁴

In some classes of cases the ordinary rule of a preponderance being sufficient is supplemented, as in the cases between natural parties, with a rule that a clear case must be made out; and such an instance is that of a bill to restrain an action of a corporation in violation of charter amounting to a public nuisance.¹⁵ The records and minutes are *prima facie* and not conclusive evidence of the corporate proceedings.¹⁶ The certificate of commissioners to receive subscriptions and to certify the amount subscribed is conclusive as to the amount and validity of the amount so certified, where they were appointed by and acting under legislative enactment.¹⁷

§ 3106. — Corporate existence, incidents and character. With the mode of proving the existence and character of the corporation in actions between other parties this section has nothing to do, though in many instances the rule might be the same whosoever were the parties.¹⁸ The mode of proof is to a goodly extent regulated by statute. Official certificates are made conclusive by some statutes, while in other states they are *prima facie* only, and the statutes usually permit other

¹³ The statute (Sayles' Ann. Civ. St. 1897, art. 3057) making authenticated copies of instruments executed by the insurance commissioner evidence, relates only to instruments required by law to be filed in his office. *Southwestern Surety Ins. Co. v. Anderson*, 106 Tex. 46, 155 S. W. 1176, rev'g (Tex. Civ. App.), 152 S. W. 816.

¹⁴ In order that official returns or filings shall be admissible as fraudulent representations, it must appear that they were known to the defrauded person. *Fogg v. Pew*, 10 Gray (Mass.) 409, 71 Am. Dec. 662.

¹⁵ Evidence must be clear that there will be a nuisance injurious to the public. *District Attorney v. Lynn & B. R. Co.*, 16 Gray (Mass.) 242. See also chapters on Injunctions; Forfeiture, etc., *infra*.

¹⁶ *Just v. Idaho Canal & Improvement Co.*, 16 Idaho 639, 133 Am. St.

Rep. 140, 102 Pac. 381; *Northland Produce Co. v. Stephens*, 116 Minn. 23, 133 N. W. 93; *State v. Guertin*, 106 Minn. 248, 130 Am. St. Rep. 610, 119 N. W. 43; *Woonsocket Union R. Co. v. Sherman*, 8 R. I. 564.

A witness may testify as to the delivery of certain securities to a corporation regardless of what appears in the minutes. *Fouche v. Merchants' Nat. Bank of Rome*, 110 Ga. 827, 36 S. E. 256.

Parol evidence to impeach or explain or supplement them, see § 3100, *supra*.

¹⁷ *Connecticut & P. R. R. Co. v. Bailey*, 24 Vt. 465, 58 Am. Dec. 181, and see *Lane v. Brainerd*, 30 Conn. 565; *Litchfield Bank v. Church*, 29 Conn. 137.

¹⁸ See as to proof generally, §§ 416-440, *supra*.

evidence to be received even when a statutory mode of proof is provided.¹⁹

There are various ways of proving corporate existence besides putting the articles in evidence,²⁰ and in general it may be said, that if user as a corporation be established, the other necessary facts will be supplied by presumption to make a prima facie case.²¹ The presumptions upon this fact have already been treated.²² In actions where de jure existence is not a direct issue it is ordinarily sufficient to prove a de facto existence or facts raising an estoppel conclusive of that fact,²³ and this is the rule where the issue of nul tiel is joined.²⁴ The rule against collateral attack in a private suit will exclude evidence of irregularities, such as that the articles were improperly allowed to be filed because the name was one which could not lawfully be chosen.²⁵ Where it is only necessary to prove a de facto existence, it may be done by proving assumption of corporate existence although there was also proof of de jure existence.²⁶ It is said that strict proof of de jure existence is necessary (a) in actions by the state to try the very question, (b) proceedings by the corporation exercising a franchise in derogation of common right, (c) proceedings of a penal character by the corporation, (d) actions on contracts, like subscriptions, where corporate existence is the consideration, and (e) where

¹⁹ §§ 438, 440, *supra*.

²⁰ A statement of the court that corporate existence must be proved by the articles of incorporation and in no other way is erroneous. *First Nat. Bank of Iowa City v. Walker*, 27 Idaho 199, 148 Pac. 46.

²¹ § 422, *supra*.

²² §§ 422-424, 3091, *supra*.

²³ §§ 417-420, *supra*. And see *Trustees of First Presbyterian Church of Duluth v. United States Fidelity & Guaranty Co.*, 133 Minn. 429, 158 N. W. 709; *Kilpatrick-Koch Dry-Goods Co. v. Box*, 13 Utah 494, 45 Pac. 629.

Prima facie incorporation is enough when no issue is made. *MacMillan Co. v. Stewart*, 69 N. J. L. 212, 54 Atl. 240, *aff'd* 69 N. J. L. 676, 56 Atl. 1132.

Assumpsit on a note to make up a fund subscribed for an endowment of a professorship in defendant's seminary does not require strict proof.

Hudson v. Green Hill Seminary Corporation, 113 Ill. 618.

Where pleadings are oral affirmative proof that plaintiff is a corporation suffices. *Gillin Printing Co. v. Traphagen*, 36 N. Y. Misc. 774, 74 N. Y. Supp. 900.

²⁴ *Hudson v. Green Hill Seminary Corporation*, 113 Ill. 618; *Nelson Chessman & Co. v. Singers*, 183 Ill. App. 591; *Dean & Son v. W. B. Conkey Co.*, 180 Ill. App. 162; *Patton & Gibson Co. v. Shreve & Kelso*, 134 Ill. App. 271; *Concord Apartment House Co. v. Alaska Refrigerator Co.*, 78 Ill. App. 682; *Heaston v. Cincinnati & F. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430.

²⁵ *Vallejo & N. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238 (choice of improper name); *Heaston v. Cincinnati & Ft. W. R. Co.*, 16 Ind. 275, 79 Am. Dec. 430.

²⁶ *Vallejo & N. R. Co. v. Reed Orchard Co.*, 169 Cal. 545, 147 Pac. 238.

power to take by will is in issue depending on regularity of corporate origin.²⁷

Direct testimony of an officer to the fact suffices to prove that the party is a corporation,²⁸ or the fact of a consolidation,²⁹ if there is no objection to the competency of such proof.

Long user of corporate attributes,³⁰ or user coupled with proof of a charter or articles under a general law,³¹ or with proof of organization³² suffices. User may be proved by election of officers, meetings or business evincing corporate activity.³³

The proof may also be made by showing organization under a general law, or proof of the charter and of compliance with conditions,³⁴ or acceptance,³⁵ or completion of organization,³⁶ but if the charter is in presenti without conditions, it is enough.³⁷ If an official act was necessary to institute an organization meeting, proof of the meeting

²⁷ *Hudson v. Green Hill Seminary Corporation*, 113 Ill. 618.

²⁸ *Goldberg, Bowen & Co. v. Dimick*, 169 Cal. 187, 146 Pac. 672.

In absence of objection testimony by the president to the direct fact suffices though a statute provides for a certificate as prima facie proof. *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042 (a criminal case); *Stanford Land Co. v. Steidle*, 28 Wash. 72, 68 Pac. 178. This is also the rule in actions in general. § 425, supra.

²⁹ *Kinion v. Kansas City, Ft. S. & M. R. Co.*, 39 Mo. App. 382.

³⁰ *Daniels v. Roanoke Railroad & Lumber Co.*, 158 N. C. 418, 74 S. E. 331.

³¹ *Ramsey v. Peoria Marine & Fire Ins. Co.*, 55 Ill. 311; *Dean & Son v. W. B. Conkey Co.*, 180 Ill. App. 162; *Bank of Manchester v. Allen*, 11 Vt. 302.

An act for incorporation of a grand lodge, vesting it with power to establish local lodges as bodies corporate, and proof of election of trustees and record of that fact by plaintiff local lodge conformable to the act, shows plaintiff's corporate existence. *Marsh v. Astoria Lodge No. 112, I. O. O. F.*, 27 Ill. 421.

³² *McFarlan v. Triton Ins. Co.*, 4 Den. (N. Y.) 392.

³³ § 439, supra.

³⁴ Certified copy of charter and proof of compliance with conditions suffice. *Calor Oil & Gas Co. v. Franzell*, 33 Ky. L. Rep. 98, 109 S. W. 328.

An exemplification of the charter and acts of user suffice. *United States Bank v. Stearns*, 15 Wend. (N. Y.) 314; *Williams v. Bank of Michigan*, 7 Wend. (N. Y.) 539.

³⁵ *Daniels v. Roanoke Railroad & Lumber Co.*, 158 N. C. 418, 74 S. E. 331.

³⁶ Where the act of incorporation does not ipso facto create the corporation, prima facie proof of organization or user is necessary in addition. *Wood v. Jefferson County Bank*, 9 Cow. (N. Y.) 194.

Evidence of organization of religious corporation held sufficient. *Methodist Episcopal Union Church v. Pickett*, 23 Barb. (N. Y.) 436, aff'd 19 N. Y. 482.

³⁷ *Cahill v. Kalamazoo Mut. Ins. Co.*, 2 Dougl. (Mich.) 124, 43 Am. Dec. 457; *Farmers' & Mechanics' Bank v. Troy City Bank*, 1 Dougl. (Mich.) 457.

alone is deficient.³⁸ In making such proof the charter and articles and other writings may be proved by copy according to the usual rules.³⁹ The articles themselves with official filing marks thereon suffice.⁴⁰

By the doctrine of estoppel to question corporate existence,⁴¹ if a fact be proved raising an estoppel against the party who would deny incorporation, it suffices until such party overcomes or avoids the estoppel. The estoppel is equivalent to the fact. An admission, too, is equivalent to proof in its effect; and accordingly, as against the corporation an acknowledgment of its incorporation constitutes an admission of the fact,⁴² which may be by designating an agent for service,⁴³ or making the contract sued on.⁴⁴ Recognition by the other party will also suffice in favor of the corporation, e. g., making a contract or dealing with it as a corporation,⁴⁵ especially the one sued on,⁴⁶

³⁸ A record reciting a meeting "agreeable to a legal warrant" and organization thereat, does not without proof of the warrant or any showing that it was a legal warrant to form a corporation, make out the proof. *McKenney v. Bowie*, 94 Me. 397, 47 Atl. 918.

³⁹ Best and secondary rule, see §§ 3095-3099, and this section, *supra*. As to copies of official records, see § 440, *supra*, and this section, *infra*.

⁴⁰ *Sierra Land & Cattle Co. v. Bricker*, 3 Cal. App. 190, 85 Pac. 665.

⁴¹ Chapter 11, *supra*.

⁴² A letter by the corporation stating it was such suffices. *Marx v. Raley & Co.*, 6 Cal. App. 479, 92 Pac. 519.

Carrying on business as a corporation, issuing stock and holding out to be such, suffices. *Holt v. Tennent-Stribling Shoe Co.*, 69 Ill. App. 332.

Doing business under a name importing incorporation is sufficient. *Imperial Curtain Co. v. Jacob*, 163 Mich. 72, 127 N. W. 772, 17 Det. L. N. 751.

Deed by corporation as such to opposite party suffices. *Anderson v. Kanawha Coal Co.*, 12 W. Va. 526.

Appeal bond filed by defendant may show its corporate existence. *Transier v. St. Louis, K. C. & N. Ry. Co.*,

54 Mo. 189; *Hudson v. St. Louis, K. C. & N. Ry. Co.*, 53 Mo. 525.

Taking an appeal from a lower court as a corporation and evidence of dealings as such suffice. *Auburn Cycle Co. v. Foote*, 69 Ill. App. 644.

⁴³ Certified copy of certificate designating agent for service, which recites incorporation in Great Britain, suffices. *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080.

⁴⁴ *Henry Weis Cornice Co. v. J. B. Neevel & Sons*, 187 Mo. App. 496, 174 S. W. 159; *Real Estate Sav. Inst. v. Fisher*, 9 Mo. App. 593.

⁴⁵ Receipt showing a contract by defendants with plaintiff as a corporation. *Sierra Land & Cattle Co. v. Bricker*, 3 Cal. App. 190, 85 Pac. 665.

Stipulation as to making of assessments held an admission. *Rikhoff v. Brown's Rotary Shuttle Sew. Mach. Co.*, 68 Ind. 388.

A premium note to the corporation suffices. *Hyatt v. Whipple*, 37 Barb. (N. Y.) 595.

Dealings recognizing incorporation. *J. L. Smathers & Co. v. Toxaway Hotel Co.*, 167 N. C. 469, 83 S. E. 844; *Daniels v. Roanoke Railroad & Lumber Co.*, 158 N. C. 418, 74 S. E. 331.

⁴⁶ *Tustin Fruit Ass'n v. Earl Fruit Co.*, 121 Cal. xviii, 53 Pac. 693; *Nel-*

or a contract with another recognizing it,⁴⁷ or by admission of the fact.⁴⁸ But the dealings as proved must be tantamount to recognition of its corporate character.⁴⁹ In order to rebut an estoppel to deny incorporation the course of the parties' dealings may be considered as bearing on the character it was understood to have.⁵⁰

A patent by the United States to the patentee as a corporation is proof of its character as such, at least where the land is the subject of controversy.⁵¹

Numerous statutes provide for proof by certified copy,⁵² and such certificates are not usually exclusive of other competent evidence but are merely a cumulative mode of proof.⁵³ Such a statute was held

son *Chesman & Co. v. Singers*, 183 Ill. App. 591.

The contract sued on running to plaintiff by name "Continental Insurance Company" is sufficient. *Continental Ins. Co. v. Richardson*, 69 Minn. 433, 72 N. W. 458.

Same where it sues on note made to its corporate name. *Knapp, Stout & Co. Company v. Joy*, 9 Mo. App. 575; *Lucas Market Sav. Bank v. Goldsoll*, 8 Mo. App. 595 (mem. dec.).

Action based on a deed which recites incorporation. *German Bank v. Stumpf*, 6 Mo. App. 17.

⁴⁷ Recitals in a mortgage. *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080.

⁴⁸ *Forbis v. Piedmont Lumber Co.*, 165 N. C. 403, 81 S. E. 599.

⁴⁹ Mere testimony that plaintiff dealt with defendants as a corporation does not show that it existed when the other evidence shows no organization, charter or existence. *Ward-Truitt Co. v. Bryan & Lamb*, 144 Ga. 769, 87 S. E. 1037.

The contract sued on does not prove it on a plea nul tiel where the only thing evincive of corporate character in it is plaintiff's name containing the word "company." *American Ins. Co. of Newark, New Jersey v. McClelland*, 184 Ill. App. 381.

Admission of the indebtedness sued on does not admit incorporation of

claimant creditor. *Florsheim & Co. v. Fry*, 109 Mo. App. 487, 84 S. W. 1023.

⁵⁰ If the issue is whether plaintiffs dealt with defendants as a corporation, or as a partnership, evidence is admissible as to sales to the partnership on the representation of one of the defendants that it was a partnership, for the purpose of preventing application of an estoppel. *Christian & Craft Grocery Co. v. Fruitdale Lumber Co.*, 121 Ala. 340, 25 So. 566.

⁵¹ *Galbraith v. Shasta Iron Co.*, 143 Cal. 94, 76 Pac. 901, 143 Cal. xviii, 76 Pac. 1127.

Patent to corporation reciting that it is one "existing under the laws of the state" suffices. *Southern Pac. R. Co. v. Purcell*, 77 Cal. 69, 18 Pac. 886.

⁵² § 440, *supra*.

Certificates held sufficient. *Reno v. Reno & Juchem Ditch Co.*, 51 Colo. 588, 119 Pac. 473; *Dowagiac Mfg. Co. v. Higinbotham*, 15 S. D. 547, 91 N. W. 330.

⁵³ § 440, p. 947, *supra*.

A copy of certificate of incorporation made prima facie by Rem. & Bal. Code, § 3682, is not exclusive. It may also be shown by the original articles in the regular form. *State v. Superior Court for Clallam Co.*, 62 Wash. 612, 114 Pac. 444; *State v. Pittam*, 32 Wash. 137, 72 Pac. 1042 (criminal case); *Stanford Land Co. v. Steidle*, 28 Wash. 72, 68 Pac. 178.

not to apply to corporations formed under an earlier act without such a provision.⁵⁴ Under statutes providing for official publication of a list of existing corporations, the presence of the corporate party's name on such a list suffices.⁵⁵ Writings like certificates coming from official sources must appear to be records or proved as copies of records to be admissible.⁵⁶ On proving a certificate or articles it is not usually necessary to prove the filing of duplicate copies in other offices, or other formalities,⁵⁷ or such steps as publication.⁵⁸ Slight misrecitals in the officer's certificate are not a fatal objection.⁵⁹ A certificate of

⁵⁴ *Billings Realty Co. v. Big Ditch Co.*, 43 Mont. 251, 115 Pac. 828.

⁵⁵ A published list in the book of statutes enumerating certain corporations as existing, defendant being one, is sufficient by virtue of *Shannon's Code*, § 2033. *Coal Creek Consol. Coal Co. v. East Tennessee Iron & Coal Co.*, 105 Tenn. 563, 59 S. W. 634; *Tennessee Automatic Lighting Co. v. Massey* (Tenn. Ch. App.), 56 S. W. 35.

⁵⁶ An act of incorporation which merely purports to show that such a paper, which came from the secretary of state, has been recorded is not admissible. *Star Loan Ass'n v. Moore*, 4 Pennw. (Del.) 308, 55 Atl. 946.

⁵⁷ It sufficed to show the filing of a certificate with the clerk of the circuit court and issuance of a license without also showing the filing of a duplicate with the secretary of state. *Stone v. Great Western Oil Co.*, 41 Ill. 85.

Copy of articles certified by county auditor and proof of user suffices without proof of filing with secretary of state (Bal. Code, § 4252). It is made "prima facie." *Spokane & I. Lumber Co. v. Loy*, 21 Wash. 501, 60 Pac. 1119, 58 Pac. 672; *Knapp, Burrell & Co. v. Strand*, 4 Wash. 686, 30 Pac. 1063.

Certified copy of articles or certificate of incorporation from secretary of state and certified copy of duplicate articles from county clerk suffices. *Hecht v. Acme Coal Co.*, 19 Wyo. 10, 113 Pac. 786.

Proof of certificate recorded with county clerk and user thereunder suffices without proof of recording in banking department. *Leonardsville Bank v. Willard*, 25 N. Y. 574.

Introduction of an exemplified copy of a certificate from the secretary of state showing formation of a corporation of the same name suffices. Strict proof of all other formalities is not essential. *Remington Paper Co. v. O'Dougherty*, 65 N. Y. 570.

⁵⁸ Articles suffice without proof of their publication and return where the only issue, if any, is on corporate existence. *Riverside Sand & Cement Mfg. Co. v. Hardwick*, 16 N. M. 479, 120 Pac. 323.

Under Laws 1905, p. 111, amending B. & C. Comp. § 5054, the articles, without calling a witness thereto or proving any other steps in organization, suffice, unless overcome by the other party. *Columbia Valley Trust Co. v. Smith*, 56 Ore. 6, 107 Pac. 465. But see *Goodale Lumber Co. v. Shaw*, 41 Ore. 544, 69 Pac. 546, where on proof of articles by a witness the remaining steps were declared to be necessary proof.

⁵⁹ A certificate from the secretary of state setting out a copy of the articles and affidavit is admissible though it misnames the affidavit a "certificate." *Canal St. Gravel-Road Co. v. Paas*, 95 Mich. 372, 54 N. W. 907.

intention to engage in a business,⁶⁰ or an official permit or certificate authorizing a business commonly done by corporations, but which an individual might do, will not tend to prove a corporation.⁶¹ A national bank existence may be proved by a copy of the comptroller's certificate and supporting evidence of user,⁶² and it is conclusive thereof.⁶³

It is not necessary to prove existence of a foreign corporation by an authenticated copy of the charter or the articles or other formative papers in connection with the foreign law, though that is the best evidence of the fact, and is such as to insure full faith and credit. By common-law principles and also by statute proof may be made by copies or even by proof of user and the doing of business as a corporation,⁶⁴ or by admission of the foreign corporation.⁶⁵ But it is better to prove more than mere user, and there should be, in addition to user, proof of a certificate or charter or a general law for formation of such corporations as the party,⁶⁶ or if the charter is proved it should be supplemented with proof of organization under it.⁶⁷ The foreign

⁶⁰ A certificate made and filed by the nominal plaintiff showing that he proposed to engage in banking under a certain name does not tend to show that there was a corporation by that name of which plaintiff was president. *Hallett v. Harrower*, 33 Barb. (N. Y.) 537.

⁶¹ Certificates by the insurance department authorizing doing of insurance business are not competent. Such certificates might be issued to individuals. *American Ins. Co. of Newark*, New Jersey v. *McClelland*, 184 Ill. App. 381.

⁶² § 433, *supra*, and see also *Hanover Nat. Bank v. Johnson*, 90 Ala. 549, 8 So. 42; *Mix v. National Bank of Bloomington*, 91 Ill. 20, 33 Am. Rep. 44; *Garton v. Union City Nat. Bank*, 34 Mich. 279; *First Nat. Bank of Rock Island v. Loyhed*, 28 Minn. 396, 10 N. W. 421.

Organization certificate and comptroller's certificate to national bank of same place and name as plaintiff, suffices. *Washington County Nat. Bank v. Lee*, 112 Mass. 521.

Under general issue a comptroller's certificate for "West River National

Bank of Jamaica" proves existence of West River National Bank of Jamaica, Vermont, the name sued under. The fact that it did business before date of the certificate does not show that it was a different corporation. *Thatcher v. West River Nat. Bank*, 19 Mich. 196.

⁶³ § 438, *supra*.

⁶⁴ See § 437, *supra*, and chapter on Foreign Corporations generally, *infra*.

⁶⁵ Designating an agent for service of process. *Anglo-Californian Bank v. Field*, 146 Cal. 644, 80 Pac. 1080.

⁶⁶ Copy of record of incorporation certified, and proof of user. *Concord Apartment House Co. v. Alaska Refrigerator Co.*, 78 Ill. App. 682.

Proof of general corporation law of foreign state and of user and of notes given in corporate name, suffices. *Miami Powder Co. v. Hotchkiss*, 17 Ill. App. 622.

⁶⁷ The authenticated copy of an act was sufficient to prove a grant of a charter to a foreign corporation and its powers; but further proof of organization or action under it was necessary. *Gaines v. Bank of Mississippi*, 12 Ark. 769.

law need not be proved in addition to a charter from the presumptively competent authorities of the foreign state.⁶⁸ If there has been a change in its name that must be proved in connection with proof of its existence.⁶⁹ The proof need not show all the organic steps which would be required in the state of the forum.⁷⁰ A foreign act of incorporation is a foreign law and must be proved as such.⁷¹ A foreign official certified copy should be authenticated according to the act of congress unless there is a statute admitting such certificates without authentication according to the act of congress.⁷² A statute will lend no evidentiary force to a certificate in another state, and it will be rejected as hearsay when offered there.⁷³

Nonexistence from the beginning may be shown by evidence that the organic acts of stock payments, elections and meetings were lacking, and that frauds and fictions were practiced,⁷⁴ and the sham and fraud may be shown by nonpayment of the incorporation fee.⁷⁵ A forfeiture or dissolution extinguishing the corporation must be proved by facts amounting thereto, which will be either an expiration by time

⁶⁸ A charter from the governor of its state to a foreign corporation reciting his authority under the law to grant it need not be supplemented by proof of the foreign law. Legality of his action will be presumed. *Agnew v. Bank of Gettysburg*, 2 Harr. & G. (Md.) 478.

But it has been held that ordinarily, as to a foreign corporation, an authenticated certificate should be supplemented by proof of a foreign law, authorizing the corporation. And even *de facto* existence cannot be proven unless a foreign law making it *de jure* possible is proven. *Milwaukee Gold Extraction Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995.

⁶⁹ Foreign statutes of incorporation and changing name held sufficient. *West v. Carolina Life Ins. Co.*, 31 Ark. 476.

Evidence consisting of certificates held to show foreign existence and regular change of name. *Cellulose Package Mfg. Co. v. Calhoun*, 166 Cal. 513, 137 Pac. 238.

⁷⁰ Certified copy of articles duly authenticated suffices though such arti-

cles do not state all that would be required in Iowa. *Wardner, Bushnell & Glessner Co. v. Jack*, 82 Iowa 435, 48 N. W. 729.

⁷¹ *Lewis v. Bank of Kentucky*, 12 Ohio 132, 40 Am. Dec. 469.

⁷² A sworn and certified copy from the office of secretary of the foreign state is admissible. *Paine v. Lake Erie & L. R. Co.*, 31 Ind. 283.

A certificate from the secretary of a territory that an attached copy was a copy of articles is admissible only when authenticated according to act of congress or when authenticated so as to be admissible under a state statute. *Milwaukee Gold Extraction Co. v. Gordon*, 37 Mont. 209, 95 Pac. 995. See also § 437, *supra*.

⁷³ *Fish v. Smith*, 73 Conn. 377, 84 Am. St. Rep. 161, 47 Atl. 711.

⁷⁴ The corporation was a sham to cover partnership liability. *Christian & Craft Grocery Co. v. Fruitdale Lumber Co.*, 121 Ala. 340, 25 So. 566.

⁷⁵ *Christian & Craft Grocery Co. v. Fruitdale Lumber Co.*, 121 Ala. 340, 25 So. 566.

or condition, or an accepted surrender of the charter, or a legislative dissolution, or a judicial or official forfeiture and annulment. Long nonuser may afford evidence that one of these has taken place. Ordinarily every element of extinction must be proved, that is to say, there must be proof not only of ground for forfeiture but also that extinction has followed by judicial decree or official act. The issue will not ordinarily arise directly in any suit to which the corporation is a party except on a plea in abatement for dissolution, and the matter therefore will be deferred for convenience to a later chapter.⁷⁶ In connection with the statutory rules of proof by certificates by officials it may be noted that a certificate by a secretary of state of things done in his office will not make out proof that the governor's acts, also required to complete an extinction, have been done.⁷⁷

Acceptance of the charter may be proved either by a formal act or by an implication of acceptance consisting in organization under the statute or in exercise of the powers which the statute confers or, in the case of a charter by special act, by the application for it; but, in the case of a charter requiring acceptance by vote or in any other formal manner, proof of that kind of an acceptance is necessary.⁷⁸ The corporate books and records, if they show it, are admissible to prove the acceptance of the charter, or of an amendment, and are the best evidence thereof; and secondary evidence of it or parol evidence of it are also sufficient under the ordinary rules of evidence.⁷⁹ Acceptance by an individual member may be shown by his having participated in the organization by joining in a call for a meeting for that purpose or by any similar act.⁸⁰ Acceptance of an amendment of the charter in like manner may be proved by showing any corporate action which assumes or affirms by necessary implication that it has been accepted.⁸¹

Organization and preliminary proceedings may be proved by the corporate books recording such facts,⁸² and also by certificates, copies thereof, articles and copies of them, and other filings and records and documents, which are evidence because they have an official quality or

⁷⁶ See chapter on Forfeiture, Dissolution and Winding Up, *infra*.

⁷⁷ On the issue of forfeiture the certificate of the secretary of state, while evidence of the things pertaining to his office recited to have been done, is not evidence of the acts required to be done by the governor and of his proclamation. *Kehrlein-Swinerton Const. Co. v. Rapken*, 30 Cal. App. 11,

156 Pac. 972. See other cases chapter on Forfeiture, etc., *infra*.

⁷⁸ § 430, *supra*.

⁷⁹ See § 430, *supra*, also § 3096, *supra*.

⁸⁰ *Gleaves v. Brick Church Turnpike Co.*, 1 Sneed (Tenn.) 491.

⁸¹ See chapter on Amendment and Repeal of Charter, *infra*.

⁸² § 431, *supra*, also § 3101, *supra*.

are made evidence by statute.⁸³ A filed certificate of incorporation or the like document is not conclusive evidence of due organization⁸⁴ unless it is the official act of a public officer or persons performing the public function of ascertaining that fact and recording the same.⁸⁵

Identity of the corporation and its common name may be proved orally,⁸⁶ and similarity in name with other evidence may show that one corporation is part of another,⁸⁷ and that a corporation is the same in substance as a preceding voluntary association.⁸⁸ Identity of the corporation sued by a wrong name may be proved by its acts done under that name.⁸⁹

The charter purposes and objects of the corporation are proved by the charter or articles or a certified copy of them, and they are the

Minutes of meetings of subscribers if identified and shown to be correct or authoritatively made, are prima facie evidence of the preliminary proceedings for incorporation. *Sample v. Glenn*, 91 Ala. 245, 24 Am. St. Rep. 894, 9 So. 265, rev'g 6 So. 46; *Peake v. Wabash R. Co.*, 18 Ill. 88; *Ryder v. Alton & S. R. Co.*, 13 Ill. 516; *Vawter v. Franklin College*, 53 Ind. 88.

Corporate book of records is admissible to prove incorporation of church. *Townsend v. First Freewill Bapt. Church*, 6 Cush. (Mass.) 279.

The original corporation book is admissible to prove organization. *Grays v. Lynchburg & S. Turnpike Co.*, 4 Rand. (Va.) 578.

Organization held sufficiently proved to exercise power of eminent domain. *Williamsport, N. & M. R. Co. v. Standard Lime & Stone Co.*, 76 W. Va. 21, 84 S. E. 908.

⁸³ §§ 432, 433, *supra*.

⁸⁴ A governor's certificate that it had the right to take tolls, is not conclusive of its organization. *Duke v. Cahawba Nav. Co.*, 10 Ala. 82, 44 Am. Dec. 472.

⁸⁵ *Dollbear v. American Bell Tel. Co.*, 126 U. S. 1, 31 L. Ed. 988.

Certificate of commissioners legislatively appointed to receive and certify subscriptions. *Litchfield Bank*

v. Church, 29 Conn. 137; *Tar River Nav. Co. v. Neal*, 10 N. C. 520.

⁸⁶ A minister's testimony may prove that the corporation is the one intended by a name commonly used to designate it but slightly inaccurate, it being the only one in the state so known. *Alabama Conference M. E. Church South v. Price*, 42 Ala. 39.

⁸⁷ "Southern Ry. Co. in Kentucky" held on evidence to be merely a part of "Southern Ry. Co." though separately incorporated. *Southern R. Co. in Kentucky v. Thomas*, 28 Ky. L. Rep. 951, 90 S. W. 1043.

⁸⁸ Evidence held insufficient to show that defendant originally a voluntary association by one name was the same as a corporation with a variant name. *Piries v. First Russian Slavonic Greek Catholic Benev. Society*, under the Protectorate of Archangel St. Michael, 83 N. J. Eq. 29, 89 Atl. 1036.

⁸⁹ On the issue that a new company was the intended defendant, merely sued by a wrong name, evidence is proper to show the extinction of the former one by a foreclosure, etc., that defendant is lessee and operator, that its servants did the injury, and that it uses the property and name of the old company. *Pennsylvania Co. v. Sloan*, 125 Ill. 72, 8 Am. St. Rep. 337, 17 N. E. 37.

sole evidence thereof,⁹⁰ but the plans of the incorporators and promoters,⁹¹ and its plans and purposes in furtherance of charter objects may be proved by oral testimony of the officers.⁹²

The corporate powers are to be proved by the charter or articles which define and limit them,⁹³ if the issue is not disposed of by the presumption of power,⁹⁴ or by the rule of estoppel under the ultra vires doctrine based on recognition of power necessary for the transaction.⁹⁵ The charter of one corporation may be admitted on the question of the rights or powers of another whose charter defines its rights and powers by reference to the one offered.⁹⁶

§ 3107. Witnesses in action where corporation is party—In general.

By the rule which disqualified witnesses having an interest, no stockholder was competent if the corporation was one for profit, though he was competent if the corporation was a membership corporation and he had no pecuniary interest,⁹⁷ but this rule is now made obsolete by statutes in England and all the states, the only remnant of it which is here material being that disqualifying the survivor of a transaction with a deceased person to testify thereof.⁹⁸ Under some early statutes where competency of parties as witnesses depended on the mutual and counter oaths of the parties, one could not be his own witness against a corporation because it could not make an oath against him, the stat-

⁹⁰ § 3096, *supra*.

⁹¹ The purpose which the promoters and incorporators had in organizing the particular corporation may be inquired into independent of the recitals in the charter. *First State Bank & Trust Co. of Hereford v. Southwestern Engineering & Construction Co.*, — Tex. Civ. App. —, 153 S. W. 680.

⁹² § 3097, *supra*, and see *New York, N. H. & H. R. Co. v. Offield*, 78 Conn. 1, 60 Atl. 740.

⁹³ § 811, *supra*.

The charter, though unnecessary to prove corporate existence in an action by the corporation not denied by answer, may be admissible as bearing on issues of corporate power under the charter. *Taylor v. Bank of Illinois*, 7 T. B. Mon. (Ky.) 576, 584.

⁹⁴ §§ 811, 3091, *supra*.

⁹⁵ Chapter 37, § 1523 *et seq.*, *supra*.

Recognition by dealings will not prove possession of powers not ordinarily incident to all corporations. *Chapman v. Colby*, 47 Mich. 46, 10 N. W. 74.

⁹⁶ The charter of a predecessor is admissible to show what were "all the rights, privileges and immunities granted to" it, and by reference conferred on a successor. *Southern Ry. — Carolina Division v. Howell*, 79 S. C. 281, 60 S. E. 677.

⁹⁷ 1 Greenleaf, Evidence, § 333, and *Brown v. First Nat. Bank of Douglas County*, 49 Colo. 393, 113 Pac. 483.

A director, who was no longer a stockholder, was held competent. *Randel v. Chesapeake & D. Canal*, 1 Harr. (Del.) 233.

⁹⁸ 1 Greenleaf, Evidence [16th Ed.], § 328b. See also § 3108, *infra*.

utes not applying in such cases.⁹⁹ Neither was a stockholder a "party" under such a statute.¹

§ 3108. — Competency where interest of a decedent is adverse.

The statutes mentioned in the last section are designed generally to preserve the incompetency of witnesses in so far as they might be called to give their versions of a transaction or conversation with a person since deceased by testifying where the personal representative or other legal successor of such decedent stands as the opposing party in litigation. By reason of the distinction between the corporation and its members, officers and agents, and the further distinctness of their interests, though interrelated, the question arises whether under these statutes persons may testify who are such members, officers or agents. It depends greatly on the terms of the statutes, which vary considerably. Some statutes disqualify parties only,² or "original

⁹⁹ Code, §§ 2313, 2314, enabling plaintiff to establish his "demand by his own oath" within a limit as to amount, does not apply to actions in which a corporation is party. It could not take the counter oath to exclude such testimony. *Yonge v. Mobile & O. R. Co.*, 31 Ala. 422.

Code, § 2779, providing that in certain cases "either party may be a witness in his own behalf unless the party against whom the testimony is offered swears that the testimony proposed to be given is untrue," has no application where one of the parties is a corporation and thus incapable of an oath. *Alabama & T. Rivers R. Co. v. Oaks & Mills*, 37 Ala. 694.

¹ *Newcastle & R. R. Co. v. Brumback*, 5 Ind. 543.

² **United States.** A person interested but not a party is competent under U. S. Rev. St. § 858. *Potter v. National Bank*, 102 U. S. 163, 26 L. Ed. 111.

Arkansas. Manager of corporation is not a "party" and may testify of cautions given to deceased employee. *Mosley v. Mohawk Lumber Co.*, 122 Ark. 227, 183 S. W. 187.

Kansas. Whether railroad superintendent stands as "party" questioned.

Walker v. Brantner, 59 Kan. 117, 68 Am. St. Rep. 344, 52 Pac. 80. School trustees or officers may testify for the school district. *Mendenhall v. School Dist. No. 83 of Jewell County*, 76 Kan. 173, 90 Pac. 773.

Michigan. Corporators are not parties. *Rust v. Bennett*, 39 Mich. 521.

New Jersey. Directors and officers are not parties. *New Jersey Trust & Safe-Deposit Co. v. Camden Safe-Deposit & Trust Co.*, 58 N. J. L. 196, 33 Atl. 475.

Ohio. General manager and officer is not a "party." *Cockley Milling Co. v. Bunn*, 75 Ohio St. 270, 116 Am. St. Rep. 741, 9 Ann. Cas. 179, 79 N. E. 478.

Tennessee. Stockholder is not a "party" to the action. *Grange Warehouse Ass'n v. Owen*, 86 Tenn. 355, 7 S. W. 457. President of corporation is competent. *Nashville Trust Co. v. First Nat. Bank*, 123 Tenn. 617, 134 S. W. 311.

Wisconsin. Officer of corporation is not a party. *Twohy Mercantile Co. v. McDonald's Estate*, 108 Wis. 21, 83 N. W. 1107. Agent of corporation is not a party. *Hanf v. Northwestern Masonic Aid Ass'n*, 76 Wis. 450, 45

parties to the contract or other transaction which is the subject of the investigation''; ³ others disqualify parties and persons on whose behalf the action is prosecuted ⁴ and others all persons directly interested in the event.⁵

N. W. 315. Pastor, who was vice president of a church, is not party in a probate proceeding wherein it is legatee. In re Bruendl's Will, 102 Wis. 45, 78 N. W. 169. Stockholder is competent. Johnson v. Fraternal Reserve Ass'n, 136 Wis. 528, 117 N. W. 1019. Laws 1907, c. 197, p. 845, expressly made stockholders, officers and trustees of corporations incompetent. Id.

³ Stockholders are neither parties to the contract nor to the suit. Downes v. Maryland & D. R. Co., 37 Md. 100.

Director and stockholder is not a party. Flach v. Gottschalk Co., 88 Md. 368, 42 L. R. A. 745, 71 Am. St. Rep. 418, 41 Atl. 908.

President can prove his corporation's claim against an estate by testifying to transaction with decedent. It is not his claim (Code, § 758). Mitchell v. Tishomingo Sav. Inst., 56 Miss. 444.

Officer is competent to state what he overheard. Paul E. Wolff Shirt Co. v. Frankenthal, 96 Mo. App. 307, 70 S. W. 378.

The negotiating officer or agent is incompetent. Others are not. Southwestern R. Co. v. Papot, 67 Ga. 675; Central R. & Banking Co. v. Papot, 59 Ga. 342; Georgia Masonic Mut. Life Ins. Co. v. Gibson, 52 Ga. 640.

The secretary of a corporation who negotiated the contract is "party to the contract or cause of action" under the statute (section 6354) and is disqualified, but an attorney for it who had no interest was competent. Ham & Ham Lead & Zinc Inv. Co. v. Catherine Lead Co., 251 Mo. 721, 158 S. W. 369.

Contracting agent is incompetent. Soeding v. Bonner & Zollner Iron Co., 35 Mo. App. 349.

If the stockholder did not negotiate

the contract he is competent. He is competent unless the transaction was between himself, as agent of the corporation, and deceased. Banking House of Wilcoxson & Co. v. Rood, 132 Mo. 256, 33 S. W. 816.

But it has been held that an agent who negotiated the contract may testify regarding it. First Nat. Bank v. Terry's Adm'r, 99 Va. 194, 37 S. E. 843 (bank directors testifying about a pledge to the bank). Mutual Life Ins. Co. of New York v. Oliver, 95 Va. 445, 28 S. E. 594 (insurance agent).

⁴ Stockholder and officer can testify, because though interested he is not a party or person on whose behalf the action is prosecuted. Merriman v. Wickersham, 141 Cal. 567, 75 Pac. 180.

Cashier and assistant cashier are not parties. City Sav. Bank v. Enos, 135 Cal. 167, 67 Pac. 52.

⁵ **Colorado.** Directors, officers and stockholders are disqualified. Brown v. First Nat. Bank of Douglas County, 49 Colo. 393, 113 Pac. 483; Gilmour v. Hawley Merchandise Co., 21 Colo. App. 307, 121 Pac. 765; Gilmour v. First Nat. Bank of Central City, 21 Colo. App. 301, 121 Pac. 767.

Illinois. Stockholder is incompetent because interested in the event. Anthony Ittner Brick Co. v. Ashby, 198 Ill. 562, 64 N. E. 1109; Consolidated Ice Mach. Co. v. Keifer, 134 Ill. 481, 10 L. R. A. 696, 23 Am. St. Rep. 688, 25 N. E. 799; National Woodenware & Cooperage Co. v. Smith, 108 Ill. App. 477; Christiansen v. Dunham Towing & Wrecking Co., 75 Ill. App. 267. Officer who is not stockholder is competent. Casey v. Sawyer Biscuit Co., 163 Ill. App. 145; Southern Collegiate Institute of Albion v. Avery's Estate,

Another form of disqualification applies to parties in inter-

157 Ill. App. 568. A member in a fraternal society bound to pay assessments towards meeting its benefit certificates is interested in the result and incompetent. *Cronin v. Supreme Council Royal League*, 199 Ill. 228, 93 Am. St. Rep. 127, 65 N. E. 323, rev'g 101 Ill. App. 479. The pastor, trustees and members of a church, having neither financial interest nor obligation in it, are competent. *Adams v. First M. E. Church of Irving Park*, 251 Ill. 268, 96 N. E. 253. In Illinois a stockholder in a banking and trust company which was nominated as executor was held incompetent as an attesting witness to the will. The statute of wills permitted none but "competent" witnesses to attest and was construed as relaxing none of the incompetency existing in the statutes relating to witnesses unless the witness took an interest in the estate. *Scott v. O'Connor-Couch*, 271 Ill. 395, 111 N. E. 272. This reasoning, though technical, seems well established in that state by authority and would afford a rule if the stockholder in a corporate executor were called as an ordinary witness.

Indiana. Treasurer entitled to percentage on collection of note is disqualified in action on it. *Modlin v. Northwestern Turnpike Co.*, 48 Ind. 492.

Iowa. Stockholder is interested in the action to enforce agreement by third person to pay claims against corporation. *First Nat. Bank of Burlington v. Owen*, 52 Iowa 107, 2 N. W. 980. Stockholder in a bank does not have a direct and present interest in a debt owing to it. *Kyle v. Kyle*, 175 Iowa 734, 157 N. W. 248. The stockholder of a mortgagor is not disqualified where the action stands between the administrator of the mortgagee and other creditors claiming

conflicting priorities. *Hitt v. Sterling-Goold Mfg. Co.*, 111 Iowa 458, 82 N. W. 919.

Minnesota. A member of a firm which holds stock is disqualified by interest. *Farmers' Union Elevator Co. v. Syndicate Ins. Co.*, 40 Minn. 152, 41 N. W. 547. A subsequent member of a lodge, liable to no assessments because of becoming a member after decedent's death has such a remote and contingent interest that he is not disqualified. *Perine v. Grand Lodge A. O. U. W.*, 48 Minn. 82, 50 N. W. 1022.

Nebraska. In an action against one bank the stockholder of another is incompetent to prove transactions with decedent where the object is to recover a deposit, and the judgment might be competent in an action against the other bank on the same transaction. *Tecumseh Nat. Bank of Tecumseh v. McGee*, 61 Neb. 709, 85 N. W. 949.

New York. Stockholder is incompetent under Code Civ. Proc. § 829. *Andrews v. Reiners*, 112 App. Div. 378, 37 Civ. Proc. 51, 98 N. Y. Supp. 658; *Keller v. West, Bradley & Cary Mfg. Co.*, 39 Hun 348. Officer and member of mutual benefit association is competent under Code Civ. Proc. § 829, though he is assessable to make up benefit fund. *Raab v. National Slavonic Society*, 90 Misc. 379, 152 N. Y. Supp. 1033, on authority of *Bopple v. Supreme Tent Knights of Maccabees of World*, 18 App. Div. 488, 45 N. Y. Supp. 1096. Treasurer of purely charitable corporation is not disqualified under statute. He has no interest. *In re O'Rourke*, 12 Misc. 248, 34 N. Y. Supp. 45.

Tennessee. On a will contest inhabitants of a school district legatee are competent to testify of sanity of testator. *Gass' Heirs v. Gass' Ex'rs*, 3 Humph. 278.

est⁶ or disqualifies a party to "testify for himself," or "in his own behalf."⁷

Under all of these an officer, stockholder or agent is disqualified only when he falls within the terms of the statute, the footnotes showing what was decided in each case. The effect of the statutes is to qualify witnesses who before were not qualified, rather than to disqualify any. The persons mentioned are exceptions from the general qualifying effect of the modern statutes.⁸

Some statutes combine two or more of the preceding factors of disqualification, and provide, for example, that parties to the action

⁶ Stockholders of plaintiff in accounting suit against cashier's estate cannot testify. *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 So. 228.

One to whom a lease was executed and who assigned it to a firm and it to a corporation of which he became president is a "party in interest" and cannot testify of a transaction with plaintiff's testator. *Gilmore v. H. W. Baker Co.*, 12 Wash. 468, 41 Pac. 124.

Persons interested in the result cannot testify (syllabus adds, unless the administrator and heirs are examined in their own behalf). *Huntington & K. Land Development Co. v. Thornburg*, 46 W. Va. 99, 33 S. E. 108.

⁷ Civil Code Proc. § 606, subd. 2, disqualifying any person to "testify for himself," etc., disqualifies stockholder where corporation is a party against a personal representative. *Storey v. First Nat. Bank*, 24 Ky. L. Rep. 1799, 72 S. W. 318. This was followed in: *Bagby's Adm'r v. American Surety Co. of New York*, 161 Ky. 78, 170 S. W. 492 (shareholders of bank in suit by its indemnitor against defaulting cashier's administrator); *Leonora Nat. Bank v. Ragland's Adm'r*, 32 Ky. L. Rep. 1403, 108 S. W. 854 (stockholder); *Kentucky Stove Co. v. Bryan's Adm'r*, 27 Ky. L. Rep. 136, 84 S. W. 537 (stockholders).

Where the representative of decedent gives evidence as to the transaction, a stockholder may under the statute testify in rebuttal, but not

otherwise. *Bayless Stove Co. v. McCarthy's Assignee*, 15 Ky. L. Rep. 364.

Stockholder in bank which has become insolvent is disqualified by reason of interest arising from his stockholder's liability which success in the suit would lessen. *Farmers' Bank of Wickliffe v. Wickliffe*, 134 Ky. 627, 121 S. W. 498.

A policyholder in a mutual life insurance company interested only in its so-called profits, is competent. *New York Life Ins. Co. v. Johnson's Adm'r*, 24 Ky. L. Rep. 1867, 72 S. W. 762.

A mere agent (superintendent) might testify to verbal statements or transactions but if he was a stockholder with an interest he could not. *Massey's Adm'r v. Pike Consol. Coal Co. (Ky.)*, 116 S. W. 276.

When the effect of testimony is to change the witness, so that the preponderance of his interest is opposed to his testimony he is not testifying "in his own behalf against an executor," etc., and is competent. *Thayer v. El Plomo Min. Co.*, 40 Ill. App. 344.

⁸ Officer was qualified at common law and is also under statute. Even a stockholder is disqualified only in relation to transactions with decedent. *Kuhn v. Germania Life Ins. Co.*, 71 Mo. App. 305. See also *Fink v. Hey*, 42 Mo. App. 295 (unincorporated society).

as well as persons interested in the event are disqualified.⁹ Another type of statute disqualifies witnesses where the "adverse party" is an executor, etc., or "derives title by, through or from any deceased person," etc. This has no application to a transaction had between the witness and a since deceased agent of a corporation party, which derived no title from the agent.¹⁰

An officer or "agent" of the corporation cannot testify to a matter equally within the knowledge of the deceased under the Michigan statute. Within this term "agent" are included only the agents of the corporation for the purpose involved,¹¹ and an officer of a subsidiary is not an officer of the principal corporation.¹²

A statute in Georgia disqualifies witnesses to testify of transactions had with a since deceased or since insane officer or agent of a corporation party adverse in interest. Even though the transaction was in the presence of third persons they are disqualified by it,¹³ but they may testify to the fact of the deceased agent's authority.¹⁴ The corporate officers and agents are not disqualified when the opposite party is deceased,¹⁵ but under another statute of that state a person inter-

⁹ See California and Iowa cases, *supra*. The cases are collated to that language which controlled the decision.

¹⁰ *Beaston v. Portland Trust & Savings Bank*, 89 Wash. 627, Ann. Cas. 1917 B 488, 155 Pac. 162.

¹¹ The "finance keeper" of a local lodge cannot testify to reasons assigned by a deceased member for dropping out of the lodge in an action to recover a death benefit. *Edgerly v. Ladies of Modern Maccabees*, 185 Mich. 148, 151 N. W. 692.

A clerk employed by the agent of a lodge is not an agent. *Rousseau v. Brotherhood of American Yeomen*, 177 Mich. 568, 143 N. W. 626. To same effect, a clerk of an agent of an insurance company is competent. *Krause v. Equitable Life Assur. Society*, 105 Mich. 329, 63 N. W. 440.

Fellow brakemen and conductor were not agents to warn a brakeman, hence they can testify as to warning given. *Brennan v. Michigan Cent. R. Co.*, 93 Mich. 156, 53 N. W. 358.

¹² A local officer is not an officer of the supreme lodge, and if not its agent

in the transaction in question he is competent. *Wallace v. Fraternal Mystic Circle*, 121 Mich. 263, 80 N. W. 6, 6 Det. L. N. 448.

¹³ *Dolvin v. American Harrow Co.*, 131 Ga. 300, 62 S. E. 198.

Indorser of note on which a bank is suing is not a competent witness against the bank as to a conversation with its since deceased president. *Staton v. Exchange Bank of Rome*, 15 Ga. App. 137, 82 S. E. 784.

¹⁴ *Dolvin v. American Harrow Co.*, 131 Ga. 300, 62 S. E. 198.

¹⁵ The statute provides that "no other exceptions" to competency shall be allowed but those prescribed, and none is prescribed where a corporation sues or defends against a decedent's representative. *Cody v. First Nat. Bank*, 103 Ga. 789, 30 S. E. 281 (cashier); *Maxwell v. Imperial Fertilizer Co.*, 103 Ga. 108, 29 S. E. 597 (agent); *Rosser v. Georgia Pac. Ry. Co.*, 102 Ga. 164, 29 S. E. 171 (agent); *Bank of Southwestern Georgia v. McGarrah*, 120 Ga. 944, 48 S. E. 393 (stockholder); *Ullman v. Brunswick*

ested in the result of a suit cannot testify, if as a party he could not. This, it was held, disqualified members of a fraternity in a suit involving title to its property against a decedent's executors.¹⁶

Though a stockholder may be incompetent under a statute disqualifying any person to testify for himself "in chief," this does not exclude him from being called to prove a defense after the case in chief is otherwise made out.¹⁷ Where conversations only are excluded, a communication of some other character may be proved unless it is part of a conversation.¹⁸

Of course if the testimony does not relate to transactions or communications with decedent the statutes do not apply.¹⁹ Therefore the witness may testify to any fact of which he has independent knowledge²⁰ or to facts subsequent to death though they may be the same as those before;²¹ and distinction must be made where the elicited testimony is against the corporation²² or the witness.²³

The relationship of the witness to one of the interested parties standing opposed to a deceased actor in some transaction or the party represented by such deceased actor is a vital element in the rule. The possibility that a corporation may incur a liability over an event of failure of the suit or may benefit by its success, and that thereby the witness may suffer or be benefited does not constitute a disqualifying interest in an action to which it is not a party.²⁴ Where decedent's

Title Guarantee & Loan Co., 96 Ga. 625, 24 S. E. 409.

¹⁶ Clements v. Western Lodge No. 91, F. & A. M., 101 Ga. 62, 28 S. E. 494.

¹⁷ Western Dist. Warehouse Co. v. Hayes, 16 Ky. L. Rep. 763, 29 S. W. 738, citing Smith v. Owenton Turnpike Co., 14 Ky. L. Rep. 924.

¹⁸ The statute disqualifying a witness to a "conversation" with a deceased person applies to a stockholder of the adverse party, and though he is a superintendent and gave a warning to decedent, he cannot testify to it if part of a conversation. Peterson v. Merchants' El. Co., 111 Minn. 105, 27 L. R. A. (N. S.) 816, 137 Am. St. Rep. 537, 126 N. W. 534.

¹⁹ Bank of Southwestern Georgia v. McGarrah, 120 Ga. 944, 48 S. E. 393.

Officers may prove that a deceased executor waived notice of claim. Cox

v. Higginbotham's Adm'r, 25 Ky. L. Rep. 1057, 76 S. W. 1079.

If the question calls for a disclosure of the transaction in addition to stating who were the real parties it renders the witness incompetent. Koehler v. Adler, 91 N. Y. 657.

²⁰ Reichenbach v. Ellerbe, 115 Mo. 588, 22 S. W. 573.

²¹ Foster v. Collner, 107 Pa. St. 305.

²² A stockholder may establish execution of an instrument against the corporation. Canandarqua Academy v. McKechnie, 90 N. Y. 618.

²³ Thayer v. El Ploma Min. Co., 40 Ill. App. 344.

²⁴ Chance of liability was held too remote where corporation had previously stopped business and had all assets sold by sheriff. Talbot v. Laubheim, 188 N. Y. 421, 81 N. E. 163.

In a suit to cancel a deed the in-

representative is not a party the statutes do not apply,²⁵ which is the case where a wife sues on an insurance policy to which she is entitled by its terms and not derivatively through deceased.²⁶ The distinction has been made that if the agent was not acting as such when the communications were had he is not disqualified.²⁷ Actions by another to the use of the corporation are treated the same as if by the corporation for this purpose.²⁸

The whole object of the statute, says the Kentucky court, is to disqualify the living to testify where the dead cannot, and to put them on equality; hence a subsequent parting with interest does not remove the disqualification.²⁹ It depends greatly on the statutory language, however, and other courts hold that a subsequent parting with interest qualifies the witness,³⁰ and among them the Wisconsin court has held that not only may the legislature destroy competency pending trial but also that the person by resignation of his office may restore it;³¹ but certainly it has not this effect if the extinction of his interest is

debtedness of defendant to a bank does not disqualify its stockholders. *Kyle v. Kyle*, 175 Iowa 734, 157 N. W. 248.

²⁵ *Porter v. F. M. Davies & Co.*, 223 Fed. 465, appeal dismissed 223 Fed. 1022 (mem. dec.), rehearing denied 224 Fed. 451.

²⁶ *Hamill v. Supreme Council of Royal Arcanum*, 152 Pa. St. 537, 25 Atl. 645.

²⁷ Railroad superintendent talking to an injured locomotive driver whose widow afterwards sued for wrongful death. *Walker v. Brantner*, 59 Kan. 117, 68 Am. St. Rep. 344, 52 Pac. 80; *Wallace v. Fraternal Mystic Circle*, 121 Mich. 263, 80 N. W. 6, 6 Det. L. N. 448, where statute disqualified "agents" of corporation.

²⁸ Stockholder suing for use of the corporation on a bond cannot testify, and the fact that a surety for defendant's intestate is alive does not make any exception under the statute. *Cree v. Becker*, 49 Colo. 268, 112 Pac. 783.

²⁹ Parting with his shares after the communication and before testifying does not remove disqualification. *Bag-*

by's Adm'r v. American Surety Co. of New York, 161 Ky. 78, 170 S. W. 492; *Leonora Nat. Bank v. Ragland's Adm'r*, 32 Ky. L. Rep. 1403, 108 S. W. 854.

A shareholder whose bank has been reimbursed for a defalcation by its bonded cashier is not thereby made competent in a suit by the cashier's surety against his administrator. *Bagby's Adm'r v. American Surety Co. of New York*, 161 Ky. 78, 170 S. W. 492.

³⁰ *Isenberg v. Huntingdon Millwork & Lumber Co.*, 62 Pa. Super. Ct. 491; *Searle v. First Nat. Bank*, 2 Walk. (Pa.) 395.

A witness who was stockholder for a short time during which a transaction was had, but who ceased to be such, was not incompetent. *Tecumseh Nat. Bank of Tecumseh v. McGee*, 61 Neb. 709, 85 N. W. 949.

³¹ One who was no longer an officer was held competent, though he resigned to qualify himself because of a disqualifying statute passed pending trial. *In re McNaughton's Will*, 138 Wis. 179, 118 N. W. 997, aff'd on rehearing 120 N. W. 288.

incomplete and partial.³² It is a question of fact whether an assignment is bona fide or merely colorable to qualify the witness.³³ A relation to the corporation formed after the communication is not a disqualifying one according to one statute.³⁴

Objection to such testimony may be made after the witness is sworn in chief and before giving the objectionable testimony.³⁵ It is error sufficient for reversal to admit a witness for all purposes over objection, where he may have been incompetent by reason of participation in the transaction.³⁶ Error in excluding or admitting a witness may, however, be harmless because of the verdict or other cause.³⁷

§ 3109. Subpoenas and notices to produce or to allow inspection.

The witnesses are summoned into court by the same means as in any other actions, but a question arises whether a witness can be required by subpoena duces tecum to bring in corporate books and papers. The better rule is that an officer who has them in custody may be so compelled, even where the corporation is not a party,³⁸ and a mere

³² Limitations barring stockholder's liability and an assignment which was only partial held not to exclude possibility of liability of stockholder, who was also liable on a collateral contract. *Gunster v. Jessup*, 196 Pa. St. 548, 46 Atl. 940.

³³ One who had transferred his stock and testified at a former trial and then taken a retransfer of it, and again transferred it to the same person was allowed to testify. The appellate court declined to interfere with this ruling, but observed that the inference was strong of a bare assignment to enable the witness to testify. *Christiansen v. Dunham Towing & Wrecking Co.*, 75 Ill. App. 267.

³⁴ *Perine v. Grand Lodge A. O. U. W.*, 48 Minn. 82, 50 N. W. 1022.

³⁵ *Gilmour v. Hawley Merchandise Co.*, 21 Colo. App. 307, 121 Pac. 765, explaining and limiting an earlier case which held objection waived if not made on the voir dire.

³⁶ *Banking House of Wilcoxson & Co. v. Rood*, 132 Mo. 256, 33 S. W. 816.

³⁷ *Ham & Ham Lead & Zinc Inv. Co. v. Catherine Lead Co.*, 251 Mo. 721, 158

S. W. 369; *Johnson v. Fraternal Reserve Ass'n*, 136 Wis. 528, 117 N. W. 1019.

Where other proof established the fact. *Edgerly v. Ladies of Modern Maccabees*, 185 Mich. 148, 151 N. W. 692.

³⁸ President and secretary can be compelled to produce corporate books and papers in a federal equity suit to which the corporation is not a party. *Wertheim v. Continental Railway & Trust Co.*, 15 Fed. 716. In this case which was a New York case the federal court declined to follow the later New York cases, holding the contrary doctrine, and followed Bank of Utica v. Hillard, 5 Cow. (N. Y.) 153, making the distinction that a clerk could not be so compelled but an officer might.

The president of a corporate party may be compelled by subpoena duces tecum to produce evidence in his possession consisting of metal patterns as well as paper writings. *Johnson Steel Street-Rail Co. v. North Branch Steel Co.*, 48 Fed. 195. So the general manager may be compelled. *Johnson Steel Street-Rail Co. v. North*

clerk or agent who has them not cannot be so compelled; but some early cases denied that either officer or clerk was compellable.³⁹ The courts cannot compel the attendance and examination of an officer beyond the reach of its process by ordering the corporation to produce him, which it also has no power to compel or any legal duty to do.⁴⁰ When a corporation is one of the parties, a notice to produce addressed to the corporation and not a subpoena duces tecum to its officer is the proper practice to bring its books into court.⁴¹ The matter is now largely regulated by statutes.⁴² The notice may be served on the attorney of the corporation who has appeared for it.⁴³ The notice should be reasonably certain as to what books and papers

Branch Steel Co., 48 Fed. 191. See also Edison Elec. Light Co. v. United States Elec. Lighting Co., 44 Fed. 294, where an officer was compelled to produce them.

In New York production may now be required by subpoena duces tecum "in like manner as if it was in the hands, or under control of a natural person." It is directed to "the president or other head of the corporation, or to the officer in control of" the books. N. Y. Code Civ. Proc. § 868.

³⁹ A clerk without control over the books cannot be required on a subpoena duces tecum to produce them. Bank of Utica v. Hillard, 5 Cow. (N. Y.) 153.

Individual defendants cannot be required to produce books of a corporation not party and of which they have no control save as its agents. Opdyke v. Marble, 18 Abb. Pr. (N. Y.) 266.

Corporate officers or agents cannot be compelled in an action between strangers to produce its books on a subpoena duces tecum. (There is a dictum in the opinion that the only way to get such books even if it was a party is by motion for statutory discovery.) Morgan v. Morgan, 16 Abb. Pr. N. S. (N. Y.) 291, 39 Barb. (N. Y.) 20; La Farge v. La Farge Fire Ins. Co., 14 How. Pr. (N. Y.) 26.

⁴⁰ The court said: "We know of no legal duty imposed upon a corporation

to produce its officer as a witness when the process of the court cannot reach him. The duty of an officer of a corporation is prescribed by law, or by the articles of incorporation, or the by-laws of the corporation. The power of a corporation over its officers has respect only to the duties to the corporation which the law imposes. We know of no legal duty imposed upon an officer of a corporation to appear as a witness against that corporation, except in obedience to the writ of subpoena of a court duly served upon him. We know of no power in the corporation, or any duty devolving upon it, to compel its officer to appear as a witness before a court. We know of no right in a court to compel a corporation to produce its officer as an adverse witness." Central Grain & Stock Exchange v. Board of Trade of Chicago, 125 Fed. 463.

⁴¹ Since the corporation has the custody of its books and papers a subpoena duces tecum to its clerk would be improper. Westcott v. Atlantic Silk Co., 3 Metc. (Mass.) 282, 290.

⁴² See § 3110, infra, and consult the local statutes generally on the subject.

⁴³ Notice to the attorney of record for the corporation is the proper practice. Thayer v. Middlesex Mut. Fire Ins. Co., 10 Pick. (Mass.) 326.

are desired, and must not call for a large number of unnecessary ones.⁴⁴

§ 3110. Discovery, inspection and examination or deposition. Under the chancery practice it is proper to join officers or agents as parties with the corporation for the purpose of a discovery by them⁴⁵ and the answers made by them to the interrogatories on oath may be used as evidence.⁴⁶ In a chancery discovery the officers make and swear to their own answers and not to that of the corporation, unless it goes only to writings which are pleaded or specified in the interrogatories.⁴⁷ A statutory proceeding of more or less similar scope is now in use in many states for the same purpose, or for the purpose of eliciting necessary disclosures before trial, or for use as evidence,⁴⁸ and a similar method is now in force in federal equity courts under the New Equity Rules.⁴⁹ Such statutes should be liberally construed

⁴⁴ Notice set out and held bad. *Branan v. Nashville, C. & St. L. R. Co.*, 119 Ga. 738, 46 S. E. 882.

⁴⁵ See §§ 2945, 3026, *supra*.

There can be discovery only by joining officers. *Kirby v. Lake Shore & M. S. R. Co.*, 14 Fed. 261; *Brumly v. West Chester County Mfg. Society*, 1 Johns. Ch. (N. Y.) 366.

⁴⁶ § 3111, *infra*.

⁴⁷ *Brumly v. West Chester County Mfg. Society*, 1 Johns. Ch. (N. Y.) 366.

By statute in New York it was provided that discovery might be required in certain cases although the corporation would be subjected to forfeiture. *Robinson v. Smith*, 3 Paige (N. Y.) 222, 24 Am. Dec. 212.

⁴⁸ *Apperson v. Mutual Ben. Life Ins. Co.*, 38 N. J. L. 272.

If a paper or receipt showing delivery of goods to a railroad has been turned over to its claim department, the production of such paper may be obtained by complying with Rev. St. 1899, §§ 737, 738, 740 (Ann. St. 1906, p. 729 et seq. *Evans v. St. Louis, I. M. & S. R. Co.*, 149 Mo. App. 166, 129 S. W. 1050.

The right to examine "a party"

(Code Civ. Proc. § 870), includes corporations which are examined through their officers. The chancery doctrine of discovery against officers of defendant is adapted under the statute. *People v. Mutual Gas Light Co.*, 54 How. Pr. (N. Y.) 286.

⁴⁹ If any party is a private corporation "any opposite party" may apply for an order to file interrogatories "to be answered by any officer of the corporation." New Equity Rule 58. See full text of rule 226 U. S. Appx.

The new method now provided by Rule 58 for procuring discovery supplants the old method. *Pittsburgh Water Heater Co. v. Beler Water Heater Co.*, 222 Fed. 950.

The word "discovery" in the rule is not used in the old technical sense. The interrogatories should not go to the extent of calling on an officer to inquire of officers of a subsidiary and supposedly controlled foreign corporation. It is not to be used to harass and vex but to facilitate trials by making useless production of evidence avoidable. If the evidence could be produced by deposition of the foreign corporation's agents, the defendant's officer ought not to be required to

but will not be extended to permit examination of members of the corporation beyond the terms of the statute.⁵⁰ The terms of the statutes are various, but in New York and California, which may be taken as typical of the code states, there is a provision for inspection of papers and books and in a distinct statute for taking the deposition of an officer as a witness before trial. Besides these is a subpoena duces tecum which will bring in the books and papers for use in examining a witness. They are all distinct. It is a fair statement of the rule of all the statutes, that discovery or examination is proper where the information is material, indispensable to complainant in prosecution of the suit, within defendant's knowledge, and not otherwise available.⁵¹ Such affidavit as the statute requires, generally with a showing that the books or papers are necessary and material, must be made with the motion or petition.⁵² Under a statute allowing the filing of interrogatories in the case of a corporation, it must be shown that the opposite party is a corporation.⁵³ Where the examination may by statute be had at any time before trial, delay caused by the opposing party's resistance will not be accounted as laches.⁵⁴ The order or notice of inspection may be served on the attorney of record for the corporation if the statute designates no other person.⁵⁵

The New York statute, set out below, has been built up by amendments evoked by decisions.⁵⁶ Formerly officers could not be examined in that state because none but "parties" were examinable under

gather it as hearsay and state it in his answers. *Union Sulphur Co. v. Freeport Texas Co.*, 234 Fed. 194.

⁵⁰ The officers of defendant are not "any party to the action" and cannot be examined (Practice Act, § 159). *Apperson v. Mutual Ben. Life Ins. Co.*, 38 N. J. L. 272.

⁵¹ *King v. Livingston Mfg. Co.*, 180 Ala. 118, 60 So. 143.

The proper practice to ascertain whether plaintiff is a foreign or domestic corporation is to propound interrogatories under the statute. *Head v. J. M. Robinson, Norton & Co.*, 191 Ala. 352, 67 So. 976. See also cases, this section, *infra*.

⁵² If corporate books are at a distance the affidavit should show that there were material entries in them, and that a request for copies of such entries had been made. *Beaver v.*

Hartsville University, 34 Ind. 245. See also New York cases, *supra*.

⁵³ Gen. St. c. 129, § 50. *Gott v. Adams Exp. Co.*, 100 Mass. 320.

⁵⁴ *Boyle v. Consolidated Gas Co.*, 46 N. Y. Misc. 191, 94 N. Y. Supp. 27.

⁵⁵ An order for inspection of books may be served on the attorney who has appeared for the corporation. It is an "ordinary proceeding" in the action. So as to one striking the answer for disobedience. *Rossner v. New York Museum Ass'n*, 20 Hun (N. Y.) 182.

⁵⁶ In New York the deposition may be taken of a party (Code Civ. Proc. § 870) or "a person not a party" (section 871).

"If the party sought to be examined is a corporation, the affidavit shall state the names of the officers or directors thereof or any of them whose

the statutes,⁵⁷ which had the effect of making corporations not examinable until the statute was amended;⁵⁸ and the statute making officers and directors examinable does not include agents and servants.⁵⁹ The proper practice before the code amendment was to proceed for an inspection and discovery of books and papers, and to call the officers as witnesses on the trial,⁶⁰ which it was compelled to produce on penalty of having its answer stricken out.⁶¹ Under the New York statute for the production of books and papers on order for use in connection with deposition of an officer such books must be necessary and the application show it; and therefore an examination will not be ordered if it appears that by means of subpoena duces tecum all that is necessary can be produced at the trial,⁶² or at all when they are not necessary for examination of the witness whose deposition is to be taken.⁶³ Neither can they be produced for taking the deposition

testimony is necessary and material, or the books and papers as to the contents of which an examination or inspection is desired." N. Y. Code Civ. Proc. § 872, subd. 7.

There is a separate proceeding for discovery and inspection of books on petition, verified by affidavit and order. N. Y. Code Civ. Proc. §§ 803-809.

Production of books without subpoena may be ordered on an examination for use of the witness in the examination (Code Civ. Proc. § 872, subd. 7), but a technical inspection of books is regulated by other laws (sections 803-809). *Bruen v. Whitman Co.*, 106 N. Y. App. Div. 248, 94 N. Y. Supp. 304; *In re Sands*, 98 N. Y. App. Div. 148, 90 N. Y. Supp. 749; *Boyle v. Consolidated Gas Co.*, 46 N. Y. Misc. 191, 94 N. Y. Supp. 596.

The order need not comply with requirements of the separate statute (sections 803-809) for inspection of books. *Mauthey v. Wyoming County Co-op. Fire Ins. Co.*, 76 N. Y. App. Div. 579, 78 N. Y. Supp. 596.

⁵⁷ *Goodyear v. Phoenix Rubber Co.*, 48 Barb. (N. Y.) 522.

⁵⁸ Before amendment there was no way to examine a corporation before trial. *Boorman v. Atlantic & P. R.*

Co., 78 N. Y. 599; *People v. Mutual Gas Light Co.*, 74 N. Y. 434; *Boorman v. Atlantic & P. R. Co.*, 17 Hun (N. Y.) 555, aff'd 78 N. Y. 599.

⁵⁹ A provision that the affidavit shall state the names "of the officers or directors" whose testimony is necessary, etc., excludes agents and servants. They cannot be examined before trial (Code Civ. Proc. § 872). *Reichmann v. Manhattan Co.*, 26 Hun (N. Y.) 433.

⁶⁰ *Goodyear v. Phoenix Rubber Co.*, 48 Barb. (N. Y.) 522.

⁶¹ *La Farge v. La Farge Fire Ins. Co.*, 14 How. Pr. (N. Y.) 26.

⁶² The N. Y. Code, § 868, was so amended that subpoena duces tecum will issue to produce a book or paper belonging to a corporation; and, that being possible, the examination of books and papers of defendant before trial will be denied on an application merely showing ungrounded belief that material matter will be disclosed. *Central Crosstown R. Co. v. Twenty-Third St. Ry. Co.*, 53 How. Pr. (N. Y.) 45.

⁶³ *Wood v. J. L. Mott Iron Works*, 114 N. Y. App. Div. 108, 99 N. Y. Supp. 677; *De Brunoff v. McClure-Tissot Co.*, 83 N. Y. App. Div. 640, 82 N. Y. Supp. 38.

of a witness under some other part of the statute,⁶⁴ or the office of a subpoena duces tecum interchanged with that of an order for production of the books.⁶⁵ When they appear to be necessary in examining the witness production will be ordered.⁶⁶ When the order denies the application to bring them in, but afterwards it appears necessary to have them in connection with examination of the witness they may then be brought in by subpoena duces tecum.⁶⁷ The name of the officer must be stated in the application and it must appear that he is an officer in the application under the present statute of that state.⁶⁸ If necessity and materiality of the books and papers be stated on information and belief the grounds thereof ought to be stated.⁶⁹ In New York (and in other states) the order is for examination of the corporation, and the officers are named to make it for the corporation.⁷⁰

The California statute is much simpler. It merely provides for the taking of depositions of witnesses, making the statute applicable when

It cannot be resorted to to gain testimony which is not necessary because of public record. *Muldoon v. New York Cent. & H. River R. Co.*, 98 N. Y. App. Div. 169, 91 N. Y. Supp. 65.

Production of books will not be required when not needed to examine witness but party will be relegated to the regular proceeding to produce books for inspection. *Ryan v. New York Cent. & H. River R. Co.*, 124 N. Y. App. Div. 34, 108 N. Y. Supp. 371.

⁶⁴ They can be brought in only to aid in examination of a witness called under the particular subdivision. *Hart v. American Cotton Co.*, 41 N. Y. Misc. 436, 84 N. Y. Supp. 1065. And see *In re Thompson*, 95 N. Y. App. Div. 542, 89 N. Y. Supp. 4.

⁶⁵ *Searle v. Halstead & Co.*, 67 N. Y. Misc. 560, 124 N. Y. Supp. 811.

⁶⁶ *Thompson v. Alden*, 135 N. Y. App. Div. 57, 119 N. Y. Supp. 742; *Strodl v. Farish-Stafford Co.*, 63 N. Y. Misc. 54, 116 N. Y. Supp. 570.

⁶⁷ If they are not ordered and are needed a subpoena duces tecum to bring them may issue. *Gibbons v.*

San Luis Min. Co., 125 N. Y. App. Div. 741, 110 N. Y. Supp. 96; *Ryan v. New York Cent. & H. River R. Co.*, 124 N. Y. App. Div. 34, 108 N. Y. Supp. 371.

⁶⁸ *Herzig v. Washington Fire Ins. Co.*, 144 N. Y. App. Div. 174, 128 N. Y. Supp. 988; *Turk v. Koehler & Co.*, 144 N. Y. App. Div. 53, 128 N. Y. Supp. 809.

⁶⁹ Should show the sources and grounds thereof by something more than mere inference. *Central Cross-town R. Co. v. Twenty-Third St. R. Co.*, 53 How. Pr. (N. Y.) 45.

⁷⁰ The examination is nominally of the corporation through its officer ordered to be examined for that purpose and not of the officer as such. *Meade v. Southern Tier Masonic Relief Ass'n*, 119 N. Y. App. Div. 761, 104 N. Y. Supp. 523; *Shumaker v. Doubleday, Page & Co.*, 116 N. Y. App. Div. 302, 101 N. Y. Supp. 857; *Jacobs v. Mexican Sugar Refining Co.*, 112 N. Y. App. Div. 657, 98 N. Y. Supp. 542. But see *Donaldson v. Brooklyn Heights R. Co.*, 119 N. Y. App. Div. 513, 104 N. Y. Supp. 178.

a corporation is a party and the witness is an officer or member.⁷¹ Then there is another statute for the inspection of writings.⁷²

In Indiana where the order is for the corporation to be examined on interrogatories, it should select an agent who has knowledge to answer for it.⁷³

The Massachusetts proceeding is given the same scope as a discovery and goes so far as to require the officer to answer interrogatories calling on him to make inquiries of other officers and agents of the corporation in order to disclose the information thus gained.⁷⁴ Depositions may be taken against a corporation in the ordinary way in most of the states,⁷⁵ after it is in court by summons or appearance.⁷⁶ The statutory proceedings for examination of witnesses or the adverse party before trial also result in a deposition by the terms of many of the statutes, and sometimes, as in California, the deposition serves both purposes. The local statutes must be carefully consulted with the decisions thereon; for it would be impossible to fully treat the matter here without far departing from the scope of this chapter.⁷⁷ The required notice of the taking of depositions is said to be especially

⁷¹ Testimony of a witness may be taken by deposition "at any time after the service of the summons or the appearance of the defendant, and in a special proceeding after a question of fact has arisen therein. * * * When the witness is an officer or member of a corporation which is a party." Cal. Code Civ. Proc. § 2021.

The procedure is by serving notice of intention to take the deposition with a copy of affidavit that the case is within the statute. See Cal. Code Civ. Proc. § 2031. The examination is by question and answer as other depositions. Cal. Code Civ. Proc. § 2032.

⁷² Under Cal. Code Civ. Proc. § 1000, on notice an order may be made for inspection of books and papers and to permit taking of copies. This is in addition to other methods of producing them by witnesses.

⁷³ The corporation should select an agent who knows the facts to answer for it and he should answer without evasion. *Cleveland, C. & St. L. R. Co. v. Miller*, 165 Ind. 381, 74 N. E.

509. And see *Louisville, N. A. & C. Ry. Co. v. Henly*, 88 Ind. 535.

⁷⁴ The statutory examination under Pub. St. c. 167, § 53, is not confined to his own knowledge but the interrogatories may require him to make inquiry of officers and agents and to disclose the information gained. *Toland v. Paine Furniture Co.*, 179 Mass. 501, 61 N. E. 52, following *Gunn v. New York, N. H. & H. R. Co.*, 171 Mass. 417, 50 N. E. 1031. Followed in *Robbins v. Brockton St. Ry. Co.*, 180 Mass. 51, 61 N. E. 265, with examples of interrogatories held proper.

⁷⁵ Depositions on notice may be taken against a corporation, and *dedimus* or agreement are not the only methods. *Eastman v. Coos Bank*, 1 N. H. 23.

⁷⁶ The defendant corporation's subsequent voluntary appearance did not cure this. *Oxford Iron Co. v. Quinchett*, 44 Ala. 487.

⁷⁷ See this section, *infra*, as to statutory examinations before trial.

requisite against a corporate party.⁷⁸ Such notice should be given to the agent served with summons, if a legal agent therefor, or to some other agent or officer competent to receive service,⁷⁹ or an officer,⁸⁰ or under statutes on an agent of the kind described.⁸¹

§ 3111. Depositions, affidavits and answers as evidence. There is no difference between the evidentiary use and force of an ordinary deposition in corporation cases and in other cases; and under the statutes which have supplanted older forms of discovery the result of the examination of an officer or of the inspection of books may generally be used in evidence as well as in preparation for trial.⁸² In Indiana and Massachusetts the statute makes the answers admissible as evidence against the corporation,⁸³ while in Wisconsin answers made by an officer are admissible but those by a mere agent are not.⁸⁴ In

⁷⁸ If the corporation has not appeared or been legally served a deposition of the other party taken without notice or a showing to excuse it that the corporation's domicile or its agent was not in the county to whom notice could be given, is invalid and will be suppressed. *Oxford Iron Co. v. Quinchett*, 44 Ala. 487.

⁷⁹ *Oxford Iron Co. v. Quinchett*, 44 Ala. 487. Notice may be served on same agent on whom summons was served. *Katzenstein v. Raleigh & G. R. Co.*, 78 N. C. 286.

⁸⁰ In the absence of a statute the clerk or some principal officer should be served with notice of taking. It is invalid if served on a mere member. *Great Falls Mfg. Co. v. Mathes*, 5 N. H. 574.

President. Eastman v. Coos Bank, 1 N. H. 23.

⁸¹ A station agent is not the "agent or attorney of record" (Code Civ. Proc. § 352) on whom notice of taking may be served. *Atchison, T. & S. F. R. Co. v. Sage*, 49 Kan. 524, 31 Pac. 140.

Code Civ. Proc. § 378. *Atchison, T. & S. F. R. Co. v. Meek*, 49 Neb. 295, 68 N. W. 509.

Notice may be served on the local

agent. *Missouri Pac. Ry. Co. v. Collier*, 62 Tex. 318.

⁸² Answers to interrogatories propounded under the statute may be read on the issue of corporate existence. *Folsom v. Star Union Line Fast Freight Line*, 54 Iowa 490, 6 N. W. 702.

A deposition taken in a former suit by plaintiff may be received, the witness being since deceased, to prove the corporate seal on a contract, also because of the admission implied by relying thereon in that suit. *Philadelphia, W. & B. R. Co. v. Howard*, 13 How. (U. S.) 307, 14 L. Ed. 157.

⁸³ *Louisville, N. A. & C. Ry. Co. v. Henly*, 88 Ind. 535.

Interrogatories answered by its vice president in an action for services are evidence to show an agent's authority or want of it, in an action against the corporation, but not so far as he states his opinion or conclusion as to what the agent was authorized to do. *Parrot v. Mexican Cent. R. Co.*, 207 Mass. 184, 34 L. R. A. (N. S.) 261, 93 N. E. 590.

⁸⁴ The deposition of an officer taken under the statute is admissible as evidence though he be present in court. *Johnson v. St. Paul & W. Coal Co.*, 126

New York and California the examination of the witness aided by the produced corporate books is a deposition.⁸⁵

Affidavits made *ex parte* are receivable in proof usually only on certain motions, and not then unless the facts are sufficiently averred,⁸⁶ or to verify the issues or pleadings.⁸⁷ An *ex parte* affidavit is not admissible to prove incorporation.⁸⁸

The effect of the answer in chancery is to afford evidence if made under oath by an officer⁸⁹ and if made by the corporation under its seal has the same evidentiary force that an unsworn answer has.⁹⁰ Under the chancery practice less evidence was required to overcome the answer of a corporation, not sworn to, than was required ordinarily in other cases.⁹¹ In federal equity courts the evidence is now taken in open court except as otherwise provided,⁹² and such is believed to be the general rule now in chancery courts.

Wis. 492, 105 N. W. 1048. But not that of its mere employee. *Hughes v. Chicago, St. P., M. & O. R. Co.*, 122 Wis. 258, 99 N. W. 897.

⁸⁵ See § 3110, *supra*.

⁸⁶ In a special proceeding alleging petitioner's corporation an opposing affidavit denying it on want of information and belief amounts to nothing. *In re New York, L. & W. R. Co. v. Union Steam-Boat Co.*, 99 N. Y. 12, 1 N. E. 27.

⁸⁷ By whom affidavits and verifications are to be made, see §§ 2984, 3083, *supra*.

⁸⁸ *Bowyer's Adm'r v. Giles, F. & K. Turnpike Co.*, 9 Gratt. (Va.) 109.

⁸⁹ The sworn answer of an officer joined as co-defendant is admissible against it. *McKim v. Odom*, 3 Bland (Md.) 407.

The officer, provided his answer is separate from the corporation's, may be used by plaintiff and cross-examined by the corporation, or it may disprove his statements. *Vermilyea v. Fulton Bank*, 1 Paige (N. Y.) 37. But see *Wright v. Dame*, 1 Metc. (Mass.) 237.

A corporation cannot answer under oath, and an answer sworn by its officer is not evidence, it seems, but certainly not to prove an affirmative de-

fense. *Coca Cola Co. v. Gay-Ola Co.*, 200 Fed. 720.

⁹⁰ *Bouldin v. Baltimore*, 15 Md. 18; *Maryland & N. Y. Coal & Iron Co. v. Wingert*, 8 Gill (Md.) 170.

A corporate answer in chancery, being not sworn, is not evidence but in so far as responsive presents issues of fact devolving on plaintiff the burden of proof. So held on motion to dissolve an injunction on bill and answer. *Baltimore & O. R. Co. v. Wheeling*, 13 Gratt. (Va.) 40. See also *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601, Fed. Cas. No. 5,902.

Answer under seal will defeat or dissolve injunction on the equity of the bill, though for want of an oath it is not evidence. *Haight v. Morris Aqueduct*, 4 Wash. C. C. 601, Fed. Cas. No. 5,902.

⁹¹ *State Bank v. Edwards & Walke*, 20 Ala. 512.

⁹² By New Equity Rule 46 it is provided, "In all trials in equity the testimony of witnesses shall be taken orally in open court, except as otherwise provided by statute or by these rules," etc. Depositions may be taken (Rule 47 et seq.) and discovery may be had according to the mode provided by Rule 58.

VII. TRIAL AND ITS INCIDENTS

§ 3112. In general. The cases reveal no principles of trial practice that are essentially peculiar to corporation actions beyond the few which appear hereinafter. In New York, and other states, certain actions may be assigned to a preferred or special calendar.⁹⁴ The issues in abatement and dilatory issues are triable in the same manner as such issues are in all other actions. Generally it is discretionary under present practice to try them separately and before the main issues,⁹⁵ and a case standing on such issues is ready for trial without further notice, unless notice is required generally to put the cause on the calendar.⁹⁶ When such a plea is tried separately the merits will not be gone into.⁹⁷ Issues of the corporate existence should be tried on the pleadings in the regular manner, and not by motion.⁹⁸ The right to open and close,⁹⁹ the mode of conducting examination of witnesses, including the right to cross-examine members of the corporation as hostile witnesses,¹ and the rules regulating arguments and

⁹⁴ Code Civ. Proc. § 791, subd. 8, providing for a preference on the calendar of an action against a corporation on a note does not require an order, since the right appears by the complaint. *Eastern Nat. Bank v. Brunswick Chemical Works*, 18 Abb. N. Cas. (N. Y.) 473.

A preference on the calendar to actions on a "contract, note, or other evidence of debt," does not include actions on a policy of insurance. *Anonymous*, 6 Cow. (N. Y.) 41.

An irregularity in notice to put a case on the short cause calendar is waived by affidavit denying that the party to have been served is a corporation. *Auburn Cycle Co. v. Foote*, 69 Ill. App. 644.

⁹⁵ A plea to the jurisdiction in that the attachment process could not issue against a corporation within the state may be tried with the main issues or separately. Hence it was not error to try them separately. *Voss v. Evans Marble Co.*, 101 Ill. App. 373.

⁹⁶ When an answer contains nothing but matter of abatement the case stands for hearing thereon, and defend-

ant must be present. No further notice to answer to the merits is due to it. *Curfman v. Fidelity & Deposit Co. of Maryland*, 167 Mo. App. 507, 152 S. W. 126.

⁹⁷ Hence where jurisdiction depended on liability of co-defendant in whose residence venue was laid, the merits of his liability must be left to trial of the main issue. *Central of Georgia Ry. Co. v. Brown*, 113 Ga. 414, 84 Am. St. Rep. 250, 38 S. E. 989.

⁹⁸ Exceptions to corporate existence and capacity of plaintiff cannot be tried on motion to dismiss for want of jurisdiction, but only on the exceptions themselves. *Carondelet Canal & Navigation Co. v. First Chevere Tedesco*, 37 La. Ann. 100.

⁹⁹ Where the admission of making the note sued on also admits corporate existence, though there is elsewhere a denial of it, the prima facie case so made entitles defendant to open and close. *E. Van Winkle Gin & Machine Works v. Mathews*, 2 Ga. App. 249, 58 S. E. 396.

¹ One of the owners of a defendant corporation when called by the oppos-

conduct of the counsel, are according to general practice. The rule is well settled that in addressing the jury appeals to prejudice against corporations, like any other such appeals, will be ground for reversal if any prejudice results. This is a general principle of trial practice, however, and not one of corporation law.² It is permissible to comment on the want of any substantial difference between two corporations, where the case fairly presents the existence of two and one of them is liable.³ In keeping with the right of the court to regulate the order of proof, evidence may be received in judicial discretion out of order to cure deficiencies in the case made in chief.⁴ A question arises where it is moved to exclude from the court room all witnesses but the one under examination. Generally a corporate officer whose knowledge necessarily requires his presence will be allowed to remain, especially where the statute exempts parties from such a rule or order, the officer being a "party" under such a statute.⁵ It is discretionary to a large extent,⁶ and in one case the corporation was required to elect which of two might remain.⁷

ing party may by leave of court be examined as on cross-examination. *North American Restaurant & Oyster House v. McElligott*, 227 Ill. 317, 81 N. E. 388, aff'g 129 Ill. App. 498.

² *Abbott, Civil Jury Trials*, p. 627; 38 Cyc. 1499.

³ Mere comment of counsel that there is no difference between defendant and another corporation of similar name, not stating any fact in evidence, is not error. *Armour Packing Co. v. Vietch-Young Produce Co.* (Ala.), 39 So. 680.

To characterize as "fake" and fraudulent a defense that the wrong corporation had been sued, was not unwarranted where the evidence showed two owned by the same persons and no plain distinction between them. *North American Restaurant & Oyster House v. McElligott*, 227 Ill. 317, 81 N. E. 388.

⁴ The failure to prove corporate existence in chief may be cured by leave to put it in before closing evidence. *Emerson Co. of West Virginia v. Nimocks*, 88 Fed. 280.

⁵ *Lenoir Car Co. v. Smith*, 100 Tenn. 127, 42 S. W. 879.

But it has been held that the chief officer is not a party entitled to remain under the statute, and it was not an abuse of discretion to exclude him where no special reason for his remaining was shown. *Kentucky Union Lumber Co.'s Assignee v. Abney*, 17 Ky. L. Rep. 401, 31 S. W. 279.

An officer of a (municipal) corporation is not a party entitled to remain, and when a witness may be excluded unless he has some special knowledge or information concerning the case which renders it necessary that he remain. *Trotter v. Stayton*, 45 Ore. 301, 77 Pac. 395.

⁶ It was not an abuse of discretion to exclude defendant's conductor, its only agent present, from the court room during trial of an action for negligence in train management, resulting in plaintiff's injury. *Central Railroad & Banking Co. v. Phillips*, 91 Ga. 526, 17 S. E. 952; *Gulf, C. & S. F. Ry. Co. v. Bruce* (Tex. Civ. App.), 24 S. W. 927.

⁷ It was not error to put one of two

§ 3113. Conduct and control; compromise and discontinuance. The general control of actions resides in the directors,⁸ delegated as a managerial function to proper officers.⁹ Incident to the control over suits is the authority to make compromises which may be in the directors or by the managerial officer within the limits of his delegated authority.¹⁰ An executive committee of the directors may move for dismissal (of an appeal) without a formal vote by the directors and against the dissent of the president, and although the directorate is de facto only and not de jure in office.¹¹ The right to control or discontinue the action arises not infrequently in stockholders' suits, where, it must be remembered, the action does not stand wholly in the right of the directors but sounds in the right of the whole body of the stockholders represented by the plaintiff. In such actions all the rights of the corporation and the stockholders will govern the propriety of the proposed control or disposal of the suit.¹² There may be an implied discontinuance as to individuals where the action in form against them was tried as one against a corporation composed of them.¹³ The propriety of dismissing or discontinuing the suit involuntarily is discussed in a later section.¹⁴

§ 3114. Judge and jury. About the only question which arises in this connection is that of membership or interest in the corporation or bias or prejudice as disqualifying the judge or the juror. The right to a jury trial depends on the general law of juries and is primarily governed by the legal or equitable character of the suit, rather than by any principles of corporation law. The common-law principles by which relationship or pecuniary interest or prejudice

officers, both being witnesses, under the rule and allow the other to remain, the corporation to elect which. *Atlanta Terra Cotta Co. v. Georgia Ry. & Elec. Co.*, 132 Ga. 537, 64 S. E. 563, an eminent domain case.

⁸ § 1988, *supra*.

⁹ Authority of officers and agents with respect to actions and suits, see §§ 2051, 2054, 2055 (president); 2131, 2136 (general manager); 2155, 2158 (bank cashier), *supra*.

¹⁰ §§ 2051 (president), 2131 (general manager), 2155 (bank cashier), *supra*. And see *Northern Liberty Market Co. v. Kelly*, 113 U. S. 199, 28 L. Ed. 948; *First Nat. Bank of*

Charlotte v. National Exch. Bank of Baltimore, 92 U. S. 122, 23 L. Ed. 679; *Farmers' Mut. Ins. Co. v. Meese*, 49 Neb. 861, 69 N. W. 113; *Moss v. Averell*, 10 N. Y. 449; *In re Norwich Provident Ins. Soc.*, 8 Ch. Div. 334.

¹¹ *Young v. Schenck*, 64 Wash. 90, 116 Pac. 588.

¹² See chapter on Stock and Stockholders, subd. Remedies of Stockholders, etc., *infra*.

¹³ It is discontinued as to them and becomes one against it. *White v. Equitable Nuptial Ben. Union*, 76 Ala. 251, 52 Am. Rep. 325.

¹⁴ § 3118, *infra*.

or bias were determined are now enacted into statutes, or new statutory tests are established, in most jurisdictions. This is so both as to the judge and the jurors.¹⁵ In the federal courts the qualifications for and exemptions of jurors are the same as in the highest court of law in the states respectively at the time when summoned for service.¹⁶

Generally speaking any interest will render the judge incompetent.¹⁷ "The interest need not be large, but it must be real";¹⁸ hence a stockholder or member is disqualified to act as judge because of his interest in the corporate party.¹⁹ Being related to officers, stockholders or members does not disqualify a judge as being related to a party; since

¹⁵ Third degree of consanguinity disqualifies. Cal. Code Civ. Proc. § 170; Texas Rev. Stat. art. 1138.

Disqualification of a federal district judge occurs by reason of being "in any way concerned in interest," or having been "of counsel," or being a "material witness," or "so related to or connected with either party as to render it improper, in his opinion, for him to sit on the trial" and is a ground for calling in another judge. Judicial Code, § 20. The same shall be done and the same procedure had, when "a party to any action or proceeding * * * shall make and file an affidavit that the judge * * * has a personal bias or prejudice either against him or in favor of any opposite party." Judicial Code, § 21.

¹⁶ U. S. Judicial Code, § 275.

¹⁷ Judge who is director and legal adviser of bank cannot sit on trial of action by bank's debtor where recovery of debt will depend contingently on plaintiff's success in the action. *Jones v. American Cent. Ins. Co.*, 83 Kan. 44, 109 Pac. 1077.

Judge holding stock in rival bank which lost heavily by failure of defendant's bank, wrecked by defendant, should not try indictment for false swearing in making an official report of the failed bank. *Anderson v. Com.* (Ky.), 117 S. W. 364.

Judge who was a stockholder at the time of a dedication by a corporation

is disqualified to sit afterwards when validity of the dedication is disputed. *State v. Call*, 59 Fla. 610, 51 So. 537.

¹⁸ Judge, who as stockholder of old and insolvent corporation had a right to come into a reorganization scheme on payment of a sum certain per share, was not interested in a former subsidiary corporation after all its stock had been sold on foreclosure, so that his corporation had no interest. *People v. Whitridge*, 144 N. Y. App. Div. 493, 129 N. Y. Supp. 300.

Not disqualified by the fact that he and one of the parties are stockholders in a corporation not interested in the suit. *Hyde Park Lumber Co. v. Shepardson*, 72 Vt. 188, 47 Atl. 826.

Judge who is not a lot owner is not disqualified because his father and other relatives are buried in defendant corporation's cemetery. *Houston Cemetery Co. v. Drew*, 13 Tex. Civ. App. 536, 36 S. W. 802.

¹⁹ Stockholder. *Adams v. Minor*, 121 Cal. 372, 53 Pac. 815, holding the smallness of interest not material; *King v. Thompson*, 59 Ga. 380; *Queens-Nassau Mortg. Co. v. Graham*, 157 N. Y. App. Div. 489, 142 N. Y. Supp. 589; *Washington Ins. Co. v. Price*, 1 Hopk. Ch. (N. Y.) 1; *Bank of North America v. Fitzsimons*, 2 Bin. (Pa.) 454 (judge who was stockholder declined to sit).

Stockholder and director. In re *Reddish*, 49 Hun (N. Y.) 612, 2 N. Y. Supp. 259.

the corporation and not its members is the party.²⁰ A contrary ruling was made where the judge's wife was a stockholder, and there appears to be a sound distinction to support it.²¹ Even if relationship disqualifies when within the prohibited degree, it has no such effect if it is a remoter degree.²² If the relatives of a judge have a right to become parties, for example in a representative action by citizens of a municipality against the corporation, but have not done so, the judge is not disqualified by relationship to one of the parties.²³ A former holding of stock in one of the parties,²⁴ or a former, but since canceled subscription,²⁵ or a holding of stock in a corporation which is no longer interested in the outcome of the action,²⁶ or a directorship at the time the contract sued on was made with the corporation, but since ceased,²⁷ constitutes no disqualification by reason of interest but it is preferable that the judge decline to sit where the transfer has been recent.²⁸ A sale of his interest by the judge pending considera-

Director of national bank and hence required by law to own ten shares. *Williams v. City Nat. Bank of Quanah* (Tex. Civ. App.), 27 S. W. 147.

²⁰ *In re Dodge & Stevenson Mfg. Co.*, 77 N. Y. 101, 33 Am. Rep. 579, rev'g 14 Hun (N. Y.) 440; *Lansingburgh Bank v. McKie*, 7 How. Pr. (N. Y.) 360; *Lewis v. Hillsboro Roller-Mill Co.* (Tex. Civ. App.), 23 S. W. 338; *Ex parte Tinsley*, 37 Tex. Cr. 517, 66 Am. St. Rep. 818, 40 S. W. 306; *Wise County Coal Co. v. Carter Bros. & Co.*, 3 Willson Civ. Cas. Ct. App. (Tex.) § 306; *Searsburgh Turnpike Co. v. Cutler*, 6 Vt. 315.

²¹ Disqualified because wife was stockholder. *First Nat. Bank of Rapid City v. McGuire*, 12 S. D. 226, 47 L. R. A. 413, 76 Am. St. Rep. 598, 80 N. W. 1074.

²² A judge married to a stockholder's cousin is related in the fourth degree as degrees are reckoned in California, and so is not disqualified by Code Civ. Proc. § 170, which reaches only the third degree as a disqualification. *Robinson v. Southern Pac. Co.*, 105 Cal. 526, 28 L. R. A. 773, 38 Pac. 94.

²³ Persons who might but have not

come in as co-parties in a representative action are not parties adverse to the corporation, though conceivably interested in a property sense. *International & G. N. Ry. Co. v. Anderson County* (Tex. Civ. App.), 174 S. W. 305.

²⁴ *Scadden Flat Gold Min. Co. v. Scadden*, 121 Cal. 33, 53 Pac. 440; *Palmer v. Lawrence*, 5 N. Y. 389, aff'g 5 N. Y. Super. Ct. 161; *Henderson v. Tillamook Hotel Co.*, 76 Ore. 379, 149 Pac. 473, 148 Pac. 57; *Nicholson v. Showalter*, 83 Tex. 99, 18 S. W. 326.

²⁵ Judge who canceled subscription and took no stock is competent though corporation is interested. *Andes v. Ely*, 158 U. S. 312, 39 L. Ed. 996.

²⁶ Stockholder in corporate creditor of the corporation is qualified where debt is paid or assigned without recourse before judgment, even though for the purpose of qualifying him. *Nicholson v. Showalter*, 83 Tex. 99, 18 S. W. 326.

²⁷ *Johnson v. Marietta & N. G. R. Co.*, 70 Ga. 712.

²⁸ Two days. *Henderson v. Tillamook Hotel Co.*, 76 Ore. 379, 149 Pac. 473, 148 Pac. 57.

tion of the case does not restore competency to sit.²⁹ Administration and insolvency proceedings³⁰ and eminent domain proceedings³¹ are governed by the same rules as above mentioned for civil actions generally. Where the disqualification exists it cannot be waived.³²

Since a fair and impartial jury is a matter of right, and the jurors must stand impartially between the parties, members³³ or stockholders in any corporation for profit are, by reason of their direct pecuniary interest and relation to it, incompetent to sit as jurors in a case where the corporation is a real or beneficial party,³⁴ and it is said that the corporation is bound to know and raise the objection for the protection of its own interest in the proceeding.³⁵ The distinction has been made, that in a nonpecuniary corporation, members may be competent; thus a member of the Masonic fraternity having no pecuniary interest in it is competent though it is a party.³⁶ In an-

²⁹ Sale after submission and pending decision does not qualify the judge. *Adams v. Minor*, 121 Cal. 372, 53 Pac. 815.

³⁰ Stockholder in bank is disqualified to approve its claim against a decedent's estate pending before him. *State v. Mack*, 26 Nev. 430, 69 Pac. 862.

A proceeding on the assignment of the corporation for benefit of creditors was held a civil proceeding which may be transferred to another judge if the regular one is a stockholder and officer. *Kittridge v. Kinne*, 80 Mich. 200, 44 N. W. 1051.

³¹ *Gregory v. Cleveland, C. & C. R. Co.*, 4 Ohio St. 675.

³² Such disqualification being jurisdictional cannot be waived. *Adams v. Minor*, 121 Cal. 372, 53 Pac. 815; *People v. Whitridge*, 144 N. Y. App. Div. 493, 129 N. Y. Supp. 300; *First Nat. Bank of Rapid City v. McGuire*, 12 S. D. 226, 47 L. R. A. 413, 76 Am. St. Rep. 598, 80 N. W. 1074.

Judgment held erroneous where judges who were stockholders appointed appraisers to condemn land. *Gregory v. Cleveland, C. & C. R. Co.*, 4 Ohio St. 675.

³³ Policyholders in a mutual insurance company who are assessable to

pay losses are incompetent because of interest in an action on a policy. *Martin v. Farmers' Mut. Fire Ins. Co.*, 139 Mich. 148, 102 N. W. 656.

So are members of a fraternal benefit society sued on a benefit certificate. *Sovereign Camp W. O. W. v. Ward*, 196 Ala. 327, 71 So. 404; *Woodmen of World v. Wright*, 7 Ala. App. 255, 60 So. 1006.

³⁴ So held in a condemnation proceeding. It was also held that the action of such jury in locating the road and assessing damages was wholly avoidable on objection of claimants, who were ignorant of the disqualifying facts, which the corporate officers knew, and that objection could be made to confirmation of the report. *Peninsular Ry. Co. v. Howard*, 20 Mich. 18.

The juror is directly interested where he is a stockholder and as such is liable under the statute for costs which may be awarded against the corporation. But his ownership by assignment of a contract to purchase stock would not disqualify him. *Fleeson v. Savage Min. Co.*, 3 Nev. 157.

³⁵ *Peninsular Ry. Co. v. Howard*, 20 Mich. 18.

³⁶ *Burdine v. Grand Lodge of Alabama*, 37 Ala. 478.

other case it was ruled that unless the venireman was a member of the local lodge which was the litigant party he was competent.³⁷

If the corporation is not a party, and is not subject to liability in the event of the action, its stockholder is competent when free from actual bias or prejudice;³⁸ hence, the stockholders or employees of one corporation are competent as jurors, unless they have a pecuniary interest, in an action where another is party, though the corporations stand as lessor and lessee,³⁹ principal and subsidiary,⁴⁰ or insurer and insured against liability,⁴¹ or as co-insurers.⁴² The same result was declared where a stockholder of one damage claimant sat on a jury to award condemnation damages to another claimant.⁴³

But that church members are disqualified in an action by trustees of one church for possession of the church house and lot against trustees of another church, see *Cleage v. Hyden*, 6 Heisk. (Tenn.) 73.

³⁷ *Odd Fellows society. Delaware Lodge No. 1, I. O. O. F. v. Allmon*, 1 Pennew. (Del.) 160, 39 Atl. 1098.

³⁸ Thus a stockholder in a turnpike company may sit in an action to recover a penalty from a toll gatherer for closing the gate and collecting tolls when the road was out of repair, the company not being liable for such penalty, though it would have been liable under another part of the statute for extortion by him. *Williams v. Smith*, 6 Cow. (N. Y.) 166.

Stockholder in bank whose teller alone was sued is competent. *Stevenson v. Moore* (Ky.), 118 S. W. 951.

The fact that an individual party and a juror are both stockholders in one corporation is not objectionable. *Brittain v. Allen*, 13 N. C. 120.

As a further illustration: Policyholders in an insurance company are not incompetent on a jury of inquiry into the cause of a fire which they reported was set for the purpose of defrauding the insurer. *Com. v. Williams*, 54 Pa. Super. Ct. 545.

³⁹ *Augusta Southern R. Co. v. McDade*, 105 Ga. 134, 31 S. E. 420.

The smallest pecuniary interest dis-

qualifies. Thus a stockholder in one road, operated on a pooling arrangement with another, cannot sit as a condemnation juror when the latter is the condemnor. *Page v. Contoocook* Val. R. R., 21 N. H. 438.

⁴⁰ Stockholder in corporation which owned the stock of defendant corporation was disqualified by interest. *McLaughlin v. Louisville Elec. Light Co.*, 100 Ky. 173, 24 L. R. A. 812, 37 S. W. 851.

⁴¹ Stockholders, officers, agents and servants of an insuring liability corporation held subject to challenge for cause of interest in a personal injury suit. *Citizens' Light, Heat & Power Co. v. Lee*, 182 Ala. 561, 62 So. 199.

Within judicial discretion the juror may be asked if he is interested in an insurance company as stockholder, etc. *M. O'Connor & Co. v. Gillaspay*, 170 Ind. 428, 83 N. E. 738, and cases there cited; *Featherstone v. Lowell Cotton Mills*, 159 N. C. 429, 74 S. E. 918.

⁴² Policyholders in mutual companies with a co-insurance clause held not to have a pecuniary interest disqualifying them as jurors in an action on a policy of another insurer. *Citizens' Sav. Bank & Trust Co. v. Fitchburg Mut. Fire Ins. Co.*, 86 Vt. 267, 84 Atl. 970.

⁴³ *Com. v. Boston & M. R. R.*, 3 Cush. (Mass.) 25.

A prejudice against all companies in defendant's business is a disqualification, even if removable by evidence.⁴⁴

According to a very well-known rule it is not reversible error to overrule a challenge for cause and thus force the challenger to exclude the objectionable juror by resort to peremptory challenge, unless prejudice therefrom is pointed out.⁴⁵

The methods for the calling and formation of common-law juries are determined by the local statutes applicable alike in all actions.⁴⁶ In the formation of juries not according to common law, as for instance in eminent domain proceedings, the general law of such actions governs unless the charter establishes a rule peculiar to the particular corporation.⁴⁷

§ 3115. Questions of law and fact. Whether a particular issue is one of law or of fact depends on the nature and qualities of the issue as a matter of substance; and accordingly each will be found treated in various portions of this work where the subject-matter of the issue is treated. A few illustrative cases are here cited, however, in connection with references to other contexts. Examples are: the questions of jurisdiction and venue,⁴⁸ of existence,⁴⁹ and of

⁴⁴ Against all insurance companies. *Winneshiek Ins. Co. v. Schueller*, 60 Ill. 465, holding, however, that no prejudice resulted.

Against all railroad companies. *Shane v. Butte Elec. Ry. Co.*, 37 Mont. 599, 97 Pac. 958. In the foregoing case it was pointed out that the statutory modification of this rule applied only in criminal cases. And see *Atchison, T. & S. F. R. Co. v. Chance*, 57 Kan. 40, 45 Pac. 60, where the juror required "continual effort" to overcome such prejudice; *St. Louis & S. F. R. Co. v. Hooser*, 44 Tex. Civ. App. 229, 97 S. W. 708, where juror "could not help being influenced."

⁴⁵ Not all peremptory challenges were exhausted. *Martin v. Farmers' Mut. Fire Ins. Co.*, 139 Mich. 148, 102 N. W. 656; *Fleeson v. Savage Min. Co.*, 3 Nev. 157; *Norris v. Holt-Morgan Mills*, 154 N. C. 474, 70 S. E. 912; *Blevins v. Erwin Cotton Mills Co.*, 150 N. C. 493, 64 S. E. 428. (Many other authorities on this point will be found

in general works on Juries and Appeals.)

But if all were exhausted the error is reversible. *Atchison, T. & S. F. R. Co. v. Chance*, 57 Kan. 40, 45 Pac. 60; *Shane v. Butte Elec. Ry. Co.*, 37 Mont. 599, 97 Pac. 958; *St. Louis & S. F. R. Co. v. Hooser*, 44 Tex. Civ. App. 229, 97 S. W. 708.

⁴⁶ See local statutes and general works on trial practice.

⁴⁷ The charter prevails over the general law limited to companies formed under it. *Cairo & F. R. R. Co. v. Trout*, 32 Ark. 17.

⁴⁸ Jurisdictional fact of plaintiff's residence was for jury. *Gundlin v. Hamburg-American Packet Co.*, 8 N. Y. Misc. 291, 28 N. Y. Supp. 572.

⁴⁹ Existence of a particular corporation is a question of fact. *Cheraw & C. R. Co. v. Garland*, 14 S. C. 63; *Cheraw & C. R. Co. v. White*, 14 S. C. 51.

If the evidence of a foreign corporation rests in an authenticated copy

the identity of a corporation named as defendant,⁵⁰ its foreign or domestic character,⁵¹ its powers,⁵² the construction and terms of by-laws,⁵³ the personnel of its officers, agents and members or stockholders,⁵⁴ the question whether it or another, or its officers, made a given contract, or did an act,⁵⁵ or adopted a promoter's contract,⁵⁶ the authority of its officers and agents,⁵⁷ notice to or knowl-

of the record entitled to full faith and credit, no question of fact is presented. *Bennington Iron Co. v. Ruth-erford*, 18 N. J. L. 105, 35 Am. Dec. 528.

⁵⁰ It was for the jury to say whether a new corporation was the intended defendant, merely sued by a wrong name, or whether it was introduced into the case as successor of the old one whose name was used. *Pennsylvania Co. v. Sloan*, 125 Ill. 72, 8 Am. St. Rep. 337, 17 N. E. 37.

⁵¹ Whether corporation is foreign or domestic is question of law dependent on its charter. *Atlantic Coast Line R. Co. v. Spencer*, 166 N. C. 522, 82 S. E. 851.

⁵² Whether use of a barge was intra vires a foreign corporation formed to operate steamboats and carry goods on a certain river, held a jury question. *Tennessee River Transp. Co. v. Kavanaugh*, 93 Ala. 324, 9 So. 395.

Purchase of hotel furniture by a brewing corporation is not as matter of law ultra vires. *Keating v. American Brewing Co.*, 62 N. Y. App. Div. 501, 71 N. Y. Supp. 95.

⁵³ § 499, supra.

Construction of by-laws is for the court. *Tennessee River Transp. Co. v. Kavanaugh*, 93 Ala. 324, 9 So. 395.

⁵⁴ See generally Chap. 42, supra, as to Officers and Agents; chapter on Stock and Stockholders, infra.

Whether a stockholder is also an agent is a fact question. *Billings Realty Co. v. Big Ditch Co.*, 43 Mont. 251, 115 Pac. 828.

⁵⁵ See §§ 1492-1494, supra, in connection with the discussion of the ad-

missibility of parol evidence on the question.

Which of two corporations of similar name made a contract was a jury question where there was a doubt. *United Press v. A. S. Abell Co.*, 58 N. Y. App. Div. 611, 68 N. Y. Supp. 613.

Whether sale was to defendant or to its manager who negotiated contract. *O. M. Cockrum Co. v. Klein*, 165 Ind. 627, 74 N. E. 529.

Whether an officer in making a contract, intended to bind himself or his corporation, where his promise was expressed in first person singular. *McGowan Commercial Co. v. Midland Coal & Lumber Co.*, 41 Mont. 211, 108 Pac. 655.

The meaning of a letter was for the jury where that depended on the question whether the writer was then acting for the corporation or for others. *Nashua Iron & Brass Foundry Co. v. Chandler Adjustable Chair & Desk Co.*, 166 Mass. 419, 44 N. E. 348.

Where the grant was to one person to be a corporation and to associate others with him, and it does not appear whether his acts were individual or corporate, such is a question of fact for proof. *Penobscot Boom Corporation v. Lamson*, 16 Me. 224, 33 Am. Dec. 656.

⁵⁶ What constitutes adoption of a promoter's contract is a question of law, but whether on the evidence it was adopted is a question of fact. *Moriarity v. Meyer*, 21 N. M. 521, L. R. A. 1916 E 1165, 157 Pac. 652.

⁵⁷ Authority of officers and agents is generally a question of fact for the

edge by the corporation.⁵⁸ The issues of misnomer and other matters in abatement, including nul tiel corporation when pleaded in abatement, were not jury issues at common law, for all such pleas were concluded under a verification and not to the country; but under the modern practice this is regulated, no doubt, by the general practice for the trial of dilatory issues.⁵⁹

§ 3116. Instructions and direction of verdict or nonsuit. Little can be written profitably in this connection on instructions to the jury. The subject is one that does not readily admit of collateral or incidental treatment, and should be studied in a general work on instructions.⁶⁰ The substance of an instruction as a correct statement of law must be tested by the law on the particular subject-matter of the instruction. As to that reference must be had to the other parts of this treatise. The verbal form in which a correct instruction must be put so as not to mislead the jury or commit to it matters belonging to the province of the court, the manner of formulating requests for desired instructions, and the practice in making objections to the instructions or the giving or refusal of them, do not depend on corporation law. To attempt to single out the corporation cases wherein the general law in these respects has been applied would be more confusing because of its incomplete nature than it could be helpful.⁶¹ The

jury, unless it depends on the construction of writings such as the articles or by-laws. § 1945, *supra*.

What authority a railroad general manager had during an attempted dismissal of him. *Mobile, J. & K. C. R. Co. v. Hawkins*, 163 Ala. 565, 51 So. 37.

Apparent authority of a department superintendent to purchase supplies for his department. *Brace v. Northern Pac. Ry. Co.*, 63 Wash. 417, 38 L. R. A. (N. S.) 1135, 115 Pac. 841.

⁵⁸ Whether a statutory notice to initiate a duty and liability of the corporation was in fact given was for the jury. *Weymouth v. Penobscot Log Driving Co.*, 71 Me. 29.

Whether corporation knew of or directed acts of servants tortious in nature. *Ex parte Birmingham Realty Co.*, 183 Ala. 444, 63 So. 67.

Questions of law and fact as to true valuation of thing taken in payment for stock or against which it was issued, see chapter on Stock and Stockholders, subd. Watered and Fictitiously Paid Up Stock, *infra*.

⁵⁹ The existence of a foreign record of the act of incorporation cannot be put in issue on a conclusion to the country as a jury question of fact, since the record if properly authenticated is entitled to full faith and credit. *Bennington Iron Co. v. Rutherford*, 18 N. J. L. 105, 35 Am. Dec. 528.

⁶⁰ Consult *Blashfield's Instructions to Juries*; *Sackett's Instructions to Juries*.

⁶¹ See forms adopted to various actions in 2 *Blashfield on Instructions* (2nd Ed.), §§ 2165-2180.

following examples on a few questions will illustrate this, and possibly help to direct a search for additional precedents. The jury may be charged in proper terms that no distinction should be made because one of the parties is a corporation, but that the case should be decided as one between individuals.⁶² The general rule, that the instructions should be limited by, conformable to, and complete upon the issues, has been applied in the manner shown in the footnotes in respect to instructions on organization and existence,⁶³ on name and identity of the corporation,⁶⁴ corporate power or want of power,⁶⁵ the theory on which the corporation is liable on contract,⁶⁶ and the responsibility of the corporation for the act or contract of its agents.⁶⁷ Similarly the general requirement that they must be correct in law, certain in application, and intelligible in meaning to laymen has been applied to instructions on the use of technical terms, like "de jure" and "de facto," without explaining and defining their meaning in common words,⁶⁸ estoppel to deny incorporation admitted by an appearance,⁶⁹ the use of oral evidence in proof, explanation or contradiction of min-

⁶² A requested charge that the action should be decided like one between two individuals making no distinction because the party is a corporation is correct; but when coupled with objectionable language should be refused. *Chicago & E. I. R. Co. v. Burridge*, 211 Ill. 9, 71 N. E. 838, rev'g 107 Ill. App. 23.

⁶³ An instruction on compliance with formalities of organization was rightly refused where the pleadings at most made no issue beyond existence of the corporation. *Riverside Sand & Cement Mfg. Co. v. Hardwick*, 16 N. M. 429, 120 Pac. 323.

⁶⁴ An instruction must not assume a difference between corporations where there was merely a change in name. *Wilson v. Chesapeake & O. R. Co.*, 21 Gratt. (Va.) 654. Such either passes on a matter of evidence or else rules erroneously as a matter of law that suits must be in the original name. *Id.*

⁶⁵ Instruction on ultra vires should not be given when not in issue by special allegation. *Conowingo Land Co.*

of *Cecil County v. McGaw*, 124 Md. 643, 93 Atl. 222.

⁶⁶ Where the case will support either recovery on a contract made by a director claimed to have lacked authority, or on a quantum meruit for services, the instruction should not ignore either. *Gulf & I. Ry. Co. of Texas v. Campbell* (Tex. Civ. App.), 108 S. W. 972.

⁶⁷ Instruction as to validity of contract dependent on officer's authority must not overlook possibility that it was ratified. *Alabama Securities Co. v. Dewey*, 156 Ala. 530, 47 So. 55.

⁶⁸ Charges involving use of words de jure and de facto without explaining them held to have been misleading. *C. Aultman & Co. v. Connor*, 25 Ill. App. 654.

⁶⁹ An instruction is correct that if defendant appeared and defended the suit and appealed from the judgment of the justice to the county court it was estopped to deny corporate existence. *Burlington & M.^b R. R. Co. v. Burch*, 17 Colo. App. 491, 69 Pac. 6.

utes,⁷⁰ the effect of fraud on a resolution by directors,⁷¹ liability on promoters' contracts,⁷² or those with stockholders,⁷³ the existence of an agency for the corporation,⁷⁴ and the agent's authority.⁷⁵ And as in all other cases, an instruction or the refusal of one, though erroneous, may be harmless and hence not a ground for reversal or a new trial.⁷⁶

Any issue or the whole case may be taken from the jury, or must be taken from it, according to the rules which are of general application.⁷⁷ Therefore if any essential proof is lacking, such as a jurisdictional fact including the facts of venue, where that goes to the jurisdiction of the case and cannot be waived,⁷⁸ or the fact of cor-

⁷⁰ Where minutes were in evidence calling for explanation, a charge that "oral testimony in the case for the purpose of varying or modifying" the minutes could not be considered, was properly refused and one given that minutes could be so explained but not changed. *Indian Refining Co. v. Buhrman*, 220 Fed. 426.

Charge on admissibility of oral evidence as depending on whether articles required a record held incorrect and misleading. *Du Quoin Star Coal Min. Co. v. Thorwell*, 3 Ill. App. 394.

⁷¹ Charge on nonbinding effect of a resolution of directors made in fraud and at an illegal meeting, held correct. *Goodwin v. United States Annuity & Life Ins. Co.*, 24 Conn. 591.

⁷² Instructions as to liability on promoter's contracts held correct and not misleading. *Delgarno v. Middle West Portland Cement Co.*, 93 Kan. 654, 145 Pac. 823.

⁷³ Charge on issue that services were rendered to stockholders and not to corporation, held correct. *Vincent v. S. Alexander's Sons Co.*, 85 Conn. 512, 84 Atl. 84.

⁷⁴ A charge that the agent served was such if he was "transacting business for defendant" is too vague and is misleading, where he was a correspondent in the brokerage business and was paid by commissions. *Equitable Produce & Stock Exchange v. Keyes*, 67 Ill. App. 460.

It is error to charge that until "notice to" plaintiff the agent remains competent for service. *Equitable Produce & Stock Exchange v. Keyes*, 67 Ill. App. 460. See also § 3002, *supra*.

⁷⁵ Instruction as to authority of secretary and credit man to make contract held to have properly presented law on effect of previous representation without dissent from corporation. *Fuller v. Tootle-Campbell Dry Goods Co.*, 189 Mo. App. 514, 176 S. W. 1091.

⁷⁶ § 3125, *infra*.

⁷⁷ It was not error to instruct that plaintiff was a corporation *de facto* and thus take the question of nuli corporation away from the jury, if on the evidence there was no other possible conclusion. *Woodland Social Entertainment Ass'n v. Anderson*, 187 Ill. App. 507.

⁷⁸ Under the statute the judgment is "utterly void" if the wrong venue be chosen; hence a correct one must appear or be proven. *Southern Ry. Co. v. Brock*, 115 Ga. 721, 42 S. E. 65.

Nonsuit is proper where neither by evidence nor admission is there shown the facts essential to support the venue in an action for injuries. *Tatum v. Seaboard Air-Line Ry.*, 128 Ga. 813, 58 S. E. 465.

On such failure of proof judgment for plaintiff cannot be sustained. *Atlantic Coast Line R. Co. v. Du Pont*, 122 Ga. 251, 50 S. E. 103.

porate existence,⁷⁹ or of corporate power,⁸⁰ or of agency for the corporation,⁸¹ the court should dispose of the case by nonsuit or direction of the verdict conformably to proper practice. Instances abound of taking the case from the jury on the failure to prove some part of the substance of the cause of action, for example in actions for injuries from negligence by the servants of the corporate defendant, but in such actions the general rules are applied without being in the slightest way influenced by the fact that the corporation is a party. The objection for want of proof of an essential corporate fact may be made at any time before the case goes to the jury.⁸² A motion to take the case from the jury for failure to prove corporate existence should not be made and granted in a way which will prevent supplying the proof if it be possible.⁸³ The admission in a superseded demurrer cannot meet the requirements of proof, when failure is urged on a demurrer to the evidence for failure to prove incorporation.⁸⁴

§ 3117. Verdict and findings. Nothing about the law of verdicts and findings needs to be differentiated or varied as applied in corporation actions. In those cases where the corporation is a co-party with others, a general verdict applies to all of them.⁸⁵ If it be against the corporation sued with its officers for tort, and in their favor, it is good as a verdict notwithstanding error in the implied findings might be assigned thereon for a new trial.⁸⁶ The verdict, and like it

Verdict for plaintiff is contrary to evidence if such proof be lacking. *Southern Ry. Co. v. Brock*, 115 Ga. 721, 42 S. E. 65.

⁷⁹ Nonsuit for failure to prove incorporation will not be granted where no objection was made at the trial and the parties assumed that plaintiff's assignor was incorporated. *Kennedy v. Cotton*, 28 Barb. (N. Y.) 59.

⁸⁰ *Phenix Bank v. Curtis*, 14 Conn. 437, 36 Am. Dec. 492.

⁸¹ May be directed where issue of agency for corporation is not sustained by any proof thereof. *Hassell & Powell v. Woodstock Iron Works*, 137 Ga. 636, 73 S. E. 1052.

⁸² Want of proof of an essential corporate power. *Phenix Bank v. Curtis*, 14 Conn. 437, 36 Am. Dec. 492.

⁸³ Failure to prove corporate existence should be challenged by nonsuit,

admitting of leave to make proof, and not by demurrer to evidence. *Gilham v. State Bank*, 3 Ill. 248, 35 Am. Dec. 105.

⁸⁴ Cannot be supplied from a general demurrer to the complaint after it was overruled and defendant answered. *Jackson v. Bank of Marietta*, 9 Leigh (Va.) 240.

⁸⁵ A general verdict for plaintiff is one against both the corporate and the individual defendants. *Lewis v. Gove County Tel. Co.*, 95 Kan. 136, Ann. Cas. 1916 B 1035, 147 Pac. 1122. Great numbers of precedents on this point may be found in general treatises on practice.

⁸⁶ Verdict against corporation only when sued with officers for tort is valid on appeal but might have been urged as ground for new trial. *Bingham v. Lipman*, 40 Ore. 363, 67 Pac.

the award in condemnation proceedings, is valid if the corporation be identified thereby, though a slight variance in its name appears.⁸⁷ The verdict is supported by a presumption that incorporation, if necessary to be proved, was proved;⁸⁸ but when it is contrary to the evidence on the issue of corporate existence, it cannot be sustained on the theory that it responded to another equally unproved plea.⁸⁹

A finding on incorporation is improper if it is not in issue.⁹⁰ A finding will not be construed to produce a repugnancy.⁹¹ When in issue, an implied finding that a corporation existed overcomes one that there was no proof of it.⁹²

VIII. JUDGMENT AND ENFORCEMENT; APPEAL AND REVIEW

§ 3118. Judgment in general. The judgment must be in the corporate name or by certain reference identify it as the party to the judgment.⁹³ The general word "defendants" will include all of them, the corporation with the others, and the word "defendant" may suffice on the principle that the singular includes the plural,⁹⁴ but the word "defendants" used in this way was held, unsoundly it would

98. Many other cases on this point may be found in general treatises on practice in new trial and appeal.

⁸⁷ A misnomer in the verdict against the only defendant in the case is harmless, it seems. *Atlanta Terra Cotta Co. v. Georgia Ry. & Elec. Co.*, 132 Ga. 537, 64 S. E. 563.

A variance in name in an award in condemnation proceedings which nevertheless leaves the corporation identified is immaterial. *Peirce v. Somersworth*, 10 N. H. 369.

See generally the doctrine of misnomer, §§ 743, 3041, *supra*.

⁸⁸ After verdict for plaintiff it is presumed that its incorporation was proved. *Girls' Industrial Home v. Fritchey*, 10 Mo. App. 344.

⁸⁹ A verdict apparently based on an issue of *de facto* corporation when there was *de facto* existence shown, will not be sustained on another unproved plea. *C. Aultman & Co. v. Connor*, 25 Ill. App. 654.

⁹⁰ Where incorporation stands admitted or not in issue a finding there-

on is improper. *Moynihan v. Drobaz*, 124 Cal. 212, 71 Am. St. Rep. 46, 56 Pac. 1026.

⁹¹ Findings that the corporation did not and that the president did a thing, held to mean that he did it without authority. *E. W. McLellan Co. v. East San Mateo Land Co.*, 166 Cal. 736, 137 Pac. 1145.

⁹² A finding in action on a judgment that plaintiff, "a corporation, had and recovered" the judgment on a day certain implies that plaintiff is a corporation and is inconsistent with a finding there was no proof of incorporation. *Yankton Nat. Bank v. Benson*, 33 S. D. 399, Ann. Cas. 1916 B 1011, 146 N. W. 582.

⁹³ Sufficiency of complaint to name and describe it, see § 3041, *supra*.

⁹⁴ Although the caption of the judgment entry describes a co-defendant corporation only by the abbreviation, "et al.," this is sufficient to bind it, where the record elsewhere shows that it was ruled to plead and did so, and the judgment runs against "defend-

seem, not to include a corporation against which no process had been issued.⁹⁵ A recital that a corporation was made a defendant will be construed to mean that it was so made with respect to such rights as warranted its being a party.⁹⁶ The statute may require that the record show the facts of incorporation.⁹⁷ The rule that the name may import a corporation without express description as such, also applies to judgments,⁹⁸ and other parts of the record may supply the fact of incorporation to such a judgment.⁹⁹ The name should conform to that in the process and pleadings.¹ Under the general doctrine a slight and not misleading error in name does not vitiate the judgment.² The same rule applies to a judgment before a justice.³ An abbreviation of the corporate name in the minute entry is made certain by the full name appearing elsewhere in the judgment roll.⁴ A variance in name or misnomer is immaterial where the corporation appeared to the name

ants." *Union Trust Co. v. Atchison, T. & S. F. R. Co.*, 8 N. M. 159, 42 Pac. 89.

In an earlier writ of error in the same case by the co-defendant the word "defendant" was held to describe both defendants under the statutory rule that the singular may be read as plural. *Madden v. New Mexico & S. P. R. Co.* (N. M.), 34 Pac. 50.

⁹⁵ A record of judgment against "defendants" reciting an appearance by "defendants" without any sufficient process against one of them, a corporation, imports no jurisdiction over it, and "defendants" is to be construed as describing other defendants. *De Wolf v. Mallett's Adm'r*, 3 Dana (Ky.) 214.

It is not apparent why the corporation might not have appeared voluntarily as recited regardless of any process.

⁹⁶ Recital that a corporation, which pleaded itself to be a consolidation embracing defendant, "has been duly made a party defendant," means that it was made so as a successor in interest. *Haynes v. Backman*, 97 Cal. xvii, 31 Pac. 746.

⁹⁷ Under a statute it must appear somewhere in the record that the

plaintiff is a corporation, and of what state or country, else judgment cannot be entered. *C.-J. Toerring Co. v. R. E. Moore Co.*, 1 Boyce (Del.) 269, 75 Atl. 786.

⁹⁸ *Winner v. Weems*, 77 Miss. 662, 27 So. 618.

⁹⁹ Judgment against it by name is valid against the corporation, though not described as such, the fact appearing elsewhere in the record. *C. M. Carrier & Son v. Poulas*, 87 Miss. 595, 40 So. 164.

¹ *Bank of Metropolis v. Orme*, 3 Gill (Md.) 443; *Agnew v. Bank of Gettysburg*, 2 Harr. & G. (Md.) 478. See § 3041, *supra*, as to pleading name, § 3085, *supra*, as to variance in name.

² § 743, *supra*, also § 3085, *supra*.

Omission of the words "of Kansas," is not fatal. *King v. Wilson*, 86 Kan. 227, Ann. Cas. 1913 B 1246, 120 Pac. 342.

³ A mere misrecital of the company's name in a justice's judgment does not vitiate it. *Wilton Town Co. v. Humphrey*, 15 Kan. 372.

⁴ Such an abbreviation of the corporate name is a mere irregularity. *Lampkin v. Louisville & N. R. Co.*, 106 Ala. 287, 17 So. 448.

in the judgment,⁵ and the judgment may be entered in that name by which it did appear.⁶ Judgment against a de facto corporation is binding on it even as against rights derived from it later after acquiring a de jure existence.⁷ If lacking in jurisdiction recited or presumable, it is collaterally assailable by the purported parties.⁸ Recitals or findings that all parties appeared include by necessary construction the corporate parties in the case.⁹ Enough must appear in the record somewhere to support the jurisdiction, where the suit is against a foreign corporation,¹⁰ but details and particulars of juris-

⁵ Variance in name of defendant is met if the one named in the judgment appeared and averred a consolidation showing identity of the two. *Haynes v. Backman*, 97 Cal. xvii, 31 Pac. 746.

Judgment by an incorrect name is good if the corporation appeared thereto and waived the misnomer. Accordingly an indemnitor against such judgments was bound and could not escape liability. *American Surety Co. of New York v. Maryland Casualty Co.*, 97 Kan. 275, 155 Pac. 59.

Judgment against Algona College on a record showing the name Trustees of Algona College and acceptance of service by Algona College is good. Misnomer was waived. *Wilson v. Baker*, 52 Iowa 423, 3 N. W. 481.

Misnomer consisting in use of "Railroad" for "Railway" in corporate title held waived where defendant properly served allowed the case to go to default without objection. *Alabama & V. Ry. Co. v. Bolding*, 69 Miss. 255, 3 Am. St. Rep. 541, 13 So. 844.

Decree is binding though in former name of defendant which answered to that name without objection. *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202.

⁶ Where a corporation wrongly named answers by its right name the judgment may be entered accordingly. *Mahon v. San Rafael Turnpike Road Co.*, 49 Cal. 269.

On appeal to merits from justice judgment may be entered in correct

corporate name appearing of record. *Leftwick v. Thornton*, 18 Iowa 56.

Misnomer in indictment held to have been corrected so that judgment by correct name against corporation was not impeachable for variance. *Claryville, G. L. & B. Turnpike Co. v. Com.*, 32 Ky. L. Rep. 861, 1157, 107 S. W. 327.

⁷ Judgment against a corporation de facto, which afterwards perfects its incorporation so as to become one de jure, is good from the time of its rendition as against subsequent liens. *Bergen v. Porpoise Fishing Co.*, 41 N. J. Eq. 238, 3 Atl. 404.

⁸ § 3124, *infra*.

A special form of process allowable under the charter must be shown in the record. *Miami Exporting Co. v. Brown*, 6 Ohio 535.

Record held to show return of personal service and judicial finding thereof. *Humphrey v. Coquillard Wagon Works*, 37 Okla. 714, 49 L. R. A. (N. S.) 600, 132 Pac. 899.

⁹ Recital, "all parties appearing" means that a corporate party appeared as well as the others. *Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co.* (Tex. Civ. App.), 111 S. W. 417.

¹⁰ Personal judgment against foreign corporation requires showing in the record that it was engaged in business in the state, but it need not be shown by return to summons. *St. Clair v. Cox*, 106 U. S. 350, 27 L. Ed. 222; *Farrell v. Oregon Gold Min. Co.*,

diction are not required.¹¹ The record should show the facts sustaining a venue at a place other than the place where the corporation is ordinarily suable.¹²

The judgment is erroneous if the record shows a cause of action on which the corporation could not be bound.¹³ As in all other stages of the action the corporation and the members are distinct, so that nothing can be adjudged for or against one on a suit by or against the other,¹⁴ and a judgment for it is not to be taken as one for an individual trading under the same name.¹⁵ When the corporation is sued with others, the judgment must be joint or may be several according to the nature of the cause, though under some statutes it is permissible to enter judgment on a joint liability against part of the defendants reserving the question of the liability of the others for further proceedings, and other statutes permit dismissal of those not liable and judgment against the remaining defendants.¹⁶ Without such statutes on a joint cause of action against the corporation and others a necessity of dismissing as to one entails dismissal as to all.¹⁷ Judgment

31 Ore. 463, 49 Pac. 876, rehearing denied 50 Pac. 186.

¹¹ The record showing service through the state auditor need not show whether defendant was a foreign corporation or the details of service, no particular form being required. A simple indorsement of acceptance with the date was enough. *S. M. Smith Ins. Agency v. Hamilton Fire Ins. Co.*, 69 W. Va. 129, 71 S. E. 194.

¹² On direct attack the judgment record should show grounds for suing a domestic corporation elsewhere than the county of its principal place of business. That it had a branch where sued must appear. *Beal-Doyle Dry Goods Co. v. Odd Fellows Bldg. Co.*, 109 Ark. 77, 158 S. W. 955.

¹³ Judgment on a record showing a writing signed by the president for payment of money, but not under corporate seal, is bad, it being legally unable to contract without seal. *McBean v. Irvine's Ex'r*, 4 Bibb (Ky.), 17.

¹⁴ Judgment for or against individual members of corporate parties is

erroneous. *Campbell v. Brunk*, 25 Ill. 225.

Individual judgment on process and pleadings against the corporation is bad. *McBean v. Irvine's Ex'r*, 4 Bibb (Ky.) 17.

Judgment in action against the corporation and its officer for wrongful discharge from employment by it can only be against the corporation and not include a lien on the officer's property. *Hampton v. Buchanan*, 51 Wash. 155, 98 Pac. 374.

Judgment against individuals will not support levy against corporation. *Lillard v. Porter*, 2 Head (Tenn.) 177.

¹⁵ Judgment as for a corporation is not a judgment for an individual trading under the same name. *McCourt v. Grove*, 162 Mo. App. 521, 142 S. W. 768.

¹⁶ Consult the local statutes and books of practice. See *Black on Judgments*, § 208.

¹⁷ Where the corporation and its stockholders are sued jointly on an obligation sealed by it, but not sealed by them and therefore barred as to

should be against all defendant corporations if all of them are liable.¹⁸

Judgment will be treated as one on the issues where it disposed of them together with a motion.¹⁹

A motion in arrest will not reach failure to allege incorporation of plaintiff,²⁰ or that the contract was not in the form required by the statute for corporate contracts,²¹ or a misnomer.²² Though the judgment is ordinarily limited by the issues and the verdict thereon, yet in case of a dissolution plainly apparent the court may interfere after verdict.²³

The record of the judgment and the docketing and indexing of it will be governed by ordinary rules, and the statutes, if any, which regulate such matters; but it is to be noted that a default judgment against a corporation requires a showing on the record of the acquisition of jurisdiction somewhat more particularized than would be necessary to default a natural person.²⁴ The warrant or attorney to appear for the corporation need no longer be spread on the record, since the record of the appearance by the attorney for the corporation, coupled with the presumption that he was authorized, sufficiently shows his authority.²⁵

Notice of assignment of the judgment, it was held, may be given to defendant through its attorney in the action who remains its attorney at the time of the notice.²⁶

§ 3119. Defaults and confessions. Like any other form of judgment, a default judgment must have been before a competent court

them, the action must be dismissed as to all. *Somers v. Florida Pebble Phosphate Co.*, 50 Fla. 275, 39 So. 61.

¹⁸ *White v. Pecos Land & Water Co.*, 18 Tex. Civ. App. 634, 45 S. W. 207.

¹⁹ Judgment granting the motion and sustaining the answer on hearing on a motion to dismiss because the writ, describing defendant as a corporation, failed to show whether by foreign or domestic law, and on hearing simultaneously on an answer "in abatement," alleging that it was a foreign corporation not within the state, will be regarded as judgment on the answer. *Young v. Providence & S. S. S. Co.*, 150 Mass. 550, 23 N. E. 579.

²⁰ Motion in arrest will not lie for plaintiff's failure to aver incorpora-

tion. *Wilson v. Sprague Mowing-Machine Co.*, 55 Ga. 672.

²¹ *Kenner v. Lexington Mfg. Co.*, 91 N. C. 421.

²² Misnomer cannot be urged in arrest of judgment. *East Tennessee, V. & G. R. R. Co. v. Evans*, 6 Heisk. (Tenn.) 607.

²³ *Eagle Chair Co. v. Kelsey*, 23 Kan. 632.

²⁴ § 3119, *infra*.

²⁵ The warrant of attorney need not appear in the record. The former rule requiring it is obsolete. *Gaines v. Tombeckbee Bank, Minor* (Ala.) 50. See also §§ 2934, 3046, *supra*.

²⁶ Notice of assignment of a judgment against a foreign corporation. *Daniels v. Pratt*, 2 Tenn. Ch. 116.

and between parties before it in respect of a cause of action, all of which must in some manner be ascertainable of record or presumed. The judgment roll or record except in the features hereafter mentioned consists of the same papers and is made up like all other cases. There is nothing peculiar to corporation actions.²⁷ The term default is here used in two senses, first, where after service or appearance to the action the defendant fails to plead or attend at the trial, and second, where it fails to plead in a manner sufficient under the law to make any issue. The second is analogous to the chancery practice of taking the bill pro confesso, and is illustrated by those cases wherein by law the answer must be verified or an affidavit put in to save the issue and prevent a default. In a previous section²⁸ it has been seen that the practice in many states requires affidavit or verification or an order for trial of issues to prevent default as upon issues taken as confessed. If the issue has not been preserved in this manner the practical effect is a default, though not in the same sense as where service has been had and defendant fails to appear.

The corporation defendant to a default judgment must have been a party; hence where one of two was extinct and the other not a party, default against either was bad.²⁹ And where it had not yet been formed the default is invalid.³⁰ Under statutes it may also be necessary that the record show in some way the fact of incorporation.³¹

A requisite of particular importance in taking default against a corporation is that the record shall contain enough to show the acquisition of jurisdiction. True, it must appear to support any default, but the methods of gaining jurisdiction over the corporation are so much regulated by statute that great care must be taken* to see that the record is complete. For want of a record of any necessary jurisdictional fact it may be impeached collaterally.³² It must therefore show an appearance to the action and a default in pleading to the com-

²⁷ See § 3118, *supra*, as the general requisites of judgment.

²⁸ § 3083, *supra*.

²⁹ Judgment by default against an extinct corporation sued by an alias of a new corporation not party, and in favor of the new corporation, were both bad. *Shamokin Valley & P. R. Co. v. Malone*, 85 Pa. St. 25.

³⁰ Default while corporation was yet unformed is void, and is assailable by affidavit of illegality. *Bartram, Hen-*

drix & Co. v. Collins Mfg. Co., 69 Ga. 751.

³¹ If it does not appear in the title of the suit that plaintiff is a corporation or in the affidavit of demand or elsewhere in the record of what state or country it is a corporation, judgment cannot be entered. *C. J. Toerring Co. v. R. E. Moore Co.*, 1 Boyce (Del.) 269, 75 Atl. 786.

³² § 3124, *infra*.

plaint,³³ or else a service of process and return or other proof thereof³⁴ on one of the persons made competent for service by the statute,³⁵ though it is not essential that all facts supporting service be shown by return to service if they otherwise appear of record.³⁶ If the officer served was disqualified by interest to be served for the corporation, the default cannot be entered.³⁷ In Alabama proof to the court is additionally required that the person served bore the purported relation to the corporation, and the court must so find. Nothing short of this will suffice.³⁸ In Texas proof must be made where the name of the agent is not alleged in the petition with a request that citation be served on him,³⁹ and the proof and finding does not dispense with

³³ As to appearance and effect thereof, and acknowledgments of service, see §§ 3017-3019, *supra*.

³⁴ Return in record must show legal service. *Willamette Falls Canal, Milling & Transportation Co. v. Williams*, 1 Ore. 112. See also § 3012, *supra*.

³⁵ Statutory person must have been served. *Aiken v. Quartz Rock Mariposa Gold Min. Co.*, 6 Cal. 186.

If the return does not show the person's relation to the corporation, and no other part of the record supplies it, a default judgment is bad. *Supreme Ruling of Fraternal Mystic Circle v. Sommers*, 108 Miss. 54, 66 So. 322.

A recital in the default judgment that defendant had been duly and legally served will not supply such deficiency. *Watkins Machine & Foundry Co. v. Cincinnati Rubber Mfg. Co.*, 96 Miss. 610, 52 So. 629. As to persons who may be served, see § 2991, *supra*.

³⁶ *El Paso & S. W. R. Co. v. Kelly* (Tex. Civ. App.), 83 S. W. 855.

³⁷ *Buck v. Ashuelot Mfg. Co.*, 4 Allen (Mass.) 357. See also § 3011, *supra*.

³⁸ The settled rule requires proof and a record showing thereof that the person served was the person legally authorized thereto. The return to process is not enough. There must be a judicial inquiry and finding. *Rarden Mercantile Co. v. Hart*, 186 Ala.

513, 65 So. 327; *Ex parte National Lumber Mfg. Co.*, 146 Ala. 600, 41 So. 10; *Manhattan Fire Ins. Co. v. Fowler & Co.*, 76 Ala. 372; *Oxford Iron Co. v. Quinchett*, 44 Ala. 487; *Talladega Ins. Co. v. McCullough*, 42 Ala. 667.

The same is necessary as to a decree pro confesso. *Southern Home Building & Loan Ass'n v. Gillespie*, 121 Ala. 295, 25 So. 564.

Similar inquiry and proof is made where default is taken after voluntary acknowledgment of service by an agent or officer. *Talladega Ins. Co. v. Woodward*, 44 Ala. 287.

It will be presumed that it did so where the decree recites the fact that the court so found. *Roman v. Morgan*, 162 Ala. 133, 50 So. 273.

Neither the sheriff's return, nor the clerk's statement, nor the plaintiff's affidavit will supply this finding. *Montgomery & E. R. Co. v. Hartwell*, 43 Ala. 508; *Southern Exp. Co. v. Carroll*, 42 Ala. 437; *Oxford Iron Co. v. Spradley*, 42 Ala. 24; *Wetumpka & C. R. Co. v. Cole*, 6 Ala. 655.

A register's recital that "it was made known" that the proper person was served will not suffice. *Boyett v. Frankfort Chair Co.*, 152 Ala. 317, 44 So. 546.

³⁹ Proof of proper service must be made if petition does not allege name of agent and citation directs service on him. *Galveston, H. & S. A. R. Co. v. Gage*, 63 Tex. 568; *Miller v. First*

a return of service.⁴⁰ If a special or summary jurisdiction is invoked that must appear of record to have been obtained.⁴¹

The service must have been in season to have allowed time to plead to the complaint before the default was taken.⁴²

A cause of action pertaining to the corporation must also be stated in the pleadings, and appear of record.⁴³

In chancery the bill is taken for confessed if there is no denial or traverse of its sworn allegations in the answer, or if the answer is insufficient as such.⁴⁴ The sustaining of exceptions to an answer destroys defendant's proofs and leaves the bill stand as confessed; but this rule does not apply where a corporation answers under seal, for no exceptions can be taken thereto, it not being evidence.⁴⁵ Failing to answer a bill, moreover, confesses only what is alleged; and if a necessary fact is not alleged a decree *pro confesso* cannot stand.⁴⁶

There must be a showing on the record that the default occurred⁴⁷ and was declared.

State Bank & Trust Co. of Santa Anna (Tex. Civ. App.), 184 S. W. 614.

When the petition avers the existence and name of a local agent and the citation directs service on him, a judgment by default can be taken without proof that he was an agent. *Galveston, H. & S. A. R. Co. v. Gage*, 63 Tex. 568; *Houston & T. C. R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808.

⁴⁰ To sustain default the return to process must show legal service even though also recited in the judgment. *Miller v. First State Bank & Trust Co. of Santa Anna* (Tex. Civ. App.), 184 S. W. 614.

⁴¹ *Crawford v. Planters' & Merchants' Bank*, 6 Ala. 289.

⁴² There must have been such service that time to answer had passed for the corporation. Modes of service explained. *Dock v. Elizabethtown Steam Mfg. Co.*, 34 N. J. L. 312. This is a matter in which general law governs and the local statutes and decisions must be followed. See also § 3009, *supra*.

⁴³ When founded on a note to the cashier, some indorsement or investiture of title in the bank must appear.

McWalker v. Branch Bank, 3 Ala. 153.

When signature by defendant is alleged and a contract bearing the alleged name without that of any officer as the executing officer, it will support a default judgment. *Rock Island Lumber & Manufacturing Co. v. Fairmount Town Co.*, 51 Kan. 394, 32 Pac. 1100. See generally § 3038 *et seq.*, *supra*, especially §§ 3041, 3045, 3056.

⁴⁴ Where an answer of individuals is filed which does not suffice for the corporation and time is past, default may be taken by procedure on the bill as confessed. *Thoroughgood v. Georgetown Water Co.*, 9 Del. Ch. 84, 77 Atl. 720.

⁴⁵ Code, § 4407, entitling plaintiff to take his bill *pro confesso* on sustaining of his exceptions to the answer, has no application where exceptions are improperly made to a corporation's answer under its seal. *Smith v. St. Louis Mut. Life Ins. Co.*, 2 Tenn. Ch. 599.

⁴⁶ Allegation of corporate power. *Frye v. Bank of Illinois*, 10 Ill. 332.

⁴⁷ A recital that defendants being called came not means, as to a corporate defendant, that it was present

After the default an inquest of damages or amount must be taken unless a liquidated contract sum is due,⁴⁸ calling the corporate officers for that purpose, as may be allowed by the statutes.⁴⁹ The manner of taking an inquest of damages or amount due is usually regulated by statute or rule of court, and reference to the local practice must be had in this respect.⁵⁰ The common-law practice, to which modern methods are like in their operation, was to enter the judgment that there was a default and thereupon issue a writ of inquiry of damages on the incoming of which final judgment was entered.⁵¹ In New York, where the practice is to require an order for trial of issues and the interposition of an answer within a limited time in actions of certain kinds, judgment may be taken without further application for the amount due on the cause of action;⁵² but this does not apply where the action is in tort for an unascertained amount of damages, and in such a case an application is necessary.⁵³

As an incident to the capacity to sue and be sued, a corporation has the power to confess judgment,⁵⁴ and it may also execute a note containing or having therewith a power to confess judgment on non-

neither itself nor by attorney. *Union Pac. Ry. Co. v. Horney*, 5 Kan. 340.

⁴⁸ An insurance policy requiring adjustment of loss is not a "writing for the payment of money" (Code, § 3285) on which default can be taken and judgment entered without inquest of damages. *Commercial Union Assur. Co. v. Everhart's Adm'r*, 88 Va. 952, 14 S. E. 836.

⁴⁹ On a reference under a foreclosure decree pro confesso plaintiff corporation's officers and clerks may be examined to ascertain the amount due (2 R. S. 187, § 128). *Ontario Bank v. Strong*, 2 Paige (N. Y.) 301.

⁵⁰ Inquest may be taken against defendant corporation under Circuit Court Rule 99 where no affidavit of merits is filed. *Grand Rapids Furniture Mfg. Co. v. Burnham*, 34 Mich. 29.

⁵¹ *Bouvier's Law Dict.*, "Judgment," citing *Tidd's Pract. Forms*, 165-170. See also *Cyclopedic Law Dict.* "Judgment," "Default."

⁵² § 3083, *supra*.

⁵³ Application for judgment is re-

quired where the action is in tort as against a carrier. *Flynn v. Hudson River R. Co.*, 6 How. Pr. (N. Y.) 308.

⁵⁴ **Arizona.** *Shute v. Keyser*, 29 Pac. 386.

District of Columbia. *United States Elec. Lighting Co. v. Leiter*, 19 App. Cas. 575.

Nebraska. *Solomon v. C. M. Schneider & Co.*, 56 Neb. 680, 77 N. W. 65.

New Jersey. *Stratton v. Allen*, 16 N. J. Eq. 229.

Pennsylvania. *Prouty v. Prouty & Barr Boot & Shoe Co.*, 155 Pa. St. 112, 25 Atl. 1001.

Corporation may confess judgment like any person (Code Civ. Proc. §§ 433-437). *Solomon v. C. M. Schneider & Co.*, 56 Neb. 680, 77 N. W. 65; *Stebbins v. East Society M. E. Church*, 12 How. Pr. (N. Y.) 410, discusses confession by a church corporation without question of its power. See also §§ 2055, 2084, 2136, *supra*, as to authority of particular officers to confess judgment, for cases necessarily implying that the corporation could have confessed it by its proper agencies.

payment.⁵⁵ Furthermore the corporation may consent to the kind of judgment to be entered.⁵⁶ A confession cannot be made when the effect of it is a fraudulent preference of creditors, and some few authorities even hold in obedience to the "trust fund doctrine" that a corporation cannot at all make a preference.⁵⁷ The authority of an officer to confess judgment or execute a warrant of attorney to confess it depends on the nature of the authority possessed by him rather than on his titular office. If the scope of his authority expressly or as an incident to general authority includes such matters the confession or warrant is good; otherwise not.⁵⁸ It has been said that a confession of judgment by an officer upon whom valid service of process might have been made is valid, because if service had been made upon him, he might have suffered judgment to be taken by default, and the judgment should be no less binding where he has made appearance for the purpose of permitting judgment.⁵⁹ There is a distinction between confessing judgment in an action begun and executing an executory agreement to confess it, or a warrant to an attorney to confess it. As to either of the latter the authority of an officer is less easily implied.⁶⁰ A warrant to confess is not an instrument that requires the

⁵⁵ *Holmes v. St. Joseph Lead Co.*, 84 N. Y. Misc. 278, 147 N. Y. Supp. 104, aff'd 163 N. Y. App. Div. 885, 147 N. Y. Supp. 1117. And see *Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115.

⁵⁶ *Forty-Acre Spring Live Stock Co. v. West Texas Bank & Trust Co.* (Tex. Civ. App.), 111 S. W. 417.

⁵⁷ As to the power to make preferential transfers, see chapter on Insolvency, *infra*.

Confessed judgment by president under authority held valid even though corporation was known to be insolvent. *Kilgore v. Nicholson*, 26 La. Ann. 633.

⁵⁸ See §§ 2055 (president), 2084 (secretary), 2136 (general manager), *supra*.

The power of a general manager to confess judgment, or to execute a warrant of attorney to confess it, has been denied in *Stokes v. New Jersey Pottery Co.*, 46 N. J. L. 237.

⁵⁹ *Manley v. Mayer*, 68 Kan. 377, 1 Ann. Cas. 825, 75 Pac. 550.

Acting president was competent to confess judgment in action begun by service on him. *Chamberlin v. Mammoth Min. Co.*, 20 Mo. 96.

A just doubt may be permitted as to the logic of this reasoning. There is certainly a distinction between suffering a default by the inaction of the corporation after its officer has been served and actively confessing judgment by the same officer, especially where, as may be done in many states, a minor agent may be served.

⁶⁰ The president having extensive powers of general management may execute a power of attorney to confess judgment as incident to giving the corporate note. *Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115.

The president, secretary or treasurer can execute a power of attorney to confess judgment only when so authorized by the board. They have no such power by virtue of office. *Joel J. Bailey & Co. v. Snyder Bros.*, 61 Ill. App. 472.

corporate seal under the modern doctrines, unless a statute or the law of the corporation so provides.⁶¹ The effect of such a warrant is to waive service.⁶²

The confession should be in the name of the corporation and not that of the officer who makes it for the corporation.⁶³ Statutes regulative of judgment by confession must be complied with; and when they require the authority to be conferred and evidenced in a given manner it is indispensable that it so appears.⁶⁴ In Illinois when confessed on a warrant not under seal proof of authority of the officers should be filed with the cognovit.⁶⁵

§ 3120. Kind of judgment, relief or damages. Judgments on pleas in abatement and to the jurisdiction are sometimes without prejudice and sometimes in final bar, depending on who prevails and on the nature of the matter pleaded. The rule at common law is that if the plea is decided for the plaintiff, when tried on the merits, final judgment ensues and the corporate defendant cannot have leave to plead over. If not tried on the merits but on a demurrer, or if defendant prevails on the merits, the judgment should be respectively that defendant answer over or that the writ and action abate.⁶⁶ But by far

⁶¹ See generally § 751 et seq., *supra*, as to seal and necessity for it.

A power of attorney executed by the president to confess judgment need not have the corporate seal attached. *Ford v. Hill*, 92 Wis. 188, 53 Am. St. Rep. 902, 66 N. W. 115.

⁶² *Millard v. St. Francis Xavier Female Academy*, 8 Ill. App. 341.

⁶³ A confession by the president describing himself by a variant name of the corporation is bad. In *re Cape Sable Co.*, 3 Bland (Md.) 606.

Confession against president does not affect corporation though he describes himself as president of it. *Davidson v. Alexander*, 84 N. C. 621.

⁶⁴ Confession without action must accord with the statute, and hence must state the claim and show legal authority to the officer confessing for the corporation conferred at a meeting held on notice. A certificate of the resolution should be filed. *Nimocks v. Cape Fear Shingle Co.*, 110 N. C. 20, 14 S. E. 622.

⁶⁵ When confessed on judgment notes signed without the corporate seal, and by the president and secretary, there should be filed with the cognovit proof that the president and secretary had authority to sign the power of attorney to confess the judgment. *Joel J. Bailey & Co. v. Snyder Bros.*, 61 Ill. App. 472.

Affidavit of execution of notes and power of attorney to confess judgment is good though sworn to before the corporation's attorney as a notary public. *Evans v. Schriver Laundry Co.*, 57 Ill. App. 150.

⁶⁶ If the plea be in abatement proper, plaintiff must reply or demur to it. When he replies and tries the issues, prevailing thereon, there will be a final judgment for him. When he demurs and prevails, judgment will be that defendant answer over. But if judgment be for defendant on such a plea, either on issue of fact or on issue of law, it must be that the writ or bill be quashed. This does not strictly

the most common of the pleas of this nature interposed by corporations is that to the jurisdiction over the corporation for want of regular and sufficient service. While this objection is made in many jurisdictions by motion to quash service and return, resulting in a mere continuance of the action after such quashal, yet in others it must be made by plea.⁶⁷ Such a plea would not have been regarded as a technical one in abatement at the common law, but as one in the nature of such a plea. On it, if sustained, the resultant judgment is either that the service be quashed, leaving the action standing for further service if possible, or if it be not sustained that the defendant answer over.⁶⁸ The Tennessee court, however, makes no distinction between this kind of a plea and the technical plea in abatement, and gives judgment on the merits without leave to answer if the plea is found in favor of the service.⁶⁹ On sustaining a plea in the nature of abatement to the jurisdiction of the person for want of proper service on a competent corporate officer, it is technically proper to adjudge that plaintiff take nothing and not that the suit be dismissed.⁷⁰ The technicalities of the form of the judgment on a plea in abatement, do not often arise under the codes, where the issues are frequently all tried together. If the plea was sustained a dismissal without prejudice or on the merits would be the form corresponding to the common law judgment; and if not sustained the decision on the main issues would dispose of the case, all being tried together, or the case would be continued for better service or for answer to the merits if the issues in abatement were tried separately.⁷¹ The more common prac-

apply to a so-called plea in abatement by which agency of the person served is traversed, for such was not among the known common-law pleas in abatement. On its being found against the corporation so pleading it, leave to answer to the merits should be given. *Equitable Produce & Stock Exchange v. Keyes*, 67 Ill. App. 460. See also *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124.

⁶⁷ See §§ 3014, 3069, *supra*.

⁶⁸ See notes 66, 67, preceding.

⁶⁹ Where the plea in abatement for want of service on a competent agent is tried on the merits, judgment against defendant carries the right to have damages assessed, and leave to plead over is not allowable. *Simp-*

son v. East Tennessee, V. & G. Ry. Co., 89 Tenn. 304, 15 S. W. 735, disproving the dictum and implied decision to the contrary in *J. G. Battelle & Co. v. Youngstown Rolling Mill Co.*, 16 Lea (Tenn.) 355, where the plea was sustained.

⁷⁰ *Hartzell v. Maryland Casualty Co.*, 139 Ill. App. 366.

⁷¹ See *Atlanta & C. Air-Line Ry. Co. v. Harrison*, 76 Ga. 757; *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625; *Davidsburgh v. Knickerbocker Life Ins. Co.*, 90 N. Y. 526; *Gundlin v. Hamburg-American Packet Co.*, 8 N. Y. Misc. 291, 28 N. Y. Supp. 572; *Perry v. Erie Transfer Co.*, 28 Abb. N. Cas. (N. Y.) 430, 19 N. Y. Supp. 239.

tice and tendency is to continue the case so that service may be perfected, or so that defendant may plead over; and not to dismiss finally if the adjudication of the rights of parties on the merits would be prevented thereby.⁷² A justice of the peace has no power to so continue it, however, unless the statute confers it, and the action will stand abated or discontinued ipso facto if the service is defective.⁷³ It would be error to dismiss in limine for want of jurisdiction in the particular venue, where it was dependent on the existence of the cause pleaded which could only be known as result of a trial.⁷⁴ Where want of jurisdiction over the foreign corporation and consequently over the cause of action appears under the New York statutes a dismissal must ensue.⁷⁵ A plea will result in judgment as to that defendant who made it, and not as to others.⁷⁶

In the federal courts the case will be dismissed or remanded, if it appears that federal jurisdiction does not exist or that the case was wrongly removed.⁷⁷ After removal if the service be quashed and the federal court lacks power to issue any alias summons which will reach defendant, a dismissal is necessary.⁷⁸ A case will be dismissed and

⁷² If service is defective and can be perfected the case should be continued to allow it. *Atlanta & C. Air-Line Ry. Co. v. Harrison*, 76 Ga. 757.

By failure to serve the president of an express company, the agent having been served instead, the suit will not abate on plea with judgment accordingly, but time to serve the president and thus perfect the service will be given. *Conner v. Southern Exp. Co.*, 37 Ga. 397. See also the Illinois cases last cited, note 66, *supra*.

⁷³ If too short time after service is given in justice's court the action will abate or stand discontinued, unless statutes give power to continue. *Michigan Southern & N. I. R. Co. v. Shannon*, 13 Ind. 171. Code 1852 (2 R. S. 454, § 22) gave such power. *Id.*

⁷⁴ On an exception to jurisdiction *ex ratione personae* averring simply a domicile in another parish, a petition showing either a trespass or trespass on the case should not have been dismissed in limine on evidence that the act was done under public authority, but should have gone to trial where

the existence of such cause of action and consequently of jurisdiction could be decided. *Buteau v. Morgan's Louisiana & T. R. & S. S. Co.*, 121 La. 807, 46 So. 813.

⁷⁵ *Robinson v. Oceanic Steam Nav. Co.*, 112 N. Y. 315, 2 L. R. A. 636, 19 N. E. 625; *Davidsburgh v. Kniekerbocker Life Ins. Co.*, 90 N. Y. 526; *Gundlin v. Hamburg-American Packet Co.*, 8 N. Y. Misc. 291, 28 N. Y. Supp. 572; *Perry v. Erie Transfer Co.*, 28 Abb. N. Cas. (N. Y.) 430, 19 N. Y. Supp. 239.

⁷⁶ Dismissal for want of allegation and proof of authority of the president to bring the suit is error as to a defendant which did not except thereto, though others did, and which excepted only on a distinct ground and was overruled on that. *Pardee Co. v. H. Alfrey Heading Co.*, 129 La. 749, 56 So. 660.

⁷⁷ See §§ 2965, 2976, 3069, 3076, *supra*.

⁷⁸ *Stowe v. Santa Fe Pac. R. Co.*, 117 Fed. 368.

not remanded if it was commenced by garnishee process ineffectual for an action of that kind.⁷⁹

So far as the merits go, the judgment against or for a corporation and the relief appropriate to the action or the measure of damages will necessarily be governed by the general law, and reference thereto is required. Some causes of action peculiar to corporations, especially those between it and the officers and members, are treated elsewhere in this treatise, and the proper judgment or relief is therewith discussed.⁸⁰ In equity the decree will be molded to the necessities of the case, and as in ordinary cases may include equitable relief and damages accessory thereto.⁸¹ If judgment is given for a plaintiff suing representatively for other stockholders, it should decree application of available funds to those who should come in under the decree.⁸² Damages for refusal to transfer shares is the value of them at the time of refusal or within a reasonable time afterwards, or, in case of transfer for security, the amount of the debt and interest lost thereby.⁸³ A similar measure of compensation is allowable for conversion of his stock.⁸⁴ Compensatory damages may be awarded for expulsion of plaintiff from membership or denial of his rights as such, as well as equitable or coercive remedies for reinstatement,⁸⁵ or for refusal to permit a participation in an allotment of new stock,⁸⁶ and compensa-

⁷⁹ The garnishees are not necessary parties requiring a remand as to them. *Macurda v. Globe Newspaper Co.*, 165 Fed. 104.

⁸⁰ As to damages, see generally *Sutherland on Damages*.

As to relief between corporation and officers,, or corporation and members, see Chap. 42, *supra*, chapter on Stock and Stockholders, *infra*.

As to relief in equity or in extraordinary proceedings, see chapters on Execution and Creditors' Bills; Injunction; Receivers; Forfeiture, Dissolution and Winding Up; Stock and Stockholders; Quo Warranto; and Mandamus, *infra*.

And see general works on equity, e. g., *Fletcher Eq. Pl. & Pr.*; *Pomeroy, Eq. Juris.*, 3rd Ed.

⁸¹ Damages may be awarded against the corporation and injunction against it and its co-defendant officers and agents, as equity requires. *Cedar*

Lake Hotel Co. v. Cedar Creek Hydraulic Co., 79 Wis. 297, 48 N. W. 371.

⁸² Where the suit is by a stockholder on behalf of himself and all others who may come in to recover preferred dividends, the proper relief was to decree application of net earnings to dividends allowing the other holders to come in and prove their rights under the decree. *Prouty v. Michigan Southern & N. I. R. Co.*, 4 *Thomps. & C. (N. Y.)* 230.

⁸³ See chapter on Stock and Stockholders, subd. Refusal to Transfer Shares, *infra*, where it will be seen that another rule allowing the highest subsequent value attained by the shares will be allowed by a few courts.

⁸⁴ Chapter on Stock and Stockholders, *infra*.

⁸⁵ Chapter on Stock and Stockholders, *infra*.

⁸⁶ Chapter on Stock and Stockholders, *infra*.

tion in damages may be awarded to one who has been defrauded by the issuance of fictitious stock which has come into his hands.⁸⁷ In tort actions against the corporation the ordinary measure of damages applies, including in proper cases the liability for exemplary damages.⁸⁸

§ 3121. Costs and allowances, and security for costs. The decisions exhibit few variations from the general law of costs and allowances, which are due to the corporate nature of one of the parties. In some actions affecting corporations exceptional rules and principles are applied in taxing costs. Thus, in a stockholders' suit a recovery of a fund for the corporate benefit is had and costs and fees are allowed to plaintiff on the theory of benefit to a trust fund, but this is based on an exception to the law of costs arising out of a principle of equity rather than out of corporation law,⁸⁹ and the general principle of charging all costs to the trust fund benefited by the action, is applied in corporation actions of that general nature.⁹⁰ A statutory rule that costs shall be disallowed to a party who recovers in a superior court a sum within the jurisdiction of an inferior one where he might have sued, does not apply to a suit against a foreign corporation which was not amenable to any process that the inferior court might have issued.⁹¹ Useless costs of an examination of corporate books at the instance of an adverse party may be charged specially to the person responsible for incurring them.⁹² In like manner motion costs were taxed to a party which caused another to make an unsuccessful motion for an ulterior purpose of getting corporate books into court, where

⁸⁷ Chapter on Stock and Stockholders, *infra*.

⁸⁸ See chapter on Torts, *infra*.

⁸⁹ See chapter on Stock and Stockholders, *infra*. And see also *Burley Tobacco Co. v. Vest*, 165 Ky. 762, 178 S. W. 1102.

Where several corporations in common interest filed a joint answer and had common officers, but all costs except a trifle were charged to one corporation which incurred them, there was no error in dismissing the other two without costs. *Mountain Waterworks Const. Co. v. Holme*, 49 Colo. 412, 113 Pac. 501.

⁹⁰ On a cross-petition whereby all the property of defendant church was administered for the benefit of all

factions, the costs were charged against the trust fund. *Wiswell v. First Congregational Church*, 14 Ohio St. 31.

⁹¹ The prevailing plaintiff against a foreign corporation may have costs in the circuit court though he recovers less than \$100, there being no way of serving such corporation in justice's court. *Reath v. Western U. Tel. Co.*, 89 Mich. 22, 50 N. W. 817.

⁹² Costs of a fruitless examination of corporate books at the instance of an intervener should have been charged against him, and it was error to include it in the general costs. *G. W. Jones Lumber Co. v. Wisarkana Lumber Co.*, 125 Ark. 65, 187 S. W. 1068.

they might have been examined.⁹³ Motion costs unnecessarily made on a useless motion for leave to take default will be denied.⁹⁴ A corporate garnishee may be charged with costs if the fund is sufficient for them and the judgment.⁹⁵ A court, though it dismisses a case for want of jurisdiction over the parties and the cause of action, may notwithstanding have jurisdiction to tax costs against the loser and for the prevailing party.⁹⁶ None can be awarded against an extinct corporation on abating the action against it.⁹⁷ Under statutes counsel fees may be recovered in actions against corporations.⁹⁸

Various statutes require the plaintiff if a nonresident,⁹⁹ or if not a freeholder¹ or otherwise responsible, to give security for costs. And some statutes expressly require it of corporations² or foreign cor-

⁹³ Plaintiffs who caused a receiver, appointed in another action and extended to theirs, to move for a surrender of books and papers of the corporation, the purpose really being to discover evidence for all the creditors, may be taxed with motion costs when unsuccessful. *Interior Conduit & Insulation Co. v. Alexander, Barney & Chapin*, 27 N. Y. Misc. 598, 59 N. Y. Supp. 126.

⁹⁴ Motion costs on application for leave to take default for want of an order for trial of issues served with the answer will be denied where the application was unnecessary. *Hutson v. Morrisania Steamboat Co.*, 64 How. Pr. (N. Y.) 268, 12 Abb. N. Cas. (N. Y.) 278.

⁹⁵ *Baltimore, O. & C. R. Co. v. Taylor*, 81 Ind. 24.

⁹⁶ On dismissing a case for want of jurisdiction over the parties because they are foreign, the court has sufficient jurisdiction to award costs to the prevailing party. *Day v. Sun Ins. Office*, 40 N. Y. App. Div. 305, 57 N. Y. Supp. 1033, *aff'd* 167 N. Y. 543, 60 N. E. 1110, on opinion below; *McMahon v. Mutual Ben. Life Ins. Co.*, 8 Abb. Pr. (N. Y.) 297. *Contra*, *Harriott v. New Jersey R. Co.*, 8 Abb. Pr. (N. Y.) 284.

⁹⁷ *Combes v. Keyes*, 89 Wis. 297, 27 L. R. A. 369, 46 Am. St. Rep. 839, 62 N. W. 89.

⁹⁸ Under a statute allowing attorney's fees in cases for killing animals on railways, such fees in court below were properly included in judgment by the district court on appeal from the justice. *Missouri River, Ft. S. & G. R. Co. v. Shirley*, 20 Kan. 660.

The statute giving counsel fees to plaintiff or the corporation according to whether less or more is recovered than was claimed, provided notice is given for a time certain before commencing action (*Gen. Laws, c. 187, § 34*) entitles plaintiff to such allowance where the verdict was in a second suit commenced after such time though there was an earlier writ never entered. *Smallwood v. New York, N. H. & H. R. Co.*, 26 R. I. 451, 59 Atl. 314.

⁹⁹ Nonresident receivers of a corporation must give security if demanded. *N. Y. Code Civ. Proc. § 3268*; *Myers v. Stephens*, 52 N. Y. Misc. 632, 102 N. Y. Supp. 929.

¹ A statute requiring security of persons not freeholders applies only to natural persons. *Dunmore Mfg. Co. v. Morton, Brayton* (Vt.) 18.

² Revision, § 3442, subjects domestic as well as foreign corporations to this necessity. *D. M. V. Live Stock Ins. Co. v. Henderson*, 38 Iowa 446.

The Kentucky statute is imperative. If the corporation does not give this security, dismissal must follow. *Bank*

porations³ which shall bring any action or suit.⁴ A national bank doing business within the jurisdiction has been held to be a foreign corporation within such a statute.⁵ The affidavit asking for security need not state that plaintiff is a corporation if it so describes itself in the complaint.⁶ A motion to require security or to dismiss should be made if no proper cost bond is filed.⁷ When the statute commands a dismissal for failure to give such security, error in denying a motion for it will reverse the judgment.⁸ Under the practice requiring an indorsement on the writ of security for costs,⁹ one who indorsed in the corporate name "by" himself was held personally liable.¹⁰

§ 3122. Enforcement. Ensuing chapters will separately treat of the means and procedure by which the judgment is to be enforced either by execution or other final process, or by coercive process, or by equitable remedies.¹¹

§ 3123. Amendment, vacation or other relief from judgment. Amendments may be allowed to make the judgment correctly describe and name the corporation,¹² but the corporation cannot thereby be inducted into the case and subjected to the judgment without service,¹³

of *Columbia v. Bush*, 3 Ky. L. Rep. 692. To the same effect construing Alabama Code, § 2398, see *Alabama & T. R. R. Co. v. Harris*, 25 Ala. 232.

³ N. Y. Code Civ. Proc. § 3268, relating to the New York city court, does not require a domestic corporation to give security. *Edward Thompson Co. v. Lobenthal*, 24 Civ. Pr. (N. Y.) 247, 33 N. Y. Supp. 417.

Under the statute a cost bond from a foreign corporation must be given "before" commencing action or dismissal will ensue, unless defendant consents (Gen. St. c. 26, §§ 3, 5). *Portsmouth Foundry & Machine Works v. Iron Hills Furnace & Mining Co.*, 11 Bush (Ky.) 47.

⁴ A proceeding on motion to enforce a stockholder's subscription by judgment is a "suit." *Alabama & T. R. R. Co. v. Harris*, 25 Ala. 232.

⁵ *National Park Bank v. Gunst*, 1 Abb. N. Cas. (N. Y.) 292.

⁶ *D. M. V. Live Stock Ins. Co. v. Henderson*, 38 Iowa 446.

⁷ Not triable on motion to dissolve

injunction. *Owen County Burley Tobacco Society v. Brumback*, 128 Ky. 137, 107 S. W. 710.

⁸ *Steamboat Empire v. Alabama Coal Min. Co.*, 29 Ala. 698.

⁹ Want of a proper indorsement for security on the writ is waived if no objection is made at the first term. *Gilbert v. Nantucket Bank*, 5 Mass. 97.

¹⁰ One who indorsed a writ in the corporate name "by" himself is liable for costs without an addition that he was agent of the corporation. *Middlesex Turnpike Corporation v. Tufts*, 8 Mass. 266.

¹¹ See chapters on Attachment and Garnishment; Bankruptcy; Receivers; Contempt; Mandamus, *infra*.

¹² Where judgment was in names of individual corporators such names were stricken out and the cause allowed to proceed in corporate names. *Campbell v. Brunk*, 25 Ill. 225.

¹³ A default judgment without service on it cannot be corrected *nunc pro tunc* by striking out the corporate

If co-defendants (receivers) are secondarily liable for its debt, a general judgment against it and them may be amended to state how and when they shall be liable.¹⁴ Relief from a judgment or default is ordinarily either by motion to open it, or by an appeal if invalid, or by a direct action for relief.¹⁵ Under the modern practice relief by opening the judgment and also by amending it is governed very largely by statutes enabling such relief or amendment to be administered by motion in the same court for a limited time after rendition and entry and even after term. In a general way such statutes cover the same grounds which would have sustained a bill in equity, as well as those which the law courts entertained within their limited powers at common law.¹⁶ In various states there are statutes entitling defaulted defendants to have the default opened as of right within a limited time on motion and offer of a defense. These statutes apply only to such judgments as are within their terms, and which were rendered on the kind of service described.¹⁷ Aside from them a default will usually be opened on motion if matter of excuse is shown, similar to that recognized in equity as a ground for relief,¹⁸ or if the record fails to show a valid service.¹⁹ Where there was no binding

name and substituting it in a corrected form. *Brown v. Terre Haute & I. R. Co.*, 72 Mo. 567.

¹⁴ Judgment against the corporation and its receivers jointly was amended to read against them to be satisfied out of assets in their hands. *Proctor v. Missouri, K. & T. Ry. Co.*, 42 Mo. App. 124.

¹⁵ Motion is the correct procedure to vacate a judgment by default for want of service, but action is necessary when fraud not apparent on the face of the record is the ground. *Simmons v. Defiance Box Co.*, 148 N. C. 344, 62 S. E. 435.

A petition in the nature of a bill of review will lie only when the corporation defendant was not regularly summoned in personam and did not appear (*Rev. St. 1899, § 777*), and not to review the truth of a return that it was so served. It lies on constructive service by publication. *Fraternal Bankers of America v. Wire*, 150 Mo. App. 89, 129 S. W. 765.

Under the statute the proper course

in justice's court where the thirty days is not given to defendant having its office outside the state, and where the action was not continued but went to judgment as on default, was either to open the judgment on application or vacate it by a direct proceeding or appeal. *Michigan Southern & N. I. R. Co. v. Shannon*, 13 Ind. 171.

¹⁶ See generally *Black on Judgments*; *Freeman on Judgments*; and consult local statutes.

¹⁷ The right to come in within a year and make defense if "not personally served" applies in favor of a corporation served only on the county auditor, and not on the designated agents or officers. *Brooks v. Orchard Land Co.*, 21 Idaho 212, 121 Pac. 101.

¹⁸ See cases *infra*.

¹⁹ Default will be set aside where return of service on managing agent did not show why superior officer was not served. *Ozark Marble Co. v. Still*, 24 Okla. 559, 103 Pac. 586.

service the court is without discretion to deny relief.²⁰ A case insufficient as a matter of right may be enough to obtain relief as a favor.²¹ The court of its own motion may quash a default where it appears on the record that it was impossible to have had jurisdiction.²² Relief must be sought in season and will be lost by delay, especially where the objection to the summons and service is technical.²³

While neglect or delinquency of its own officers affords no ground for relief or for opening defaults, being imputable to the corporation as its own want of diligence,²⁴ the rule does not bar relief against such a judgment procured by the plaintiff's fraud in conjunction with an officer;²⁵ and it may not be a bar to relief where the circumstances are such that the fault is not imputable to the corporation but to the voluntary act of the agent in assuming to decide on the propriety

²⁰ Where the person served was not an agent, default must be set aside. *Klatte v. McKeand*, 95 S. C. 219, 78 S. E. 712.

²¹ Vacation of default taken after service on de facto officer will not be granted as matter of right or after long delay, though a motion addressed to the favor of the court, it seems, might present a different aspect. *Stillman v. Associated Lace Makers' Co.*, 14 N. Y. Misc. 503, 35 N. Y. Supp. 1071.

On application of a receiver appointed pendente lite and not brought into the suit, default may be opened as a matter of favor. *Knauer v. Globe Mut. Life Ins. Co.*, 46 N. Y. Super. Ct. 370.

²² *Dillard v. Central Virginia Iron Co.*, 82 Va. 734, 1 S. E. 124.

²³ By delay and acquiescence the objection that the agent served and who appeared was not authorized may be waived. *Cowden v. Wild Goose Mining & Trading Co.*, 199 Fed. 561.

Four months' delay in moving to vacate service and conducting negotiations for settlement held fatal to motion based wholly on incapacity of person served and with no showing of merits. *Coast Land Co. v. Oregon Colonization Co.*, 44 Ore. 483, 75 Pac. 884.

Default will not be opened after

long delay merely because summons was addressed to president and general agent by their names with addition of the corporation's name, they having known that it was intended as defendant and having been such officers as described and been well served. *Clark v. Porcelain Mfg. Co.*, 8 S. C. 22.

²⁴ Failure of the agent served to notify the corporate officers no defense was made. *Cazort & McGehee Co. v. St. Louis & S. F. R. Co.*, 100 Ark. 395, 140 S. W. 277.

Forgetfulness of an officer who was served and a stockholder who was to procure counsel. *Union Hide & Leather Co. v. Woodley*, 75 Ill. 435.

Relief could not be granted where any explanation the corporation might offer must necessarily show negligence of the secretary who was served in lieu of the president. *Billingham v. Miller & Teasdale Commission Co.*, 115 Mo. App. 154, 89 S. W. 356.

Papers became mislaid after they were transmitted to defendant. *Apelbaum v. Star Fire Ins. Co.*, 115 N. Y. App. Div. 117, 100 N. Y. Supp. 747.

²⁵ Fraud of the officer served in failing to inform the corporation. *Allen v. Dallas & W. R. Co.*, 3 Woods 316, Fed. Cas. No. 221.

Fraud by plaintiff by which the

of heeding the summons,²⁶ or to an agent's mistake in sending papers to the wrong superior,²⁷ or to a public official's omission to forward copies after being served *ex officio*.²⁸ It will not be set aside because of a misnomer, since tendering a proposed answer would neutralize the effect thereof.²⁹

The motion or application and affidavit should show with certainty that the service was bad, and traverse the facts in the record showing that it was good,³⁰ and make further showing that is essential to the relief;³¹ but it may be helped out by other papers in the case,³² and

president appeared before trial day and consented to judgment against defendant. *Babcock Hardware Co. v. Farmers' & Drovers' Bank*, 54 Kan. 273, 38 Pac. 256.

²⁶ Service was had on the business agent of a corporation. Upon the advice of his attorney he paid no attention to the service. No notice of the service came to the corporation until after judgment had been entered by default. *Roberts v. Wilson*, 3 Cal. App. 32, 84 Pac. 216.

²⁷ The mistake of the served agent in sending the copy to the wrong officer of the company who misplaced it, whence delay in answering, is ground for relief if a meritorious defense is proposed. *Houston & T. C. R. Co. v. Burke*, 55 Tex. 323, 40 Am. Rep. 808.

²⁸ May be opened for unavoidable casualty or misfortune consisting in want of notice due to insurance commissioner's failure to forward copy by mail. *Chicago Life Ins. Co. v. Robertson*, 147 Ky. 61, 143 S. W. 740.

²⁹ Misnomer long known, and where the answer was made to the incorrect name. *Bate Refrigerating Co. v. Gillett*, 31 Fed. 809.

Failure to aver a change of name cannot be objected to by motion to quash an execution on the judgment rendered for the corporation. *Water Lot Co. v. Bank of Brunswick*, 53 Ga. 30.

Will not be set aside for misnomer in summons and return to which no plea in abatement was made, the stat-

ute (Code 1906, § 3867) providing that only when defendant pleads to issue shall it be opened. *Varney & Evans v. Hutchinson Lumber & Manufacturing Co.*, 64 W. Va. 417, 63 S. E. 203.

³⁰ The affidavit of illegality like a pleading should be construed against its author; hence, it not denying that the person served was an officer and it appearing that service was at its place of business, the affidavit was insufficient as against a good return. *Mt. Airy Hotel Co. v. Robert Mitchell Furniture Co.*, 73 Ga. 94.

An objection for illegality of service because the president was not served will be dismissed where after opportunity to amend the affidavit so that it would show president's amenability to service, it was not amended. *Southern Exp. Co. v. Skipper*, 85 Ga. 565, 11 S. E. 871.

A showing that the agent designated for service by a foreign corporation had at time of service ceased to be officer or stockholder, as he was originally, and was sick, and that the corporation had no knowledge of the suit, held sufficient to sustain an order opening a default. *Humphreys v. Idaho Gold Mines Development Co.*, 21 Idaho 126, 40 L. R. A. (N. S.) 817, 120 Pac. 823.

³¹ A showing must be made under the Idaho practice, if default is opened because service was not personal. *Brooks v. Orchard Land Co.*, 21 Idaho 212, 121 Pac. 101.

³² Disqualification of an agent to be

the showing may be met by counter-affidavits.³³ The presumptions are in favor of the service as returned.³⁴ A motion to open default (or a proceeding equivalent thereto) based only on defective service will not be allowed if there is no showing of a meritorious defense,³⁵ but a judgment based upon fraudulently acquired jurisdiction may be set aside, although there be no showing that the corporation had a good defense to the suit or that the decree rendered was unjust.³⁶ When the service was bad the judgment ought to be opened letting the case stand continued.³⁷ A mere suggestion that the judgment lacked jurisdiction will not serve the office of a motion to suspend it and carry it over to the next term.³⁸

Equitable relief will not be granted if the legal methods of review are open and available.³⁹ No relief will be granted in equity for technical defects such as the failure of plaintiff to allege, in conformity with the fact, that it was a corporation.⁴⁰ It will not be set

served in suit on a policy payable to him in case of loss according to his interest, is sufficiently shown on motion to open default by affidavit of his interest and by an intervention in the suit by him; even if the petition alleging it and asking that he be cited was not sufficient to show it. *North British & Mercantile Ins. Co. v. Storms*, 6 Tex. Civ. App. 659, 24 S. W. 1122.

³³ Counter-affidavits may be read on the question of the agency of the person served. *Gilchrist Transp. Co. v. Northern Grain Co.*, 204 Ill. 510, 68 N. E. 558.

³⁴ It will be presumed that the person returned served as president was such, especially when there is no denial of it. *Vadnais v. East Butte Extension Copper Min. Co.*, 42 Mont. 543, 113 Pac. 747.

³⁵ Affidavit of illegality showing knowledge of the suit and not showing meritorious defense is bad when based only on defect in return which was dictated by defendants' president. *Mt. Airy Hotel Co. v. Robert Mitchell Furniture Co.*, 73 Ga. 94.

Proposed answer held to supply assigned deficiencies of complaint. *Storer*

v. Graham, 43 Mont. 344, 116 Pac. 1011.

³⁶ *Fox v. Robbins* (Tex. Civ. App.), 62 S. W. 815, where the court held, also, that a college corporation will not be charged with laches in not beginning a suit to have set aside a decree in foreclosure against it during the incumbency of the secretary and acting president who have fraudulently accepted service of process in an action, since such officers were, during the time, the parties by whom the action should have been instituted.

³⁷ *Millard v. St. Francis Xavier Female Academy*, 8 Ill. App. 341.

³⁸ A suggestion that jurisdiction was lacking with nothing about absence of defendant from hearing will not suspend the judgment and carry it over to the next term, as a motion to vacate would do. *Curfman v. Fidelity & Deposit Co. of Maryland*, 167 Mo. App. 507, 152 S. W. 126.

³⁹ Injunction will not be allowed against a void justice's judgment if certiorari will reverse it. *Kanawha & O. Ry. Co. v. Ryan*, 31 W. Va. 364, 13 Am. St. Rep. 865, 6 S. E. 924.

⁴⁰ In equity if it appears that plaintiff was a corporation, no relief will

aside because of want of authority in counsel who assumed to represent the corporation, if prejudice to the other party will result and if the corporation can be protected by recourse on the counsel.⁴¹ The complaint or bill for relief should allege the jurisdictional defects and also that the judgment is unjust.⁴²

§ 3124. Conclusiveness and effect; collateral attack. The cases here considered are merely exemplary of the general law, which may be applied more easily with the aid of them as illustrations. The judgment either for or against a corporation constitutes an estoppel of record to deny the corporate existence,⁴³ and identity.⁴⁴ Thus, in action on a judgment it will be conclusive evidence of plaintiff's corporate existence on the day it was rendered.⁴⁵ A judgment against the corporation does not bind the members as parties but for certain purposes it concludes them as to some of the facts decided,⁴⁶ and in all rights which they work out or liabilities which they sustain solely by or through the corporation, they are bound,⁴⁷ but it has neither

be granted from a judgment recovered by it in a name importing incorporation, but lacking an allegation thereof. *St. Cecilia's Academy v. Hardin*, 78 Ga. 39, 3 S. E. 305.

⁴¹ It will not be set aside to the prejudice of the other party, unless it is necessary by reason of the attorney's irresponsibility or similar reason. *American Ins. Co. v. Oakley*, 9 Paige (N. Y.) 496, 38 Am. Dec. 561.

⁴² In action to enjoin collection of a judgment because of alleged want of service, the jurisdictional defects must be alleged which vitiate it (e. g., that the road did not run through the county) and also that the judgment is not just. *Baltimore & O. R. Co. v. Brant*, 132 Ind. 37, 31 N. E. 464.

⁴³ § 355, *supra*.

⁴⁴ The judgment is conclusive of identity of defendant corporation and the one which pleaded to and defended the action. *Mobile & M. Ry. Co. v. Yeates*, 67 Ala. 164.

⁴⁵ *Yankton Nat. Bank v. Benson*, 33 S. D. 399, Ann. Cas. 1916 B 1011, 146 N. W. 582.

⁴⁶ Judgment based on return of

service made on J. Q. as president held binding on him in suit to enforce stockholder's liability, the evidence in the latter suit showing that he was in fact such officer. *Wilson v. California Wine Co.*, 95 Mich. 117, 54 N. W. 643. For the distinction between the bar of an entire cause or defense by former judgment and the conclusiveness of the former judgment on some single fact or facts therein decided, and the further distinction between the conclusiveness of a judgment on a fact decided and the effect of the judgment as *prima facie* evidence of a fact, see generally *Black on Judgments*; *Freeman on Judgments*.

⁴⁷ *Hale v. Hardon*, 95 Fed. 747; *Mutual Fire Ins. Co. v. Phoenix Furniture Co.*, 108 Mich. 170, 34 L. R. A. 694, 62 Am. St. Rep. 693, 66 N. W. 1095.

Judgment against corporation for a debt is conclusive of its amount and validity on a creditors' bill against a stockholder to reach corporate assets. *Singer v. Hutchinson*, 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388.

Conclusive against stockholder of

conclusive nor *prima facie* effect against officers or directors sued later under a statute imposing liability for official defaults or misconduct.⁴⁸ A default judgment is equally a bar with one rendered on a contest by the corporation,⁴⁹ and includes all the facts confessed by the default.⁵⁰ A foreclosure decree on the corporate property covered by a corporate mortgage to secure its notes, bonds or debts is conclusive of the facts therein expressly or impliedly determined and of nothing not so determined.⁵¹ The purchasers are protected by its conclusiveness upon the fact of corporate power⁵² the legal execution of the mortgage,⁵³ and the taking of all requisite steps to its validity.⁵⁴ The state, which as a lienholder junior to the mortgage was interested, is not bound merely because the attorney general appeared in the foreclosure suit; and when not bound it may thereafter assert its contract right to take possession of the property for the protection of its lien.⁵⁵

Applying the general rule that there must be an identity of parties and subject-matter to make a judgment a bar in another action, and the rule that the present party must have been a party to the judgment pleaded or offered as an estoppel, the corporation and its stockholders are not bound by an *ex parte* order to which they were strangers;⁵⁶ the right to register increased stock is not barred by judgment on other stock disposing of a similar demand;⁵⁷ a stock-

plaintiff's right to be paid out of any corporate assets. *Damon v. Webber*, 111 Me. 473, 89 Atl. 734. See full treatment of the doctrine that a judgment against the corporation concludes the stockholders in proceedings to enforce their stock or statutory liability, chapter Stock and Stockholders, *infra*.

⁴⁸ See Chap. 42, *supra*.

⁴⁹ Record showing process duly served shows corporation bound whether or not it was in court at time of judgment. *Walker v. Shelbyville & R. Turnpike Co.*, 80 Ind. 452.

⁵⁰ Default confesses that contract sued on was that of defendant corporation though signed by individuals. *Rowe v. Table Mountain Water Co.*, 10 Cal. 441.

⁵¹ *Simmons v. Taylor*, 23 Fed. 849; and see § 1392, *supra*.

⁵² *Hunter v. Burnsville Turnpike Co.*, 56 Ind. 213.

⁵³ A corporation claiming as purchaser at foreclosure of a mortgage by a predecessor can rely on the foreclosure decree as an adjudication that the former corporation legally executed the mortgage. *Walker v. Shelbyville & R. Turnpike Co.*, 80 Ind. 452.

⁵⁴ *Hunter v. Burnsville Turnpike Co.*, 56 Ind. 213; *Denike v. New York & R. Lime Cement Co.*, 80 N. Y. 599.

⁵⁵ *Ex parte Dunn*, 8 Rich. (S. C.) 207.

⁵⁶ An *ex parte* order to take possession of corporate property in which the public had an interest does not conclude rights of the corporation or stockholders not parties thereto. *Moore v. Schöppert*, 22 W. Va. 282.

⁵⁷ Judgment on a demand to register certain stock to a transferee is not a bar in action to compel registration of other increased stock coming to same person by allotment of subscription rights. *Bates v. United Shoe*

holder claiming title in a different right is not barred by an adjudication of title in a corporate action; ⁵⁸ a creditor's suit in another court does not bar garnishment; ⁵⁹ a suit to impeach a receivership for fraud is not barred by denial of a motion against other parties to vacate it; ⁶⁰ and hence neither the corporation nor the property in its possession is bound by a judgment against its former receiver, unless a statute makes it so or some lien was impressed. ⁶¹

The full faith and credit due to a foreign judgment may entitle it to some binding force, though it was rendered after the corporation was dissolved in the domicile and when accordingly there was no corporate party existing; but such conclusiveness extends only to the assets within the jurisdiction had in the suit in the foreign state. ⁶²

While suing to judgment against the corporation may work an estoppel to regard the individuals as liable, ⁶³ no such bar results where the judgment results in favor of the corporation. ⁶⁴

The most frequent collateral attack on corporation judgments is that based on the want of service sufficient to give the jurisdiction requisite to taking a default. The general rule is that any judgment may be assailed in a collateral proceeding for want of jurisdiction over the party asserted to have been bound thereby, or because the jurisdiction was obtained by fraud. ⁶⁵ In a direct proceeding vices

Mach. Co., 216 Fed. 140, aff'g 206 Fed. 716.

⁵⁸ Judgment in trespass to try title is not conclusive against an agent and stockholder claiming by a different title. *Bank of South Carolina v. Bobo*, 11 Rich. (S. C.) 597.

⁵⁹ *Smith v. Durbridge*, 26 La. Ann. 531.

⁶⁰ *Goodale Phonograph Co. v. Valentine*, 69 Wash. 263, 124 Pac. 691.

⁶¹ In cases to which Act of March 19, 1889, does not apply, a judgment rendered against a receiver after his discharge does not bind the corporation or the property late in the receiver's custody. *Texas & P. Ry. Co. v. Watson* (Tex. Civ. App.), 24 S. W. 952.

⁶² A foreign judgment against a domestic corporation during its existence continued after dissolution under a statute of the foreign state will be given full faith and credit only as

operating on its foreign assets, and not as operating on assets in the domicile where it had already become extinct. *Rodgers v. Adriatic Fire Ins. Co.*, 148 N. Y. 34, 42 N. E. 515, aff'g 87 Hun 384, 34 N. Y. Supp. 323.

⁶³ Judgment against a corporation as fraudulent transferee is a sufficient protection to its members from being charged as partners for the same cause, they having incorporated the firm and turned over its assets as appears by the record. *Holloway & McRaney Co. v. Brame*, 83 Miss. 335, 36 So. 1.

⁶⁴ Judgment for defendant corporation will not bar suit against individuals who assumed to represent it. *Frankfort Bank v. Anderson*, 3 A. K. Marsh. (Ky.) 1.

⁶⁵ Impeachable for fraud consisting in turning over the copy of summons and complaint to the adverse party's attorney for attention, the adverse

and defects may be urged that would not be open to collateral inquiry; but the rules determining which are direct and which are collateral are not precise and uniform in all jurisdictions.⁶⁶ An invalid foreclosure decree may be attacked on a bill to redeem.⁶⁷ It has already been stated that the return or proof of service must show a service conformable to law on a person competent under the law, and the record must contain enough to support the jurisdiction,⁶⁸ and accordingly the failure to show these things when the judgment depends on jurisdiction by process may be urged collaterally.⁶⁹ Mere formal defects in the return are concluded by the judgment and will not support a collateral attack.⁷⁰ An immaterial misnomer is not a ground for collateral attack,⁷¹ nor is the failure to substitute⁷² the true cor-

party being one of the trustees. *Whitelsey v. Delaney*, 73 N. Y. 571. See generally Black on Judgments; Freeman on Judgments; Van Fleet on Collateral Attack. There may also be relief on equitable grounds of fraud. See § 3123, supra, and general treatises.

⁶⁶ See generally Black on Judgments; Freeman on Judgments; Van Fleet on Collateral Attack.

A decree of condemnation cannot be impeached collaterally, in so far as it requires fencing, on the ground that the relief goes beyond money damages. If so it was mere error to be corrected on appropriate direct review. *Union Pac. Ry. Co. v. McCarty*, 8 Kan. 125.

In a "direct" action to enforce a judgment by default it is not conclusive that one found to have been an agent of defendant and served as such was agent. In a collateral proceeding it would be. *International & G. N. R. Co. v. Moore* (Tex. Civ. App.), 32 S. W. 379.

But being presumably true as found, the proofs must by legal evidence show clearly that a receivership was legal which is supposed to have terminated his former agency and that he was not an agent of the corporation. *Id.*

⁶⁷ Default on an unauthorized ac-

ceptance of service. *Bridgeport Sav. Bank v. Eldredge*, 28 Conn. 556, 73 Am. Dec. 688.

⁶⁸ §§ 3012, 3118, supra.

⁶⁹ Void if "agent" served was not in fact an agent. *People v. Tilden*, 121 N. Y. App. Div. 352, 106 N. Y. Supp. 247.

Judgment is void collaterally if return shows no reason why superior was not served. *Ravia Granite Ballast Co. v. Wilson*, 22 Okla. 689, 98 Pac. 949.

Judgment according to a process prescribed by the charter must have the process shown in the record, or will be void. *Miami Exporting Co. v. Brown*, 6 Ohio 535.

⁷⁰ *Crawford v. Bank of Wilmington*, 61 N. C. 136.

⁷¹ Mere misnomer of intended corporation when property served is not a fatal vice in the judgment (municipal corporation). *Hoffield v. Board of Education*, 33 Kan. 644, 7 Pac. 216.

Judgment against it by its commonly used name which was correct except that the words, "of Kansas," were omitted is not collaterally assailable. *King v. Wilson*, 86 Kan. 227, Ann. Cas. 1913 B 1246, 120 Pac. 342.

⁷² Failure to show substitution of the corporate name for that of "John Doe" by which name it was served, does not impeach a judgment reciting regular service. *Crouch v. H. L. Mil-*

porate name for a fictitious name under which it was served and brought into the case.

A finding of jurisdiction may be impeached primarily by other portions of the record and files in the case, or secondarily by parol evidence of their contents,⁷³ though some cases hold that the record and findings of jurisdiction are conclusive,⁷⁴ and one case holds that the judgment is conclusive as to the competency of the person served, where the corporation was estopped to deny it; but if estopped there is no reason to invoke the conclusiveness of the judgment on that fact.⁷⁵ A sound distinction has been made that a finding of service may be conclusive as to mere defects, but not as to a total lack of legal service.⁷⁶ A finding of jurisdiction contrary to the fact shown by the process and return in the record will not save the judgment from collateral attack,⁷⁷ and a presumption will yield to the contrary fact appearing in the record.⁷⁸ There is a minority doctrine that jurisdictional recitals and findings will prevail over the record of the summons and return or any inferences to be drawn from them; but this need only be mentioned in a cautionary way, and a study of the general law of collateral attack should be made in all instances before

ler & Co., 169 Cal. 341, 146 Pac. 880.

⁷³ A recital that service was had can be contradicted by the files in the case, and secondarily, if they are lost, by parol evidence. *Eminence Land & Mining Co. v. Current River Land & Cattle Co.*, 187 Mo. 420, 86 S. W. 145. See also cases cited in notes 77, 78, *infra*.

⁷⁴ Conclusive that person served was qualified. *Montgomery v. United States Fidelity & Guaranty Co.*, 90 S. C. 283, 73 S. E. 182, 71 S. E. 1084.

⁷⁵ Is conclusive as to capacity of one to be served as stockholder where at the time the corporation was estopped to deny it. *Stratton v. Lyons*, 53 Vt. 130.

⁷⁶ While a finding of service may be binding when merely defective, it does not exclude objection that there was no jurisdiction because no legal service. *State Ins. Co. v. Waterhouse*, 78 Iowa 674, 43 N. W. 611.

⁷⁷ Where the record recites due and regular service, but the process and

return, being part of it, rebut it, the judgment is collaterally void. *Boyle v. Oro Plata Mining & Milling Co.*, 14 Ariz. 484, 131 Pac. 155.

Justice's docket reciting service is impeachable by return showing it void. *Horn v. Mississippi River & B. T. R. Co.*, 88 Mo. App. 469.

A finding of publication "duly executed as to the defendants" does not prevail over a record showing that the corporation was not one of them. *Styles v. Laurel Fork Oil & Coal Co.*, 45 W. Va. 374, 32 S. E. 227, distinguishing *Shafer v. O'Brien*, 31 W. Va. 601, 8 S. E. 298, where the record showed nothing.

⁷⁸ It is presumed collaterally that authority to appear for a corporate defendant to the judgment was properly proved before judgment was entered; but no presumption against the fact is indulged where the authority unsealed appears of record. *In re Cape Sable Co.*, 3 Bland (Md.) 606.

venturing much assurance thereon.⁷⁹ In an early New York case it was held that the service and return gave jurisdiction regardless of the truth of the return, restricting the party to appeal or to an action for false return.⁸⁰ A clerk's affidavit that "defendants" was an alteration by him from the singular term "defendant," will not avail the corporate defendant seeking thereby to be excluded from the terms of the decree.⁸¹ A recital that the plaintiff corporation consented to the decree is conclusive without expressing that the consent was by attorney.⁸²

§ 3125. Appeal and review. Nothing more than a few of the important applications of the general law of appellate review can be treated of with propriety in this connection, but it is proper to do so as a complement of other principles involved in this chapter. Springing from the general right to sue or defend as natural persons is the right of the corporation to take or its subjection to the adversary's right to take an appeal, or a writ of error, or certiorari, and the right is not denied merely because the corporation is incapable of taking one of the procedural steps for an appeal.⁸³ Where the special charter essays to fix the right of appeal none can be taken except as therein provided.⁸⁴

As in all other stages of litigation the corporation and its members are distinct, and they cannot appeal for it; but if it fails unduly or refuses, they should proceed as on a stockholders' suit either by original action for appropriate relief or by petition to intervene, as the nature and stage of the case will admit.⁸⁵ The writ of error is

⁷⁹ See Black on Judgments; Freeman on Judgments; Van Fleet on Collateral Attack.

⁸⁰ A justice's jurisdiction being founded on the fact of service as returned and not on the truth of such return cannot be impeached collaterally by denying the return. *New York & E. R. Co. v. Purdy & Adams*, 18 Barb. (N. Y.) 574. If false the remedy is in the trial court or by appeal or by action for false return. *Id.*

⁸¹ *Union Trust Co. v. Atchison, T. & S. F. R. Co.*, 8 N. M. 159, 42 Pac. 89.

⁸² *Union Pac. Ry. Co. v. McCarty*, 8 Kan. 125.

⁸³ When the statute allows appeals to all, but requires recognizance of bail which a corporation cannot give,

it may appeal without. *Carpentier v. Delaware Ins. Co.*, 2 Binney (Pa.) 264.

⁸⁴ A provision in a special charter for an arbitration and award that "the award shall remain in force and judgment be rendered thereon" denies any appeal to the company though another provision seems to have contemplated an appeal by either party. *Darge v. Horicon Iron Mfg. Co.*, 22 Wis. 417.

⁸⁵ Where a corporation was erroneously substituted for its president sued as an individual, it can appeal but he cannot since he is not a party. *Ziegler v. George Schleicher Co.*, 56 N. Y. Misc. 582, 107 N. Y. Supp. 85. See also *Dunbar v. American Casket*

sometimes differently regarded and a stockholder aggrieved by the judgment, though not a party, may sue it out.⁸⁶ And in circumstances like the case last cited, it would seem that any form of appeal open to persons aggrieved and not only to parties aggrieved, might be available to a stockholder. It may appeal separately from co-defendant stockholders in a receivership suit, where the statute allows separate appeals.⁸⁷ The rule against appeals by defaulting parties applies to a corporation which has put in a pleading which is a nullity.⁸⁸ If the corporation was so misnamed that it was not brought into court, it has no standing to sue out error,⁸⁹ but if the service was bad because the person served was not competent the corporation may appeal.⁹⁰

It has been seen that dissolution *pendente lite* abates the action, with an exception of those corporations which by statutes have an extended existence thereafter for the purpose of winding up, and with a further exception of those where by statute the affairs are devolved on officers or liquidators to close up; and furthermore that abatement arrests all proceedings until a proper substitution is had, but ordinarily does not annul a judgment already made.⁹¹ If the dissolution occurs before the suit is begun the right, if one survives, is devolved on the legal successors in right of the corporation.⁹² It accordingly follows that a dissolved corporation cannot be either

Co., 19 Ohio Cir. Ct. 585, 10 Ohio Cir. Dec. 684.

Stockholders cannot take an appeal because the interest is not theirs; the corporation must do so. Their remedy was to call on the corporation or its officers for action. *Levert v. Shirley Planting Co.*, 135 La. 929, 66 So. 301.

See chapter on Stock and Stockholders, subd. Remedies of Stockholders, etc., *infra*.

⁸⁶ If judgment is erroneous because the corporate defendant was extinct when action begun, a stockholder subject to levy on it may sue out writ of error. *Rankin v. Sherwood*, 33 Me. 509.

⁸⁷ On a receivership suit by stockholders against the corporation and other stockholders, the corporation may under the Practice Act sue out the writ alone from decree against it. *St. Louis & S. Coal & Mining Co. v. Edwards*, 103 Ill. 472.

⁸⁸ Appeal will be dismissed when taken by corporation which was in default because its answer in chancery was a nullity having no seal. *R. Frank Williams Co. v. United States Baking Co.*, 86 Md. 475, 38 Atl. 990.

⁸⁹ Defendant, the named railroad with addition of the word "Company," cannot sue out a writ of error to a judgment on pleadings against the Q. O. & K. C. "Railroad." If the misnomer was material the service on defendant did not bring it into court. *Brassfield v. Quincy, O. & K. C. R. Co.*, 109 Mo. App. 710, 83 S. W. 1032.

⁹⁰ Appeal lies from judgment taken against corporation on service on one who had ceased to represent it. *Grossman Bros. & Rosenbaum v. Atlas Const. Co.*, 119 N. Y. Supp. 164.

⁹¹ See §§ 2954, 2955, *supra*.

⁹² See chapter on Forfeiture, Dissolution and Winding Up, *infra*.

appellant or appellee, but the appeal or writ of error must be in the name of its substituted successor, unless by virtue of such a statute as mentioned its existence is extended or its liquidator has authority to use its name when he is substituted for it.⁹³ According to the more modern and more logical rule, where the appeal does not open the case a dissolution pending it will not work an abatement of the action.⁹⁴ Consolidation pending the appeal does not prevent plaintiff in error from proceeding against the original corporation, if no extinction is thereby accomplished and no consequent abatement.⁹⁵

Under statutes dividing jurisdiction of appeals according to subjects involved, a dissolution decree involves a franchise and goes to that court which has jurisdiction of such.⁹⁶

A special and limited appeal will not exclude other modes of review, if not appearing to have been a substitute for them.⁹⁷ Denial of a

⁹³ If the suit has abated by dissolution of the corporate defendant, a writ of error cannot be sued out against it. *Venable Bros. v. Southern Granite Co.*, 135 Ga. 508, 32 L. R. A. (N. S.) 446, 69 S. E. 822; *Life Ass'n of America v. Fassett*, 102 Ill. 315.

A bill of review cannot be maintained against defendant dissolved legislatively after the judgment was rendered. *Board of Councilmen City of Frankfort v. Deposit Bank of Frankfort*, 120 Fed. 165, aff'd 124 Fed. 18.

But under the statute, where it is continued for the purpose of being sued on prior liabilities, it may sue out writ of error to the resultant judgment. *Singer & Talcott Stone Co. v. Hutchinson*, 176 Ill. 48, 51 N. E. 622, rev'g 72 Ill App. 366.

Receivers may prosecute writ of error in name of corporation after its dissolution, it being a Michigan corporation continued by statute for three years for purpose of suing or defending. *Eau Claire Canning Co. v. Western Brokerage Co.*, 213 Ill. 561, 73 N. E. 430.

Dissolution receivers may take an appeal. *People v. Troy Steel & Iron Co.*, 82 Hun (N. Y.) 303, 31 N. Y. Supp. 337.

In *Rankin v. Sherwood*, 33 Me. 509, a stockholder was allowed to sue out error on a judgment in an action begun against a dissolved corporation, he being aggrieved because under the statute execution might have issued against him.

⁹⁴ An appeal merely arrests enforcement of judgment and does not open the action to abatement by dissolution pending it. *Steinhauer v. Colmar*, 11 Colo. App. 494, 55 Pac. 291. But it has been held that appeal abates by dissolution and the suit with it. *Rider v. Nelson & Albemarle Union Factory*, 7 Leigh (Va.) 154, 30 Am. Dec. 495.

⁹⁵ *Shackleford v. Mississippi Cent. R. Co.*, 52 Miss. 159. See also §§ 2954, 2955, *supra*, chapter on Consolidation and Merger, *infra*.

⁹⁶ Is reviewable by the supreme court. *St. Louis & S. Coal & Mining Co. v. Edwards*, 103 Ill. 472.

⁹⁷ A summary proceeding for judicial hearing of an order to revoke license of a foreign insurance company, on petition of the company and providing for an appeal if the decree "is adverse to the petitioning company," does not exclude power to send up reserved questions. *Employers' Liability Assur. Corporation v. Merrill*, 155 Mass. 404, 29 N. E. 529.

petition for removal to the federal courts may be reviewed by writ of error to the state court, although it might have been removed by filing the record and invoking the power of the federal courts to protect the jurisdiction.⁹⁸

The statutes generally require some form of security, at least to prosecute the appeal and for costs, or for a supersedeas and stay,⁹⁹ but a recognizance of bail was dispensed with in an early case as something that a corporation was incapable of giving.¹

The appeal papers should run in the name of the corporation, or its regularly substituted successor.² The writ may run in the name of the successor of the nominal defendant in error, if the court judicially knows their succession.³ A petition or application for review should plainly show that the corporation and not its officer seeks the review.⁴

Corporate officers and agents are competent to make the necessary affidavits,⁵ to execute appeal bonds and undertakings,⁶ and to take such

⁹⁸ *Chesapeake & O. R. Co. v. McCabe*, 213 U. S. 207, 53 L. Ed. 765.

⁹⁹ The statute (Act of 1817) requires bail on error by a corporation only when it is to work a supersedeas, thus putting it on the same basis as a natural person. *Savings Inst. v. Smith*, 7 Pa. St. 291.

Appeals from arbitrators under the Arbitration Act of June 16, 1836, are subject to the Act of 1817 and the bail must be absolute. *Morris v. Delaware & S. Canal*, 4 Watts & S. (Pa.) 461. So on appeal from referees in a charter form of proceeding. *Schuylkill Nav. Co. v. Thomas*, 13 Serg. & R. (Pa.) 431. So on appeal from an alderman though as to him natural persons must give special bail. *Ger-mantown & P. Turnpike Co. v. Naglee*, 9 Serg. & R. (Pa.) 227. The act applies to all corporations. *Washington & P. Turnpike Co. v. Cullen*, 8 Serg. & R. (Pa.) 517.

¹ *Carpentier v. Delaware Ins. Co.*, 2 Binn. (Pa.) 264.

² Effect of dissolution, see this section, *supra*. See also chapters on Receivers; Forfeiture, Dissolution and Winding Up, *infra*.

³ A writ of error from a judgment running in the name of the Southern

Pacific R. R. Co. may be taken against the Texas and Pacific R. Co., where the public statutes enable the court to know that it is the former's successor. *Stephenson v. Texas & P. Ry. Co.*, 42 Tex. 162.

⁴ A petition for certiorari reciting the corporation as aggrieved by the judgment and praying for the writ for its relief, but also reciting that the signer is president of the corporation and also asking proper relief for him, he having verified it by oath, is a sufficient petition by it. *Ex parte Heflin*, 54 Ala. 95.

⁵ An agent though not specially deputized may make affidavit for a writ of error. *Academy of Fine Arts v. Power*, 14 Pa. 442.

An agent not being named in the statute cannot make the oath. *Washington & P. Turnpike Co. v. Cullen*, 8 Serg. & R. (Pa.) 517.

⁶ Appeal bond signed in corporate name, by its president and attested by its seal presumes all necessary authority. *Union Gold Min. Co. v. Bank*, 2 Colo. 226.

The general manager may execute such a bond. *Sarmiento v. Davis Boat & Oar Co.*, 105 Mich. 300, 55 Am. St. Rep. 446, 63 N. W. 205.

steps as are necessary for a party to do in taking an appeal.⁷ The bond will be regarded as that of the corporate party though signed by its agent.⁸ If a corporation signs the bond as surety, it must do so in a way to be a good execution of a general writing of that kind.⁹

Subject to the statutory exceptions in favor of appeals from other orders, the judgment must be final;¹⁰ and a non prosequitur entered on overruling demurrer to plea to the jurisdiction,¹¹ or the setting aside of a good service,¹² is final. The effect of appeal or error to suspend or supersede the judgment is now almost wholly determined by statutes, which generally allow a suspension if the requisite security is given though some judgments are by their nature suspended.¹³

An appeal from an order refusing to dissolve an injunction against the holding of meetings, or the voting of stock, or the decision of its validity, may be dismissed on its motion where it is a party and interested and no notice of appeal was served on it.¹⁴ Proper officers of the corporation may cause the appeal to be dismissed, although others dissent.¹⁵ Ordinarily incapacity of the corporation should be urged

⁷ The officer or agent of the corporation who is in charge of the case before a justice may enter an appeal; and it need not be recited in the record that he was managing the case to support the appeal so taken. *Crumm v. J. P. Allen & Co.*, 11 Ga. App. 203, 75 S. E. 108.

⁸ An appeal bond reciting that the corporation shall pay is its obligation, although signed by its agent. *Collins v. Hammock*, 59 Ala. 448.

⁹ Bond signed with corporate name and scroll inclosing letters "L. S." is corporate bond but a surety company was not bound where its corporate seal was impressed, but the signature was not by an officer but only by one describing himself as "attorney in fact." *Foley & Williams Mfg. Co. v. Bell & Harrell*, 4 Ga. App. 447, 61 S. E. 856.

¹⁰ Denial of leave to bring forfeiture proceeding in name of the state is not appealable by it. *State v. Oregon Cent. R. Co.*, 2 Ore. 255. Under the statute a judgment on plea in abatement for matter of law apparent on the record (Pub. St. c. 152, § 10

and c. 153, § 8) is not appealable whether the objection was formal or substantial. *Young v. Providence & S. S. S. Co.*, 150 Mass. 550, 23 N. E. 579.

¹¹ Appealable by plaintiff. *Henderson v. Maryland Home Fire Ins. Co.*, 90 Md. 47, 44 Atl. 1020.

¹² Setting aside a good return to summons held final. *Franklin Coal Co. v. Pennsylvania Water Co.*, 25 Pa. Super. Ct. 628.

¹³ Motion in error filed in receivership proceeding suspends execution of the judgment therein. *Catlin v. Baldwin*, 47 Conn. 173. Consult the local statutes.

¹⁴ *Willard v. Fisher*, 36 Wash. 229, 78 Pac. 917.

¹⁵ An executive committee of the directors will be heard to ask dismissal of an appeal, they representing the desire of the whole directorate, though without a formal vote and the president alone opposing. *Young v. Schenck*, 64 Wash. 90, 116 Pac. 588.

It need not be that such directors are de jure and regularly qualified. De facto ones have the power. *Id.*

below and not by motion to dismiss the appeal by it.¹⁶ A substitution of parties may be made on abatement pending the appeal, and the practice in the trial courts will not necessarily apply.¹⁷ If the appeal abates and the action with it the proper practice is to certify the facts as found to the trial court for the proper entry therein.¹⁸ Power of the appellate court to allow amendments may admit of amending a misnomer which the lower court deemed it could not allow.¹⁹

The record on appeal, case or return of the transcript must be made up so as to present the decision or ruling which it is desired to review, showing by the bill of exceptions or its equivalent such matters as stricken pleas in abatement,²⁰ the evidence as to competency of the person served,²¹ and the facts as to doing business within the state.²² Matters of evidence or procedure not a part of the record proper are sent up only when the appellant party (or the appellee) takes proper steps to have them included, e. g., evidence as to corporate existence.²³ The dissolution of the corporation cannot affect the judgment when not in issue by the pleadings, and therefore the preservation of evidence of dissolution in the bill of exceptions will avail nothing.²⁴

Except the jurisdictional and other essential facts,²⁵ and even in aid

¹⁶ Doubted if nonpayment of franchise tax can be urged by motion to dismiss appeal. *J. T. Stark Grain Co. v. Harry Bros. Co.*, 57 Tex. Civ. App. 529, 122 S. W. 947. See also §§ 2949, 3048, *supra*.

¹⁷ Where abatement occurs pending appeal a party should be substituted; and it need not be done within the one year (*L. O. L.* § 38) which applies in trial courts. *Service & Wright Lumber Co. v. Sumpter Valley R. Co.*, 81 Ore. 32, 152 Pac. 262, rehearing of 67 Ore. 63, 149 Pac. 531, 135 Pac. 539.

¹⁸ *Rider v. Nelson & Albemarle Union Factory*, 7 Leigh (Va.) 154, 30 Am. Dec. 495.

¹⁹ *Bullard v. Nantucket Bank*, 5 Mass. 99.

²⁰ To review the striking out of a pleading, as a plea in abatement, it must be saved in the record by a bill of exceptions. *Smith v. State*, 140 Ind. 343, 39 N. E. 1060.

²¹ To review a ruling that the president of defendant, a foreign corpora-

tion, was properly served, the evidence must be preserved by bill of exceptions. *Caldwell Furnace Foundry Co. v. Peck-Williamson Heating & Ventilating Co.*, 27 Ohio Cir. Ct. 665.

²² The question of fact whether a foreign corporation was doing business within the state, and therefore was subject to its jurisdiction, is conclusive on appeal unless the evidence is brought up in a bill of exceptions. It cannot be reviewed on affidavits accompanying the transcript of the judgment roll. *Farrell v. Oregon Gold-Min. Co.*, 31 Ore. 463, 49 Pac. 876, rehearing denied 50 Pac. 186.

²³ On a certiorari to a justice where the affidavit did not specify want of proof of corporate existence, the return need not include evidence thereon. *Lake Superior Bldg. Co. v. Thompson*, 32 Mich. 293.

²⁴ *Agnew v. Bank of Gettysburg*, 2 Harr. & G. (Md.) 478.

²⁵ Transcript on appeal from justice must show a return of service according to statute. The recital of the jus-

of them,²⁶ the things not shown will be presumed in favor of the judgment.²⁷ In federal courts if the jurisdiction does not appear on the record reversal follows.²⁸

Findings of fact as to competency of the person served,²⁹ or the facts to fix venue are conclusive on appeal.³⁰ A matter of judicial knowledge reposed exclusively in the trial court as to the corporate existence of the party ascertained from local records cannot be reviewed on appeal.³¹ The authority of the agent and the responsibility of the corporation are questions of fact, and will not be reached by a review for errors of law only.³² Reserved or certified questions arising on a special plea will reach the propriety of allowing such plea to be filed.³³

tice cannot supply proof of his jurisdiction. *Powell v. St. Louis, I. M. & S. Ry. Co.*, — Mo. App. —, 178 S. W. 212.

²⁶ Presumed to support judgment that special appearance followed general, the contrary not appearing. *Haswell & Co. v. Daniels' Roanoke River Line Steamboat Co.*, 168 N. C. 296, 84 S. E. 363.

Venue is presumed right to support the judgment. *Zindorf v. Western American Co.*, 26 Wash. 695, 67 Pac. 335.

²⁷ If nothing appears in a transcript originating with a justice to show in what state the corporation was formed, and it appears that it had a general office in Topeka, it is presumably a domestic corporation. *H. Parker Grain Co. v. Chicago, R. I. & P. Ry. Co.*, 70 Kan. 168, 78 Pac. 406.

²⁸ *Brock v. Northwestern Fuel Co.*, 130 U. S. 341, 32 L. Ed. 905.

²⁹ Whether the person served as president was so in fact is for the trial court, whose decision will not be reversed on appeal. *J. L. Mott Iron Works v. West Coast Plumbing Supply Co.*, 113 Cal. 341, 45 Pac. 683.

³⁰ Finding of fact of residence to fix venue is conclusive. *Watson v. North Carolina R. Co.*, 152 N. C. 215, 67 S. E. 502.

³¹ Whether there was a certain

drainage corporation or not is expressly made by statute a question for the judicial knowledge of the trial court and its decision will be presumed right on appeal. *Herod v. Rodman*, 16 Ind. 241.

Under such a statute, the judge must determine from the county records if the corporation has been legally organized, and there being no provision for bringing the records to the supreme court, the judge's action will be presumed correct. *Delawter v. Sand Creek Ditching Co.*, 26 Ind. 407.

A statute requiring courts of the county in which articles of association are recorded to take judicial notice of the existence of such corporations (1 G. & H. 303) does not require supreme court to take judicial notice of such fact. *Cicero Hygiene Draining Co. v. Craighead*, 28 Ind. 274.

³² Since a corporation is liable for trespass by its agent, if in fact such agent committed it under superior direction, a certiorari to a justice's judgment will not reach the question, being one of fact whether the corporation was liable. *Chicago & R. I. R. Co. v. Fell*, 22 Ill. 333.

³³ Writ of error to a judgment on a reserved question reaches the propriety of allowing a special plea of nullity in bar to be filed, on which plea the reserved question arose, the plea

In order to obtain a review of a given question, except a fundamental and incurable defect in the proceedings, proper and specific objections must be made below and saved for the reviewing court thereby, for example, jurisdictional objections,³⁴ insufficient time for answer,³⁵ sufficiency of pleadings of the corporate existence,³⁶ the question of existence and acceptance of charter,³⁷ a misnomer,³⁸ capacity of a corporation to claim a certain right,³⁹ and admissibility of a certified copy of the records.⁴⁰

The rule against reversal for error which is harmless to appellant

being demurrable and therefore not allowable. *Northumberland County Bank v. Eyer*, 60 Pa. St. 436.

³⁴ Defective service is waived if not urged below by defendant which appeared. *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913.

Jurisdictional errors such as defective service need not be saved for review by motion for new trial. *Pond v. National Mortgage & Debenture Co.*, 6 Kan. App. 718, 50 Pac. 973.

The overruling of a motion to quash the return for want of any showing that there was a proper service of the summons may be saved by exception, notwithstanding subsequent answer. *St. Louis & S. F. R. Co. v. Reed*, — Okla. —, 158 Pac. 399.

Plaintiff in error need not have moved for relief below where the service was inefficient to give any jurisdiction. (It does not appear whether this was a default case or whether the objection was properly saved.) *Stephenson Ins. Co. v. Dunn*, 45 Ill. 211.

³⁵ On appeal action will not be dismissed for failure to allow proper time after service, or continued as might have been done below, where the only objection below was by motion to dismiss. *Michigan Southern & N. I. R. Co. v. Shannon*, 13 Ind. 171.

³⁶ Sufficiency of replication to plea of nul tiel cannot be raised on appeal after allowing plaintiff to put in proof under it. *Reno v. Reno & Juchem*

Ditch Co., 51 Colo. 588, 119 Pac. 473.

³⁷ Acceptance of charter will not be first questioned on appeal after incorporation was alleged and not denied. *Reilly v. Union Protestant Infirmary*, 87 Md. 664, 40 Atl. 894.

³⁸ Suing by wrong name cannot be first challenged on appeal. *Richwine v. Presbyterian Church of Noblesville*, 135 Ind. 80, 36 N. E. 737. Suing the B. & O. R. Co., as the B. & W. R. Co., is not objectionable on appeal by the corporation which appeared and pleaded to the erroneous name without objection. *Keech v. Baltimore & W. R. Co.*, 17 Md. 32.

Objection first made on appeal that defendant and appellant is misnamed is frivolous. *Louisville, N. & G. S. R. Co. v. Reidmond*, 11 Lea (Tenn.) 205.

³⁹ Whether a corporation can under the statute claim a mechanics' lien will not be considered where the lien claim is abandoned and suit prosecuted for a money judgment. *Pacific Iron & Steel Works v. Goerig*, 55 Wash. 149, 104 Pac. 151.

⁴⁰ Under a general objection it cannot be urged on appeal that a copy of a resolution should have been excluded because the certificate of the secretary appended thereto did not date that he was the keeper of the records and official papers of the corporation as required by Rev. St. c. 51, § 16. (*J. & A. Ann. St.* ¶ 5533). *Cantwell v. Welch*, 187 Ill. 275, 58 N. E. 414.

or has been cured is illustrated in many ways: A wrong venue,⁴¹ overruling a plea nul tiel where plaintiff had to prove existence as part of his case,⁴² or the matter was presented under another plea or the proofs show that it would have been insupportable,⁴³ defective allegations of an admitted authority,⁴⁴ error in receiving evidence of an admitted existence,⁴⁵ or one otherwise proved,⁴⁶ or not put in issue,⁴⁷ suing stockholders jointly where the decree held them secondarily liable,⁴⁸ giving verdict for its agent sued with it as a tortfeasor,⁴⁹ refusing to enter judgment against one of several co-defendant corporations, all being one and the same,⁵⁰ have all been held harmless under the circumstances shown in the footnotes.

⁴¹ *Blackford v. Lehigh Valley R. Co.*, 53 N. J. L. 56, 20 Atl. 735.

Choosing the wrong venue for action of trespass to lands is cured by trial without objection. The case also questions whether the statute did not make defendant suable at its place of business though the trespass was in another county. *Edwards v. Union Bank*, 1 Fla. 136.

⁴² Harmless where the issue of corporate organization and existence is essential to the cause of action and must be proved by the corporation. *Shick v. Citizens' Enterprise Co.*, 15 Ind. App. 329, 57 Am. St. Rep. 230, 44 N. E. 48.

⁴³ Where a plea nul tiel was erroneously quashed but other pleas, attempting to plead a forfeiture for non-compliance with statute, showed that the corporation was still in existence, the error was harmless. *Henssler v. A. G. Wiese Drug Co.*, 133 Ill. App. 539.

⁴⁴ Insufficiently particularized allegations as to the agent who made a contract and its terms, held harmless because of admissions made. *Georgia, F. & A. R. Co. v. Parsons*, 12 Ga. App. 180, 76 S. E. 1063.

⁴⁵ Admission of proof of corporate existence is harmless where appearance has admitted that fact. *A. Gauthier Decorating Co. v. Ham*, 3 Colo. App. 559, 34 Pac. 484.

⁴⁶ Admission of a variant charter is harmless where corporate existence was fully proved by recognition in contract with corporation. *Spreyne v. Garfield Lodge No. 1 of United Slavonian Benev. Society*, 117 Ill. App. 253.

⁴⁷ Improper evidence of incorporation is harmless where that was not properly put in issue. *Park Bank v. Tilton*, 15 Abb. Pr. (N. Y.) 384.

Admission of evidence on question of corporate existence is harmless where general denial makes no issue on that fact. *Willoburn Ranch Co. v. Yegen*, 49 Mont. 101, 140 Pac. 231.

Where no issue was made on the question of corporate existence, admission of secondary evidence was immaterial. *Kingston Carriage Co. v. Hutton*, 25 N. Y. Civ. Pr. 68, 34 N. Y. Supp. 1101.

⁴⁸ Overruling the demurrer of members sued with the corporation as jointly liable under the statutes for its debts is harmless, if erroneous, where judgment was against it primarily and them secondarily. *Marion Tp. Union Draining Co. v. Norris*, 37 Ind. 424.

⁴⁹ *Moore v. Fitchburg R. Corporation*, 4 Gray (Mass.) 465, 64 Am. Dec. 83.

⁵⁰ If several corporations are sued as substantially one and it is expressly so alleged, a refusal to enter judgment

Affirmance as to one corporation and reversal as to a corporate co-party may be made on a judgment against both.⁵¹ Remand should be made where amendment might supply allegations of the jurisdiction,⁵² or more perfect service be made.⁵³ Reversal will be with directions to plead, if a defective service be made good by the general appearance which is involved in suing out the writ of error.⁵⁴ Reinstatement will be directed on reversing an order which set aside a valid service.⁵⁵ Reversal affects the corporation only when it is an appellant or when the judgment is joint and inseparable.⁵⁶

IX. ARBITRATIONS

§ 3126. In general. It is well settled that the corporation may agree to submit matters in dispute to arbitration.⁵⁷ Such an agreement may be entered into by counsel in court, and it is not impaired by the fact that no resolution authorizing it was shown.⁵⁸ The agree-

against one is not harmful to plaintiff who recovers judgment against the others. *White v. Pecos Land & Water Co.*, 18 Tex. Civ. App. 634, 45 S. W. 207.

⁵¹ Where one corporation defendant's motion to dismiss was erroneously overruled and the demurrer of the other was overruled, which would have been proper had the former been dismissed, judgment against both may be reversed as to the former and affirmed as to the latter. *Johnson v. Bennington & N. A. St. R. Co.*, 87 Vt. 519, 90 Atl. 507.

⁵² A cause will be sent back for amendment to aver jurisdictional facts, and if it be not done to be dismissed, rather than to reverse with final judgment where such facts are lacking. *Lexington Mfg. Co. v. Dorr*, 2 Litt. (Ky.) 256.

⁵³ Where there was such service as might be made good by amending return, the case will be remanded. *O'Hara v. Independence Lumber & Implement Co.*, 42 La. Ann. 226, 7 So. 533. Where the service is utterly wanting remand to perfect it will not

be made. *Municipality No. 1 v. Christ Church*, 3 La. Ann. 453.

⁵⁴ *Drew Lumber Co. v. Walter*, 45 Fla. 252, 34 So. 244.

⁵⁵ *Pond v. National Mortgage & De-benture Co.*, 6 Kan. App. 718, 50 Pac. 973.

⁵⁶ Reversal as to one codefendant held not a reversal as to the corporate defendant sued as joint tort feasons, the latter not having joined in the writ of error. *Union Trust Co. v. Atchison, T. & S. F. R. Co.*, 8 N. M. 159, 42 Pac. 89; *Madden v. New Mexico & S. P. R. Co.* (N. M.), 34 Pac. 50.

⁵⁷ § 816, *supra*. And see *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83, 12 L. Ed. 60; *Boston & L. R. Corporation v. Nashua & L. R. Corporation*, 139 Mass. 463, 31 N. E. 751; *Morville v. American Tract Society*, 123 Mass. 129, 25 Am. Rep. 40; *Remington Paper Co. v. London Assur. Corporation*, 12 N. Y. App. Div. 218, 43 N. Y. Supp. 431; *Brady v. City of Brooklyn*, 1 Barb. (N. Y.) 584; *Day v. Essex County Bank*, 13 Vt. 97.

⁵⁸ *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83, 12 L. Ed. 60.

ment will be construed as one for that form of arbitration which is had under the laws of the forum; and accordingly a Virginia corporation suing in the District of Columbia agreed to such an arbitration as that provided by the statutes of Maryland extended by act of congress over the district.⁵⁹ The award includes only those matters which were submitted, and does not affect the agreement of submission as to what should follow the award by way of compliance with it.⁶⁰

⁵⁹ Although a statutory arbitration given by the laws of Maryland could not apply in a forum governed by the practice of Virginia, yet the corporation having power to be sued could also submit; and when it did so after transfer of the case to the forum gov-

erned by Maryland laws the reference proceeded accordingly. *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83, 12 L. Ed. 60.

⁶⁰ *Alexandria Canal Co. v. Swann*, 5 How. (U. S.) 83, 12 L. Ed. 60.

CHAPTER 48

ATTACHMENT, GARNISHMENT, EXECUTION, CREDITORS' BILLS AND SUPPLEMENTARY PROCEEDINGS

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I. ATTACHMENT, GARNISHMENT AND EXECUTION

A. By and Against Corporations Generally

§ 3127. By corporations. The statutes which permit process by attachment or garnishment against corporations, also generally authorize such process in a suit instituted by a corporation,¹ and this by a domestic corporation,² or by a foreign corporation which has acquired the right to do business in the state.

When a foreign corporation has failed to comply with statutory conditions prerequisite to its doing business in the state, it is in no position to obtain a lien by attachment, especially if the statute in terms declares that, on failure to comply with the statutes, a foreign corporation cannot maintain any action or suit in any of the courts of the state.³ Some statutes, however, provide merely that a foreign corpora-

¹ Norton v. Norton, 43 Ohio St. 509, 3 N. E. 348.

² Trenton Banking Co. v. Havestick, 11 N. J. L. 171; Union Bank v. United States Bank, 4 Humph. (Tenn.) 369.

³ J. Walter Thompson Co. v. Whitehead, 185 Ill. 454, 76 Am. St. Rep. 51,

56 N. E. 1106, aff'g 86 Ill. App. 76; Bradley, Metcalf & Co. v. Armstrong, 9 S. D. 267, 68 N. W. 733.

The omission of the original petition, in an attachment suit by a foreign corporation, to allege facts showing plaintiff's right to transact business and sue in the state may be sup-

tion not so admitted to do business in the state shall not maintain an action on a contract made within the state.⁴ And under such a statute, and another statute authorizing foreign corporations to bring actions in the same manner as domestic corporations, a foreign corporation may sue in attachment on a contract not made in the state, without showing that it had procured a license to do business in the state.⁵

A constitutional provision restraining the legislature from granting to a certain class of corporations, such as banks, exclusive facilities in the collection of their debts, does not deprive such corporations, in common with other creditors, of the benefit of process by attachment.⁶

In the case of an execution when a corporation is plaintiff, the chief officer of the corporation may make the affidavit required by statute to entitle the plaintiff to take out an execution against the body of the defendant, and the execution debtor is estopped from denying, on habeas corpus, the existence or corporate capacity of the plaintiff in whose name judgment against him was recovered.⁷

§ 3128. Against domestic corporations. The property of a domestic corporation is not subject to attachment or garnishment, unless provision therefor is made by statute.⁸

plied by amendment so as to support the attachment. *Woldert v. Nedderhut Packing Provision Co.*, 18 Tex. Civ. App. 602, 46 S. W. 378.

⁴ *Herzberg v. Boiesen*, 53 N. Y. Supp. 256, holding further that the assignee of a claim from a foreign corporation takes no greater rights than his assignor, and if his assignor failed to file the certificate required by the statute, and thereby could not enforce a provisional remedy, the assignee cannot resort to it.

In *Box Board & Lining Co. v. Vincennes Paper Co.*, 45 N. Y. Misc. 1, 90 N. Y. Supp. 836, it was held that where the papers do not disclose the fact that the contract was made within the state, it is not necessary to aver compliance with the statutory condition in the matter of the certificate, for the purposes of an attachment. But when the attachment is sought on a cause of action arising within the state, the moving papers

in attachment must show that the corporation had complied with the statute to authorize it to do business; and this is so though the complaint shows a good cause of action. *Sawyer Lumber Co. v. Bussell*, 84 Hun (N. Y.) 114, 31 N. Y. Supp. 1107. See also *Reedy Elevator Co. v. American Grocery Co.*, 24 N. Y. Misc. 678, 53 N. Y. Supp. 989; and 23 N. Y. Misc. 520, 51 N. Y. Supp. 874, rev'g 48 N. Y. Supp. 619.

⁵ *Batchelder & Lincoln Co. v. Knopf*, 54 N. Y. App. Div. 329, 66 N. Y. Supp. 513.

⁶ *Planters' & Merchants' Bank v. Andrews*, 8 Port. (Ala.) 404.

⁷ *Ex parte Sargeant*, 17 Vt. 425.

⁸ *Delaware*. *Holland v. Leslie*, 2 Harr. 306.

Georgia. *Rives v. Boulware*, Dudley 153.

Iowa. *Taylor v. Burlington & M. R. Co.*, 5 Iowa 114.

Massachusetts. *National Bank of*

It is generally held that corporations are "persons" within the meaning of attachment and garnishment statutes,⁹ unless the language of the statute indicates that the word was employed in a more limited sense,¹⁰ and it has been said that the word "process" in a statute is sufficiently comprehensive to apply to the service of writs of attachment on a corporation as garnishee.¹¹

A statute authorizing an attachment on the property of domestic corporations in counties other than the home office of the corporation, is an enlargement of the remedy, and does not operate to repeal, by implication, a statute authorizing attachment against a domestic corporation as against individuals for the causes therein specified.¹²

A reference in a statute as to a cause to be set out in an affidavit, that one sufficient cause shall be that the defendant is a foreign corporation, does not exclude the remedy against domestic corporations. While, as against foreign corporations, that fact alone is sufficient to

Commerce v. Huntington, 129 Mass. 444; *Union Turnpike Road v. Jenkins*, 2 Mass. 37.

Pennsylvania. *Ridge Turnpike Co. v. Peddle*, 4 Pa. St. 490.

Wisconsin. *Everdell v. Sheboygan & F. R. Co.*, 41 Wis. 395; *Ballston Spa Bank v. Marine Bank*, 18 Wis. 490.

Under a statute making "the property of any corporation, * * * liable to attachment on mesne process and levy on execution for debts of the corporation in the manner prescribed by law," the real property of a manufacturing corporation is liable to attachment on mesne process.

Poor v. Chapin, 97 Me. 295, 54 Atl. 753, wherein the court said that under a previous statute, providing that an officer having an execution against a corporation could not levy upon its real estate, until he certified thereon that he was unable to find personal property of the corporation, it may be doubted whether an attachment of land could be made on mesne process.

A statute authorizing attachment against foreign corporations, etc., or when "such corporation or person has removed, or is about to remove, any of his or its property from this state, with intent to defraud his or its cred-

itors," does not authorize an attachment on a domestic corporation. *Ferrier v. American Glass Silvering Co.*, 34 How. Pr. (N. Y.) 496.

9 United States. *Gokey v. Boston & M. R. Co.*, 130 Fed. 994.

Connecticut. *Knox v. Protection Ins. Co.*, 9 Conn. 430, 25 Am. Dec. 33.

Illinois. *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124.

Massachusetts. *Lewis v. Denney*, 4 Cush. 588.

Pennsylvania. *Bushel v. Commonwealth Ins. Co.*, 15 Serg. & R. 173.

Tennessee. *Adams v. Memphis*, 3 Tenn. Cas. 392.

Virginia. *Baltimore & O. R. Co. v. Gallahue's Adm'rs*, 12 Gratt. 655, 65 Am. Dec. 254.

In *South Carolina R. Co. v. McDonald*, 5 Ga. 531, the court said that the words "person," "party," "defendant," "debtor," include a corporation.

10 Planters' & Merchants' Bank v. Andrews, 8 Port. (Ala.) 404.

11 Boyd v. Chesapeake & O. Canal Co., 17 Md. 195, 79 Am. Dec. 646.

12 Greacen v. Buckley & Douglas Lumber Co., 167 Mich. 569, 133 N. W. 538; *Michigan Dairy Co. v. Runnels*, 96 Mich. 109, 55 N. W. 617.

authorize the writ, in a suit against a domestic corporation some other ground specified in the statute should be set out.¹³

The granting of a charter to a foreign corporation in the state of the forum is not a mere license to do business, but the corporation thereupon becomes a domestic corporation and is not liable to attachment as a nonresident.¹⁴

Where a statute authorizes an attachment against a domestic corporation "when the principal place of business is not within the city of New York," a certificate of incorporation is not conclusive as to the principal place of business.¹⁵

When such process against a corporation is authorized, it can be used only against an existing corporation; as a corporation is not a person in law until after the grant of its charter, and a summons of garnishment served on one as president of a corporation, pending an application for a charter, is void.¹⁶

A judgment creditor of a private corporation may issue an execution, levy the same upon and sell the property of the corporation to the same extent as if it were a natural person.¹⁷

And if two corporations consolidate under the name of an execution defendant corporation, and the consolidated company supersedes the old corporation, assuming all the liabilities, and succeeding to all its rights and privileges, such execution against the old binds the personal property of the new corporation.¹⁸

§ 3129. Against foreign corporations—Attachment in general.

While the courts of a state may not obtain jurisdiction over a foreign corporation by service of process in such a way as to give a judgment in personam, the jurisdiction of every state and government over property having its situs within its territory is indisputable.¹⁹ In a leading case, Mr. Justice Field said: "The state, through its tribunals, may subject property situated within its limits owned by nonresidents

¹³ *Michigan Dairy Co. v. Runnels*, 96 Mich. 109, 55 N. W. 617.

¹⁴ *Bernhart v. Brown*, 119 N. C. 506, 36 L. R. A. 402, 26 S. E. 162.

¹⁵ *Rothschild v. Dithredge Flint Glass Co.*, 20 N. Y. Supp. 373, distinguishing *Blumenthal v. Hudson Boot & Shoe Mfg. Co.*, 15 N. Y. Supp. 826.

¹⁶ *Bartram, Hendrix & Co. v. Collins Mfg. Co.*, 69 Ga. 751.

¹⁷ See § 3133, *infra*.

But as to the property of public service corporations, see § 3134, *infra*.

¹⁸ *Shipman Coal-Min. & Mfg. Co. v. Pfeiffer*, 11 Ind. App. 445, 39 N. E. 291.

¹⁹ *Goldmark v. Magnolia Metal Co.*, 65 N. J. L. 341, 47 Atl. 720.

A proceeding by attachment of the property of a person nonresident or absent from the state in which the proceeding is instituted is known as "foreign attachment." *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Biddle v. Girard Nat. Bank*, 109 Pa. St. 349; *Boyer v. Bul-*

to the payment of the demands of its own citizens against them, and the exercise of this jurisdiction in no respect infringes upon the sovereignty of the state where the owners are domiciled. Every state owes protection to its own citizens, and when nonresidents deal with them, it is a legitimate and just exercise of authority to hold and appropriate any property owned by such nonresidents to satisfy the claims of its citizens. It is in virtue of the state's jurisdiction over the property of the nonresident situated within its limits that its tribunals can inquire into the nonresident's obligations to its own citizens, and the inquiry can then be carried only to the extent necessary to control the disposition of the property. If the nonresident have no property in the state, there is nothing upon which the tribunals can adjudicate."²⁰ Accordingly, if a corporation has real or personal property in another state than that by which it was created, it may be proceeded against in such other state by attachment of the property, as in case of any other nonresident, for the proceeding is in rem, and it is not necessary that the court shall acquire jurisdiction over the corporation. In this respect a foreign corporation and a nonresident, natural person occupy the same legal status.²¹ And it is now, in effect, generally so provided by statute.²²

The remedy by attachment was unknown to the common law, and derives its existence from statutory enactment, and in consideration of

lard, 102 Pa. St. 555; *Mégee v. Beirne*, 39 Pa. St. 50; *Fitch v. Ross*, 4 Serg. & R. (Pa.) 557.

At common law, foreign corporations could not be subjected to attachment as to their property to compel their appearance; whenever and wherever process can be served upon the property of a foreign corporation, the authority to do so results either from special custom, or from statute. *Clarke v. New Jersey Steam Nav. Co.*, 1 Story 531, Fed. Cas. No. 2,859.

²⁰ *Pennoyer v. Neff*, 95 U. S. 714, 24 L. Ed. 565.

²¹ *Rocky Mountain Oil Co. v. Central Nat. Bank*, 29 Colo. 129, 67 Pac. 153; *Albright v. United Clay Production Co.*, 5 Pennew. (Del.) 198, 62 Atl. 726; *Wilson v. Danforth*, 47 Ga. 676; *Hannibal & St. J. R. Co. v. Crane*, 102 Ill. 249, 40 Am. Rep. 581; *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am.

Dec. 124; *Voss v. Evans Marble Co.*, 101 Ill. App. 373; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 77 Ill. App. 59, rev'd 181 Ill. 582, 54 N. E. 987.

²² *Louisiana*. *Martin, Pleasants & Co. v. Branch Bank of Alabama*, 14 La. 415.

Massachusetts. *National Bank of Commerce v. Huntington*, 129 Mass. 444; *Andrews v. Michigan Cent. R. Co.*, 99 Mass. 534, 97 Am. Dec. 51; *Blackstone Mfg. Co. v. Blackstone*, 13 Gray 488; *Ocean Ins. Co. v. Portsmouth Marine Ry. Co.*, 3 Mete. 420.

Michigan. *Daniels v. Detroit, G. H. & M. R. Co.*, 163 Mich. 468, 128 N. W. 797.

Mississippi. *Lamb v. Russell*, 81 Miss. 382, 32 So. 916.

Missouri. *St. Louis Perpetual Ins. Co. v. Maguire*, 10 Mo. 141; *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Mo. 421.

its harshness and extraordinary character courts are generally, in the absence of any statutory provision regulating their construction, inclined to construe the statutory provisions creating it strictly in favor of those against whom it may be employed. And on account of its origin the jurisdiction of the courts to enforce this remedy is placed upon the same footing with courts of special or limited jurisdiction, with no presumption in favor of their jurisdiction in cases arising under the attachment laws.²³ Deriving its existence from statute, its scope and effect must be measured by the law of its creation.²⁴ And being in derogation of the common law and summary in its effects, and liable to be abused and used oppressively, its application is carefully guarded, and confined strictly within the limits prescribed by the statute.²⁵ Thus where it is provided by the statutes of a state that an action against a foreign corporation may be maintained by a resident of the state or by a domestic corporation for any cause of action, but that an action against a foreign corporation may be maintained by another corporation, or by a nonresident only when the action is brought to recover damages for the breach of a contract made within the state, or relating to property situated within the state, at the time of the making thereof, or

New Hampshire. Libbey v. Hodgdon, 9 N. H. 394.

New Jersey. Goldmark v. Magnolia Metal Co., 65 N. J. L. 341, 47 Atl. 720.

New York. Coolidge v. American Realty Co., 91 App. Div. 14, 86 N. Y. Supp. 318; India Rubber Co. v. Katz, 65 App. Div. 349, 72 N. Y. Supp. 658; American Trading Co. v. Bedouin Steam Nav. Co., 48 Misc. 624, 96 N. Y. Supp. 271; Box Board & Lining Co. v. Vincennes Paper Co., 45 Misc. 1, 90 N. Y. Supp. 836; Travis v. Railway Educational Ass'n, 33 Misc. 577, 68 N. Y. Supp. 893.

Pennsylvania. Bushel v. Commonwealth Ins. Co., 15 Serg. & R. 173.

South Carolina. Chitty v. Pennsylvania Ry. Co., 62 S. C. 526, 40 S. E. 944.

Tennessee. Union Bank v. United States Bank, 4 Humph. 369.

Vermont. Hawley v. Hurd, 72 Vt. 122, 52 L. R. A. 195, 82 Am. St. Rep. 922, 47 Atl. 401.

Washington. Hunter v. Wenatchee Land Co., 36 Wash. 541, 79 Pac. 40.

In *Com. v. A. B. Baxter & Co.*, 235 Pa. 179, 42 L. R. A. (N. S.) 484, 84 Atl. 136, it was held that the basis of foreign attachment was the custom of the city of London, and that statutes extending the writ to all actions ex contractu must be deemed as making it applicable to foreign corporations.

A Louisiana stockholder in a corporation, "domiciled" in Mississippi has the same right to enforce a debt, owing him by the corporation, by attaching corporate property in Louisiana as any other corporate creditor would have. *Painter v. Bank of Osyka*, 140 La. 457, 73 So. 266.

²³ *Pullman Palace Car Co. v. Harrison*, 122 Ala. 149, 82 Am. St. Rep. 68, 25 So. 697.

²⁴ *Exchange Nat. Bank of Spokane v. Clement*, 109 Ala. 270, 19 So. 814.

²⁵ *Delaplain & Co. v. Armstrong & Ulrich*, 21 W. Va. 211.

where the cause of action arose within the state, and the attachment act provides that to entitle the plaintiff to the process of attachment the jurisdictional facts must appear by affidavit, unless such affidavit shows that the case is within the statute, there is no right to the attachment, and if issued it will be void.²⁶ Under such a statute, where the cause of action does not appear to have arisen in the state, and the affidavit does not state that the plaintiff is a resident of the state, the court has no jurisdiction.²⁷

When the attachment act of a state subjects a "nonresident person," or a "nonresident debtor" of the state to its process, and there is no legislation relieving a corporation created by the laws of a foreign state from such process, a foreign corporation having property within the jurisdiction of that state is regarded as amenable to such process.²⁸

The cause of action on which the suit was brought, and in which the attachment of property is sought, must be one of which the court has jurisdiction,²⁹ and generally in order that plaintiffs may prosecute attachment against foreign corporations, they must show either that they, the plaintiffs, are residents, or that the cause of action arose within the state.³⁰

²⁶ *Coolidge v. American Realty Co.*, 91 N. Y. App. Div. 14, 86 N. Y. Supp. 318; *Ladenberg v. Commercial Bank*, 87 Hun (N. Y.) 269, 33 N. Y. Supp. 821; *Cremins v. East Lake Woolen Co.*, 25 N. Y. Civ. Proc. 365, 41 N. Y. Supp. 202; *Seiser Bros. Co. v. Potter Produce Co.*, 23 N. Y. Civ. Proc. 348, 30 N. Y. Supp. 294.

²⁷ *Oliver v. Walter Heywood Chair Mfg. Co.*, 57 Hun (N. Y.) 588, 10 N. Y. Supp. 771.

²⁸ *Connecticut. Bray v. Wallingford*, 20 Conn. 416.

Georgia. South Carolina R. Co. v. McDonald, 5 Ga. 531.

Illinois. Hannibal & St. J. R. Co. v. Crane, 102 Ill. 249, 40 Am. Rep. 581; *Mineral Point R. Co. v. Keep*, 22 Ill. 9, 74 Am. Dec. 124; *Voss v. Evans Marble Co.*, 101 Ill. App. 373; *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 77 Ill. App. 59; *Wabash R. Co. v. Dougan*, 41 Ill. App. 543, *aff'd* 142 Ill. 248, 34 Am. St. Rep. 74, 31 N. E. 594.

Pennsylvania. Beal & Simons v. Toly Valley Supply Co., 2 Pa. Dist. 671; *Bushel v. Commonwealth Ins. Co.*, 15 Serg. & R. 173.

Tennessee. Union Bank v. United States Bank, 4 Humph. 369.

Virginia. Cowardin v. Universal Life Ins. Co., 32 Gratt. 445; *Bank of United States v. Merchants' Bank*, 1 Rob. 573.

²⁹ *Pullman Palace Car Co. v. Harrison*, 122 Ala. 149, 82 Am. St. Rep. 68, 25 So. 697.

³⁰ *Coolidge v. American Realty Co.*, 91 N. Y. App. Div. 14, 86 N. Y. Supp. 318; *Bank of Commerce v. Rutland & W. R. Co.*, 10 How. Pr. (N. Y.) 1.

The New Jersey act permits the attachment of the property of a foreign corporation in the state, though it has no office or place of business in the state and transacts no business therein and though the cause of action arose outside of the state. No distinction is made in the construc-

There are, of course, statutory variations of the conditions which will give a court jurisdiction in such cases. On the one hand, under a statute providing that a nonresident may bring suit against a foreign corporation, "when the cause of action has arisen, or the subject of the action shall be situated in this state," a nonresident plaintiff may maintain an attachment in a state against property and credits situated therein and belonging to a foreign corporation,³¹ while on the other hand, when a court has not jurisdiction of a cause of action which has arisen in another state, a resident of the state cannot sue out an attachment upon the property of a foreign corporation found in the state, in a suit on a tort committed by such corporation in another state.³² And so statutes generally authorizing such process against absent debtors apply to foreign corporations,³³ though it has been held that a statute relating to absent and absconding debtors applied to natural persons only and not to foreign corporations.³⁴ Where it is provided by statute that a foreign corporation may be sued by a nonresident of the state when the cause of action shall have arisen in the state, or when the subject of the action is situated within the state, and the remedy by attachment in such state is only a provisional remedy in aid of an action, and the statute providing therefor contains no restriction upon the right of a nonresident to sue a foreign corporation, the attachment of the property of a foreign corporation in such state does not give the court jurisdiction of an action by a nonresident against such foreign corporation.³⁵

An attachment will lie against a foreign corporation having property in the state, even though it be not doing business therein, a statute authorizing attachments against such corporations doing business in the state being accumulative only and intended to allow the writ of attachment against a foreign corporation, notwithstanding it has a place of business in the state and may therefore be sued by ordinary process.³⁶ And so generally, the appointment under a statute, of an

tion of the act between debts arising within the state and those arising outside, and the act confers the right to use the writ on any creditor, without limitation or qualification. *Goldmark v. Magnolia Metal Co.*, 65 N. J. L. 341, 47 Atl. 720.

³¹ *Hodgson v. Southern Building & Loan Ass'n of Knoxville, Tennessee*, 91 Md. 439, 46 Atl. 971.

³² *Pullman Palace Car Co. v. Harrison*, 122 Ala. 149, 82 Am. St. Rep. 68, 25 So. 697.

³³ *Voss v. Evans Marble Co.*, 101 Ill. App. 373; *Bushel v. Commonwealth Ins. Co.*, 15 Serg. & R. (Pa.) 173; *Bank of United States v. Merchants' Bank*, 1 Rob. (Va.) 573.

³⁴ *McQueen v. Middletown Mfg. Co.*, 16 Johns. (N. Y.) 5.

³⁵ *Central Railroad & Banking Co. v. Georgia Const. & Inv. Co.*, 32 S. C. 319, 11 S. E. 192.

³⁶ *Wilson v. Danforth*, 47 Ga. 676; *Cincinnati, N. O. & T. P. R. Co. v. Pless & Slade*, 3 Ga. App. 400, 60 S.

agent, upon whom process may be served does not relieve a foreign corporation from liability to attachment,³⁷ though there is authority for the view that a foreign corporation which is doing business in the state pursuant to license, or has appointed an agent in the state upon whom process may be served, is not a nonresident whose property is subject to attachment upon the grounds of nonresidency.³⁸ This question, however, as many other questions upon attachment statutes, depends upon the language of the particular statute. Thus, it has been held that a clause in a statute which provides as one of the grounds for attachment "that defendant is a corporation whose chief office or place of business is out of the state" does not apply to a corporation whose principal place of business is within the state although its chief office may be without the state, the court saying that, to carry out the evident intent of the statute, the word "and" should be substituted for the word "or."³⁹ Where a foreign corporation owns property in a state and transacts business therein, but does not transact business under legislative authority and has failed to comply with a statute providing for certain conditions upon compliance with which

E. 8; *Pacific Selling Co. v. Albright-Prior Co.*, 3 Ga. App. 143, 59 S. E. 468; *Jennings v. Idaho Railway, Light & Power Co.*, 26 Idaho 703, L. R. A. 1915 D 115, Ann. Cas. 1916 E 359, 146 Pac. 101; *India Rubber Co. v. Katz*, 65 N. Y. App. Div. 349, 72 N. Y. Supp. 586.

³⁷ *Albright v. United Clay Production Co.*, 5 Pennw. (Del.) 198, 62 Atl. 726; *D. S. Cook & Son Min. Co. v. Thompson*, 110 Va. 369, 66 S. E. 79; *Cowardin v. Universal Life Ins. Co.*, 32 Gratt. (Va.) 445; *Savage v. People's Building, Loan & Savings Ass'n*, 45 W. Va. 275, 31 S. E. 991; *Quesenberry v. People's Building, Loan & Savings Ass'n*, 44 W. Va. 512, 30 S. E. 73.

³⁸ *Goldmark v. Magnolia Metal Co.*, 65 N. J. L. 341, 47 Atl. 720.

In Illinois the decisions are conflicting. In one decision the holding of the court was in accord with the rule laid down in the text. *Burr v. Co-operative Const. Co.*, 162 Ill. App. 512. See also *Hannibal & St. J. R. Co. v.*

Crane, 102 Ill. 249, 40 Am. Rep. 581.

But in an earlier decision, an attachment against a foreign corporation admitted to do and doing business in the state and having an office and property therein was sustained against its contention that it was a resident. *Voss v. Evans Marble Co.*, 101 Ill. App. 373.

Where a statute providing that such foreign corporations as comply with the statutory provisions shall not be subject to attachment, contains a proviso excepting certain classes of corporations from the operation of the statute, a foreign corporation within an excepted class cannot, by voluntarily and unnecessarily complying with the statutory provisions, relieve itself of liability to attachment as a foreign corporation. *Bigalow Fruit Co. v. Armour Car Lines*, 74 Ohio St. 168, 78 N. E. 267.

³⁹ *Rocky Mountain Oil Co. v. Central Nat. Bank*, 29 Colo. 129, 67 Pac. 153.

foreign corporations may transact business in the state, it will not be exempt from attachment against its property situate in such state.⁴⁰

It is indispensable to give a court jurisdiction in attachment proceedings against a foreign corporation, that there should be personal service of the summons in the action upon the defendant, or that the process of attachment be levied upon property of the defendant within the limits of the state, or that the process of garnishment should be served upon a garnishee having property in his possession belonging to the defendant, or who is indebted to such defendant. Where there has been no personal service in an action, nor a waiver thereof by the general appearance or otherwise, and no property of the defendant seized under an attachment, and no property or credits belonging to the defendant seized by process of garnishment, the court acquires no jurisdiction of the person or property of the defendant, and any proceedings taken in the cause are coram non judice, and void.⁴¹

§ 3130. — Attachment proceedings in federal courts. The Revised Statutes of the United States provide that "in common law causes in the circuit and district courts the plaintiff shall be entitled to similar remedies by attachment or other process, against the property of the defendant, which are now provided by the laws of the state in which such court is held for the courts thereof; and such circuit and district courts may, from time to time, by general rules adopt such state laws as may be in force where they are held in relation to attachments and other process: Provided that similar preliminary affidavits or proofs, and similar security, as required by such state laws, shall be first furnished by the party seeking such attachment or other remedy."⁴²

Prior to the enactment of this statute in 1872, it was held that the right to attach property to compel the appearance of persons, could properly be used only in cases in which persons were amenable to the process of the court, in personam; that is, where they were inhabitants, or found within the United States, and not where they were aliens, or citizens resident abroad at the commencement of the suit, and had no habitation in the United States, and even in a case of a person amen-

⁴⁰ Goldmark v. Magnolia Metal Co., 65 N. J. L. 341, 47 Atl. 720.

⁴¹ Central Loan & Trust Co. v. Campbell Commission Co., 5 Okla. 396, 49 Pac. 48, rev'd on other grounds 173 U. S. 84, 43 L. Ed. 623.

⁴² U. S. Rev. St. § 915, Act Congress June 1, 1872, c. 255, § 6, 17 U. S. Stat. L. 197, 4 Fed. St. Ann. p. 577. The

federal circuit courts are now abolished and the district court vested with the jurisdiction formerly exercised by the circuit courts.

Attachments of property, upon process instituted in federal courts, are dissolved in conformity with state laws. U. S. Rev. St. § 933, 1 Fed. St. Ann. p. 515.

able to process in personam, an attachment against his property could not be issued against him except as part of or together with process to be served upon his person.⁴³

This exemption from process of attachment, however, was a personal privilege or exemption which it was competent for the party to waive, and it was held that appearing and pleading to the merits would produce such waiver.⁴⁴

§ 3131. — Garnishment. The great weight of authority, almost unanimous in this country, establishes the doctrine that a nonresident temporarily in the state may be summoned and compelled to answer as garnishee, but if, upon his answer, it be established that he is a nonresident, he cannot be subjected to further proceedings in the cause, for want of jurisdiction, unless when he is garnished he have in his possession or be bound to pay the defendant money or deliver to him property within the state.⁴⁵ This principle which forbids garnishment of a nonresident individual temporarily within the state applies to foreign corporations, and according to the weight of authority foreign corporations and nonresident individuals stand upon the same footing in respect to garnishment, except that the former are subject to garnishment when doing business in the state in which the garnishment issues in such sense and to such extent as to have become domiciled therein.⁴⁶

Thus a foreign corporation cannot maintain in the courts of a state

⁴³ Toland v. Sprague, 12 Pet. (U. S.) 300, 9 L. Ed. 1093.

⁴⁴ Irvine v. Lowry, 14 Pet. (U. S.) 293, 10 L. Ed. 462; Toland v. Sprague, 12 Pet. (U. S.) 300, 9 L. Ed. 1093; Pollard v. Dwight, 4 Cranch (U. S.) 421, 2 L. Ed. 666.

⁴⁵ Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300.

It is said that the first announcement of this doctrine in this country was made by the Supreme Judicial Court of Massachusetts. Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300. See also Tingley v. Bateman, 10 Mass. 343, where the reason given for holding that a nonresident cannot be subjected to garnishment is stated. See further in this connection, Peters v.

Rogers, 5 Mason (U. S.) 555, Fed. Cas. No. 11,033; Green v. Farmers' & Citizens' Bank, 25 Conn. 452; Smith v. Eaton, 36 Me. 298, 58 Am. Dec. 746; Lovejoy v. Albee, 33 Me. 414, 54 Am. Dec. 630; Nye v. Lipcombe, 21 Pick. (Mass.) 263; Hart v. Anthony, 15 Pick. (Mass.) 445; Ray v. Underwood, 3 Pick. (Mass.) 302; Lawrence v. Smith, 45 N. H. 533, 86 Am. Dec. 183; Young v. Ross, 31 N. H. 201; Sawyer v. Thompson, 24 N. H. 510; Jones v. Winchester, 6 N. H. 497; Squair v. Shea, 26 Ohio St. 645; Rindge v. Green, 52 Vt. 204; Peck v. Barnum, 24 Vt. 75; Baxter v. Vincent, 6 Vt. 614.

⁴⁶ Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300.

an action against another foreign corporation begun by suing out an attachment which was never levied upon any property of the defendant, and which the plaintiff had not sought to make effectual otherwise than by causing summons of garnishment to be served upon a person not himself indebted to the defendant, but who was the agent of a third foreign corporation, a debtor of the defendant, not having an office or transacting any business in such state.⁴⁷ Nor unless expressly authorized by statute, can a foreign corporation be summoned as garnishee or by trustee process, although the principal officers of such corporation reside in the state,⁴⁸ although it is doing business in the state in conformity with state statutes,⁴⁹ or although it is a foreign railroad corporation in possession of leased railroads in the state.⁵⁰ The fact that a foreign corporation, having no property or effects in the state, has members and officers resident in the state and keeps books and records therein, does not render it subject to such process.⁵¹

If a foreign corporation is not doing business in a state, it is not subject to garnishment to reach a debt due by it to another.⁵²

There are, however, two cases, both of which have been vigorously condemned by textwriters and courts, which completely ignore the principle that a nonresident cannot be held as garnishee when it is shown that he is a nonresident and has no effects of the debtor in his possession within the state and owes him no debt payable within the state.⁵³

Both of these decisions fail to distinguish garnishment, which is a special limited statutory proceeding, from proceedings in which the courts exercise general jurisdiction and in which strict compliance with the requirements in matters of foreclosure is not ordinarily jurisdictional, as it is in attachment and garnishment. Where the action is in personam, jurisdiction of the person of the defendant is plenary jurisdiction, giving the court full power for all purposes of the action. But in garnishment, jurisdiction of the person is generally held to be only partial jurisdiction. No attention whatever was paid to this distinction in the two cases in question.⁵⁴

⁴⁷ *Associated Press v. United Press*, 104 Ga. 51, 29 S. E. 869.

⁴⁸ *National Bank of Commerce v. Huntington*, 129 Mass. 444.

⁴⁹ *Larkin v. Wilson*, 106 Mass. 120.

⁵⁰ *Gold v. Housatonic R. Co.*, 1 Gray (Mass.) 424.

⁵¹ *Danforth v. Penny*, 3 Metc. (Mass.) 564.

⁵² *Associated Press v. United Press*,

104 Ga. 51, 29 S. E. 869; *Riter-Conley Mfg. Co. v. Mzik*, 23 Ohio Cir. Ct. 164.

⁵³ *Molyneux v. Seymour, Fanning & Co.*, 30 Ga. 440, 76 Am. Dec. 662; *Morgan v. Neville*, 74 Pa. St. 52.

⁵⁴ *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300.

Some statutes in express terms authorize garnishment proceedings against foreign corporations,⁵⁵ and statutes generally permit the use of such process to reach a debt due to the defendant in the original suit by a foreign corporation doing business in the state.⁵⁶

Great conflict and confusion characterize the decisions of the courts of the several states respecting the right to proceed by garnishment against debts due from foreign corporations to nonresidents, and contracted or payable in a foreign jurisdiction. Many of the decisions rest on the theory that the debt follows the person of the creditor, and can be subjected only in the jurisdiction in which he resides.⁵⁷ Moreover, it has been held by the Supreme Court of Alabama "that a debt

⁵⁵ *Grinnell v. Niagara Fire Ins. Co.*, 127 Mich. 19, '86 N. W. 435.

⁵⁶ *United States. Gundry v. Reakirt*, 173 Fed. 167; *Mooney v. Buford & George Mfg. Co.*, 72 Fed. 32.

Georgia. Schmidlapp & Co. v. La Confidence Ins. Co., 71 Ga. 246 (holding that a foreign insurance company doing business in adjoining states is not liable to garnishment by service of process on an agent who attends to the business in those states and resides but does no business in the state in which attempt was made to garnish the company).

Illinois. Glover v. Wells, 40 Ill. App. 350, aff'd 140 Ill. 102, 29 N. E. 680; *C. M. Henderson & Co. v. Schaas*, 35 Ill. App. 155; *Roche v. Rhode Island Ins. Ass'n*, 2 Ill. App. 360.

Missouri. McAllister v. Pennsylvania Ins. Co., 28 Mo. 214.

New Hampshire. Steer v. Dow, 75 N. H. 95, 20 L. R. A. (N. S.) 263; 71 Atl. 217.

West Virginia. Pennsylvania R. Co. v. Rogers, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300.

A statute providing that "all corporations may be summoned as trustees" is intended to put corporations on the same footing as individuals, and when, under the law, a nonresident individual is not chargeable by the trustee process, although found in the state and served with process, a

foreign corporation cannot be charged as trustee. *Gold v. Housatonic R. Co.*, 1 Gray (Mass.) 424.

The fact that a foreign corporation is exempt from process of garnishment under the laws of its home state will not exempt it from such process in another state in which it is doing business. *First Nat. Bank of Detroit v. Burch*, 80 Mich. 242, 45 N. W. 93.

It is not necessary affirmatively to show that the garnishee has complied with the statutes imposing conditions upon which foreign corporations may do business in the state; compliance is presumed in the absence of a showing to the contrary. *Krafve v. Roy & Roy*, 98 Minn. 141, 116 Am. St. Rep. 346, 107 N. W. 966.

⁵⁷ See *Minor, Conflict of Laws*, § 125, where the various theories regarding the subject are discussed. Professor Minor cites many cases to sustain the correctness of the view that the situs of a debt, for purposes of garnishment, is not only at the domicile of the debtor, but in any state in which the garnishee may be found, provided the municipal law of that state permits the debtor to be garnished, and provided the court acquires jurisdiction over the garnishee, through his voluntary appearance or actual service of process upon him within the state.

due to a nonresident defendant, by a nonresident corporation, for an obligation neither made nor to be performed in this state, is not within the jurisdiction of domestic courts, and, without personal service on the defendant debtor, cannot be subjected to the plaintiff's debt by judgment against the garnishee corporation."⁵⁸

According to the weight of authority a debt due by a foreign corporation may be garnisheed in a state, if it could have been subjected to suit therein for such debt by the person to whom it was indebted, provided the laws of such state permit the garnishment of a debtor of the principal debtor.⁵⁹ The Supreme Court of the United States has considered the various views concerning the situs of the debt for the purpose of garnishment, and declared, what seems to be the most reasonable and logical doctrine, that it is not material that the principal debtor and garnishee are both nonresidents, or that the debt was contracted and payable in another state, and in a state by the laws of which it would be exempt from garnishment, and that power over the person of the garnishee confers jurisdiction on the courts of the state where the writ issues, and that if there be a law of the state providing for the garnishment of the debt then the presence

⁵⁸ *Louisville & N. R. Co. v. McCarty*, 195 Ala. 150, 70 So. 91, declining to follow *Louisville & N. R. Co. v. Deer*, 200 U. S. 176, 50 L. Ed. 426; *Harris v. Balk*, 198 U. S. 215, 49 L. Ed. 1023, 3 Ann. Cas. 1084, and thereby depart from the rule laid down in earlier Alabama decisions. The Supreme Court of the United States, however, finding itself concluded by *Louisville & N. R. Co. v. Deer* and *Harris v. Balk*, supra, and *Chicago, R. I. & P. R. Co. v. Sturm*, 174 U. S. 710, 43 L. Ed. 1144, held, in a case decided prior to *Louisville & N. R. Co. v. McCarty*, supra, that under the full faith and credit clause of the Federal Constitution, a judgment of garnishment against a railroad company, owing wages to the nonresident judgment debtor, which was rendered, as was permitted by the state statute, without service of process upon, or formal notice to such debtor, notice actually having been given him, however, by the railroad company, is

available to the company in a suit against it for wages brought by the judgment debtor in the state of his residence. *Baltimore & O. R. Co. v. Hostetter*, 240 U. S. 620, 60 L. Ed. 829.

⁵⁹ *Arkansas. Kansas City, P. & G. R. Co. v. Parker*, 69 Ark. 401, 86 Am. Rep. 205, 63 S. W. 996.

Illinois. Hunter W. Finch & Co. v. Zenith Furnace Co., 245 Ill. 586, 92 N. E. 521; *Lancashire Ins. Co. v. Corbetts*, 165 Ill. 592, 36 L. R. A. 640, 56 Am. St. Rep. 275, 46 N. E. 631, rev'g 62 Ill. App. 236.

Kentucky. Pittsburgh, C., C. & St. L. Ry. Co. v. Bartels, 108 Ky. 216, 21 Ky. L. Rep. 1670, 56 S. W. 152.

Tennessee. Mobile & O. R. Co. v. Barnhill, 91 Tenn. 395, 30 Am. St. Rep. 889, 19 S. W. 21.

West Virginia. Baltimore & O. R. Co. v. Allen, 58 W. Va. 388, 3 L. R. A. (N. S.) 608, 112 Am. St. Rep. 975, 52 S. E. 465.

of the garnishee within the state gives the court jurisdiction to make judgment against him upon garnishment proceedings, even though such presence be temporary, if during such temporary presence the principal debtor could have sued the garnishee in such state to recover the debt. The court, speaking through Mr. Justice Peckham, said: "Attachment is the creature of the local law; that is, unless there is a law of the state providing for and permitting the attachment, it cannot be levied there. If there be a law of the state providing for the attachment of the debt, then, if the garnishee be found in that state, and process be personally served upon him therein, we think the court thereby acquires jurisdiction over him, and can garnish the debt due from him to the debtor of the plaintiff, and condemn it, provided the garnishee could himself be sued by his creditors in that state. We do not see how the question of jurisdiction *vel non* can properly be made to depend upon the so-called original situs of the debt, or upon the character of the stay of the garnishee, whether temporary or permanent, in the state where the attachment is issued. Power over the person of the garnishee confers jurisdiction on the courts of the state where the writ issues. * * * If, while temporarily there, his creditor might sue him there and recover the debt, then he is liable to process of garnishment, no matter where the situs of the debt was originally. We do not see the materiality of the expression 'situs of the debt' when used in connection with attachment proceedings. If by situs is meant the place of the creation of the debt that fact is immaterial. If it be meant that the obligation to pay the debt can only be enforced at the situs thus fixed, we think it plainly untrue. The obligation of the debtor to pay his debt clings to and accompanies him wherever he goes. He is as much bound to pay his debt in a foreign state when therein sued upon his obligation by his creditor, as he was in the state where the debt was contracted. We speak of ordinary debts, such as the one in this case. It would be no defense to such suit for the debtor to plead that he was only in the foreign state occasionally or temporarily. His obligation to pay would be the same whether he was there in that way or with intention to remain. It is nothing but the obligation to pay which is garnished or attached. This obligation can be enforced by the courts of the foreign state after personal service of process thereon, just as well, as by the courts of the domicile of the debtor. If the debtor leave the foreign state without appearing, a judgment by default may be entered, upon which execution may issue, or the judgment may be sued upon in any other state where the debtor might be found. In such case the situs is unimportant. It is not a question of possession

in a foreign state, for possession cannot be taken of a debt or of the obligation to pay for it, as tangible property might be taken possession of." ⁶⁰

A state court has jurisdiction to render a judgment in garnishment of a debt due by a foreign corporation, doing business therein and permanently liable to service and suit in such state, to a nonresident, who was served by such publication as the laws of such state prescribe.⁶¹ Thus it was held that where a foreign corporation has com-

⁶⁰ *Harris v. Balk*, 198 U. S. 215, 49 L. Ed. 1023, 3 Ann. Cas. 1084, cited approvingly in *E. Swindell & Co. v. Bainbridge State Bank*, 3 Ga. App. 364, 60 S. E. 13.

⁶¹ *Louisville & N. R. Co. v. Deer*, 200 U. S. 176, 50 L. Ed. 426.

In *National Bank of Wilmington & Brandywine v. Furtick*, 2 Marv. (Del.) 35, 44 L. R. A. 115, 69 Am. St. Rep. 99, 42 Atl. 479, the court said: "The court in this case review the federal and state decisions, and show that a large majority of the states have followed the principle that, for purposes of jurisdiction in attachment proceedings, the situs of a debt is at the domicile of the creditor, unless otherwise stipulated. An exception to this rule appears to be where the garnishee is a resident of the state where the proceedings are instituted, and is under the exclusive jurisdiction of that state, and as a consequence under its power to determine for itself the rights and obligations arising from his contracts, and mode of enforcing them; and possibly another exception is where a foreign corporation is doing business in a state, and the debt arose in respect to such business, and where the corporation submits or subjects itself to the law of the state in the same manner and to the same extent in respect to such business as it would be bound to were it a corporation created by the state. We avoid expressing an opinion upon these cases. The proceeding here is not based upon any

cause of action that originated in this state, nor to enforce any contract or agreement entered into with any of its citizens, or in reference to any subject-matter within the state. It is a case of nonresident defendant and nonresident garnishee. True, the garnishee is a corporation doing business in this state, but the debt due the defendant arose from its contract for insurance made through its agency in South Carolina, with the defendant, a citizen of that state, and concerning property situated there, and was payable there under the custom of the company; and it was payable there in accordance with the principle of law that, in the absence of a place fixed by the contract, a debt is payable at the domicile of the creditor (*Central Trust Co. of New York v. Chattanooga, R. & C. R. Co.*, 68 Fed. 685), and is not such a credit or property within this state as will confer jurisdiction in this proceeding, even if service had been made upon the statutory officer. To take any other view would be to hold that it existed, had its situs, and was liable to attachment in every state in this Union where the defendant happened to have an officer upon whom process could be served, as a condition precedent to its being permitted to do business in such state. That this is true is shown by the fact that an attempt was made to attach this very same debt by a creditor in the state of New York. Upon motion, the court there vacated the attachment upon the

plied with the conditions precedent to its doing business in a state and appointed an agent therein upon whom process in any proceedings in the courts of such state may be served, it becomes subject to garnishment proceedings in such state.⁶²

In a suit against a nonresident, a foreign corporation is subject to garnishment when the cause of action arose in the state and the subject of the action is situated in the state.⁶³ A debt due from one foreign corporation to another foreign corporation, arising out of a contract entered into in the state at an agency of the debtor corporation, maintained therein for the transaction of its business, is subject to garnishment in an action in such state by a resident plaintiff against the creditor corporation, although the latter maintains no agency therein for the transaction of business, or otherwise.⁶⁴ And under the rule that the situs of a debt due by a third party to the principal defendant is in any state in which the garnishee may be found, a debt due from a foreign corporation to a nonresident who is only constructively served with process is subject to garnishment

grounds we have just stated. We believe this view to be based upon reason and supported by authority, and to be the only doctrine consistent with proper protection of citizens of other states. If it is not the situs of the defendant that gives jurisdiction, as is held in *Insurance Co. v. Chambers*, 53 N. J. Eq. 468, and if it could be granted that service was had upon the statutory officer, we would still hold that the attachment in the case should be dissolved. The statute provides that, before foreign insurance companies shall be permitted to do business in this state, they must appoint an agent upon whom process may be served. The condition has relation to the permission given. The presumption is that only such jurisdiction is claimed as is necessary to deal with litigation arising out of the business that is done under this permission. 'Statutes by which the jurisdiction is assumed should be construed strictly, and should not, unless their language is explicit, be held to confer jurisdiction beyond that which

is required to enable the courts to take cognizance of matters arising out of business done within the state, or else to protect and enforce the rights of the residents of their own state against foreign corporations.' "

⁶² *Glover v. Wells*, 40 Ill. App. 350, aff'd 140 Ill. 102, 29 N. E. 680; *Roche v. Rhode Island Ins. Ass'n*, 2 Ill. App. 360; *McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 214; *Kennedy v. Agricultural Ins. Co.*, 165 Pa. St. 179, 30 Atl. 724; *Neufelder v. German American Ins. Co.*, 6 Wash. 336, 22 L. R. A. 287, 36 Am. St. Rep. 166, 33 Pac. 870; *Dittenhaefer v. Cœur d'Alene Clothing Co.*, 4 Wash. 519, 30 Pac. 660.

⁶³ *Lancaster v. Spotswood*, 41 N. Y. Misc. 19, 83 N. Y. Supp. 572; *Goodwin v. Claytor*, 137 N. C. 224, 67 L. R. A. 209, 107 Am. St. Rep. 479, 49 S. E. 173; *Weed Sew. Mach. Co. v. Boutelle*, 56 Vt. 570, 48 Am. Rep. 821; *Brauser v. New England Fire Ins. Co.*, 21 Wis. 506.

⁶⁴ *Krafve v. Roy & Roy*, 98 Minn. 141, 116 Am. St. Rep. 346, 107 N. W. 966.

in a state in which such corporation does business,⁶⁵ although the debt did not arise out of business transacted in that state and is not payable therein.⁶⁶ So a debt due to a foreign corporation, which has never transacted any business in a state nor complied with the laws of such state prescribing certain conditions prerequisite to its doing business in such state, may be reached by garnishment, where the garnishee is subject to the process of the courts of such state.⁶⁷ But where the rule is maintained that the situs of a debt is at the domicile of the creditor and not that of the debtor, a debt due from a foreign corporation to a nonresident on a cause of action arising out of the state is not subject to garnishment.⁶⁸

In a suit against a foreign corporation, garnishment cannot be served upon a person not himself indebted to the defendant, but who is an agent of another foreign corporation, a debtor of the defendant, not having an office or transacting any business in the state.⁶⁹ The person garnishing is, in his relation to the garnishee, merely substituted to the rights of his own debtor, and can recover only where the principal defendant could recover.⁷⁰

§ 3132. Against corporations chartered in more than one state.

Where a corporation has been incorporated in two or more states, either as a single corporation incorporated within several states, or as several corporations consolidated, the situs of indebtedness on joint or consolidated business, for the purpose of garnishment, is in any one of those states,⁷¹ and such a corporation is subject to garnishment

⁶⁵ Pittsburgh, C., C. & St. L. Ry. Co. v. Bartels, 108 Ky. 216, 21 Ky. L. Rep. 1670, 56 S. W. 152.

⁶⁶ Stone v. Drake, 79 Ark. 384, 96 S. W. 197; Harvey v. Thompson, 2 Ga. App. 569, 60 S. E. 11; Sutton v. Heinze, 84 Kan. 756, 34 L. R. A. (N. S.) 238, 115 Pac. 560, rehearing denied 85 Kan. 332, 34 L. R. A. (N. S.) 239, 116 Pac. 614; Burlington & M. R. Ry. Co. v. Thompson, 31 Kan. 180, 47 Am. Rep. 497, 1 Pac. 622; Baltimore & O. R. Co. v. Allen, 58 W. Va. 388, 3 L. R. A. (N. S.) 608, 112 Am. St. Rep. 975, 52 S. E. 465.

⁶⁷ Hunter W. Finch & Co. v. Zenith Furnace Co., 245 Ill. 586, 92 N. E. 521.

⁶⁸ Louisville & N. R. Co. v. Steiner, 128 Ala. 353, 30 So. 741; Louisville

& N. R. Co. v. Nash, 118 Ala. 477, 41 L. R. A. 331, 72 Am. St. Rep. 181, 23 So. 825; Alabama Great Southern R. Co. v. Chumley, 92 Ala. 317, 9 So. 286; Louisville & N. R. Co. v. Dooley, 78 Ala. 524; Myer v. Liverpool, L. & G. Ins. Co., 40 Md. 595; Straus v. Chicago Glycerine Co., 46 Hun (N. Y.) 216, aff'd 108 N. Y. 654, 15 N. E. 444.
⁶⁹ Associated Press v. United Press, 104 Ga. 51, 29 S. E. 869.

⁷⁰ Lancashire Ins. Co. v. Corbetts, 165 Ill. 592, 36 L. R. A. 640, 56 Am. St. Rep. 275, 46 N. E. 631, rev'g 62 Ill. App. 236.

⁷¹ Johnson v. Union Pac. R. Co., 145 Fed. 249; Georgia & A. Ry. Co. v. Stollenwerck, 122 Ala. 539, 25 So. 258; Johnson v. Union Pac. R. Co., 29 R. I.

by a citizen of one of the states in the courts of that state, although the debt sought to be reached is due to a nonresident, and was contracted in one of the other states where the company is chartered.⁷⁴

B. Property and Interests Subject in General

§ 3133. Property subject in general. The property, real and personal, of strictly private corporations, such, for instance, as manufacturing, mining, and trading companies, is liable to be taken on attachment or execution, precisely as the property of an individual debtor,⁷³ differing in this respect from the property of so-called public service corporations, as is shown hereafter,⁷⁴ unless the statutes prescribe the particular kinds of property or interests which are subject to such process.⁷⁵

A corporation cannot claim that its funds are exempt from the process of its creditors, because it needs them for the repair of its property or has by resolution set them apart for that purpose.⁷⁶

In actions against corporations, attachment or execution cannot, of course, be levied on the individual property of stockholders,⁷⁷ unless there is statutory authority therefor, nor can the creditors of stock-

80, 132 Am. St. Rep. 799, 69 Atl. 298; *Pierce v. Chicago & N. W. Ry. Co.*, 36 Wis. 283.

⁷² *Mobile & O. R. Co. v. Barnhill*, 91 Tenn. 395, 30 Am. St. Rep. 889, 19 S. W. 21; *Holland v. Mobile & O. R. Co.*, 84 Tenn. 414.

⁷³ *Gardner v. Mobile & N. W. R. Co.*, 102 Ala. 635, 48 Am. St. Rep. 84, 15 So. 271; *Overton Bridge Co. v. Means*, 33 Neb. 857, 29 Am. St. Rep. 514, 51 N. W. 240; *Gooch v. McGee*, 83 N. C. 59, 35 Am. Rep. 558.

The court, in a suit begun by trustee process, will not compel performance of an executory contract between a foreign corporation and its local agent for the purpose of subsequently bringing into the agent's hands property which may be reached by such process. *Hopedale Mfg. Co. v. Clinton Cotton Mills*, 224 Mass. 193, 112 N. E. 879.

⁷⁴ See § 3171, *infra*.

In Pennsylvania statutes provide for different kinds of executions

against corporations, the property of a private corporation having no public duties to perform, being subject to an ordinary writ of fieri facias, while the property of a public service corporation is made subject to a special fieri facias. *East Side Bank v. Columbus Tanning Co.*, 170 Pa. St. 1, 32 Atl. 539; *Reynolds v. Reynolds Lumber Co.*, 169 Pa. St. 626, 47 Am. St. Rep. 935, 32 Atl. 537.

⁷⁵ *International Coal Min. Co. v. Pennsylvania R. Co.*, 152 Fed. 551; *Smith v. United States Fire Ins. Co.*, 126 Tenn. 435, 45 L. R. A. (N. S.) 266, Ann. Cas. 1913 E 196, 150 S. W. 97.

⁷⁶ *Reed v. Penrose's Ex'x*, 36 Pa. St. 214, 2 Grant (Pa.) 472; *Fox v. Reed*, 3 Grant (Pa.) 81.

⁷⁷ *Tregre & Shexnayder v. Carter Packet Co.*, 132 La. 293, 45 L. R. A. (N. S.) 189, 61 So. 379; *Adams v. Wiscasset Bank*, 1 Greenl. (Me.) 361, 10 Am. Dec. 88; *State v. Marshall*, 69 Miss. 486, 13 So. 668.

holders levy such process on a specific part of the property of the corporation,⁷⁸ and shares of paid-up stock of individual stockholders are at no time subject to levy and seizure for the debts of the corporation.⁷⁹

§ 3134. Franchises. The franchise of an ordinary private corporation cannot be levied upon and sold under a common-law execution issued upon a judgment at law nor taken by attachment, unless under some positive provision of law which points out the mode and method by which the sale and transfer may be effected.⁸⁰ And this is so also as to the franchises of public service corporations, the rule having been applied to those of railroad companies,⁸¹ of turnpike or plank road companies,⁸² of ferry,⁸³ bridge,⁸⁴ or canal companies,⁸⁵ or of water companies,⁸⁶ or of a market house association.⁸⁷

⁷⁸ *Williamson Syndies v. Smoot*, 7 Mart. (La.) 31, 12 Am. Dec. 494; *North Carolina Mut. Ins. Co. v. Hicks*, 48 N. C. 58.

⁷⁹ *Johnson v. United Rys. Co.*, 247 Mo. 326, 152 S. W. 362.

See § 3154, *infra*.

⁸⁰ *Keystone Bank v. Donnelly*, 196 Fed. 832; *New Orleans, S. F. & L. R. Co. v. Delamore*, 34 La. Ann. 1225; *Stewart v. Jones*, 40 Mo. 140; *State v. Turnpike Co. of Middletown*, 65 N. J. L. 73, 46 Atl. 569.

⁸¹ *Hatcher v. Toledo, W. & W. R. Co.*, 62 Ill. 477; *Arthur v. Commercial & Railroad Bank*, 9 Smedes & M. (Miss.) 394, 48 Am. Dec. 719; *Western Pennsylvania Ry. Co. v. Johnston*, 59 Pa. St. 290.

A statute authorizing the attachment upon mesne process, and the sale upon execution, or warrant of distress, of the franchises of corporations authorized to receive toll, so far as those franchises relate to receiving toll, though not expressly mentioning railroad corporations, includes a railroad corporation authorized to receive toll. *Simmons v. Worthington*, 170 Mass. 203, 49 N. E. 114.

And in *Lawrence v. Morgan's Louisiana & T. R. & S. S. Co.*, 39 La.

Ann. 427, 4 Am. St. Rep. 265, 2 So. 69, it was held that the franchise of a railroad company is transferred at a United States marshal's sale of the railroad and all of its franchises to the purchaser, even if he is a natural person.

⁸² *California*. *Wood v. Truckee Turnpike Co.*, 24 Cal. 474.

Kentucky. *Winchester & L. Turnpike Road Co. v. Vimont*, 5 B. Mon. 1.

Michigan. *James v. Pontiac & G. Plank Road Co.*, 8 Mich. 91.

Ohio. *Seymour v. Milford & C. Turnpike Co.*, 10 Ohio 476.

Pennsylvania. *Ammant v. New Alexandria & P. Turnpike Road*, 13 Serg. & R. 210, 15 Am. Dec. 593.

Tennessee. *Baxter v. Nashville & H. Turnpike Co.*, 78 Tenn. 488.

⁸³ *Thomas v. Armstrong*, 7 Cal. 286; *Munroe v. Thomas*, 5 Cal. 470.

⁸⁴ *Covington Draw Bridge Co. v. Shepherd*, 21 How. (U. S.) 112, 16 L. Ed. 698.

⁸⁵ *Gue v. Tide Water Canal Co.*, 24 How. (U. S.) 257, 16 L. Ed. 635; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. (Pa.) 27, 42 Am. Dec. 315.

⁸⁶ *City Water Co. v. State*, 88 Tex. 600, 32 S. W. 1033.

⁸⁷ *Palestine v. Barnes*, 50 Tex. 538.

When a statute authorizes the sale of the franchise of a corporation to satisfy a judgment, the authority is derived entirely from the statute, and the sale cannot be made in any other mode than that pointed out by the statute.⁸⁸

A statute recognizing the rights of purchasers of the franchises, and providing that they may constitute a body politic, has reference to a purchase in the manner theretofore authorized, that is, under a decree in equity, and not under a common-law execution.⁸⁹

On an execution sale of the franchise of a corporation, unauthorized and void because not made in the manner and under the conditions prescribed by the statute, the acquiescence of the stockholders, and the expenditure of money by the purchaser in improving the property, with their knowledge, will not confirm and render valid such a sale.⁹⁰

§ 3135. Property or money in hands of officer or agent. While there is not wanting authority for the view that money or property in the possession of a person as officer or agent of the defendant corporation may be reached by garnishment,⁹¹ according to the apparent

⁸⁸James v. Pontiac & G. Plank Road Co., 8 Mich. 91; Taylor v. Jerkins, 51 N. C. 316.

Where there was a judgment at law against a bridge company, under which the tolls were sold in execution, a court of equity has power to cause possession to be taken of the bridge, to appoint a receiver to collect tolls, and pay them into court, to the end of discharging the judgment at law. Covington Draw Bridge Co. v. Shepherd, 21 How. (U. S.) 112, 16 L. Ed. 698.

Under the statute for the regulation of turnpike companies, an execution cannot be levied upon the right of a company to take tolls unless notice has first been given, according to the provisions of the act, to some receiver of toll on the road. Seymour v. Milford & C. Turnpike Co., 10 Ohio 476.

⁸⁹State v. Turnpike Co. of Middletown, 65 N. J. L. 73, 46 Atl. 569.

⁹⁰James v. Pontiac & G. Plank Road Co., 8 Mich. 91.

⁹¹Littleton Nat. Bank v. Portland

& O. R. R., 58 N. H. 104, 42 Am. Rep. 584; Jepson v. International Fraternal Alliance, 17 R. I. 471, 23 Atl. 15; Everdell v. Sheboygan & F. R. Co., 41 Wis. 395.

"The officers or agents of public corporations, or quasi-public officers, are not liable to the proceeding in respect to money in their hands as such upon grounds of public policy, but it cannot be fairly said that the liability of an officer or agent of a private corporation is affected by any such considerations any more than that of an agent of a natural person in a similar case. * * * When the officer has the actual possession and the physical control of the money of the corporation, it would seem to be an unsubstantial refinement to deny the remedy because the debtor himself has a right to control the application and use of the funds. The language of the statute is very broad, and it is a remedial one and should be liberally construed. There can be no sound reason for holding that a private corporation, as a

weight of authority, it is not subject to garnishment or trustee process in an ordinary action by a creditor against the company; his possession of such property or money as an officer or agent is possession by the company.⁹² And the fact that a corporation has directed its treasurer to pay out of its funds a specified sum to the defendant in the attachment suit, as a mere gratuity for the benefit of third parties, will not render the treasurer liable to the process of garnishment, nor would it render the corporation thus liable.⁹³ This, of course, as in all matters relating to garnishment, is liable to be controlled by statute, as has been done in the case of a special statute for the enforcement of a judgment against a railroad by motion against an agent for money in his hands.⁹⁴ And in some jurisdictions a general statute is considered so broad in terms as to cover such a case, as, for instance, a statute which authorizes the execution of an attachment "by summoning any person indebted to, or having in his possession, or under his control, property belonging to the defendant." Under

debtor, is entitled to put its moneys or property into the hands of one of its officers or agents, and enjoy an immunity from the proceedings of creditors to reach it by garnishee process, denied to a natural person, who puts his money or property in the hands of his agent. The objection that sustaining the garnishment in question is to sustain a proceeding which is practically a garnishment of the debtor defendant is really quite technical and without substantial merit." *Mayo v. Hansen*, 94 Wis. 610, 36 L. R. A. 561, 69 N. W. 344.

⁹² *Georgia*. *Macon Nav. Co. v. Schofield*, 111 Ga. 881, 36 S. E. 965.

Kentucky. *Wilder v. Shea*, 13 Bush 128.

Maine. *Pettingill, Andrews & Co. v. Rangely Light & Power Co.*, 109 Me. 87, 83 Atl. 697; *Donnell v. Portland & O. R. Co.*, 73 Me. 567; *Sprague v. Steam Nav. Co.*, 52 Me. 592; *Pettingill v. Androscoggin R. Co.*, 51 Me. 370.

Missouri. *Mueth v. Schardin*, 4 Mo. App. 403.

Pennsylvania. *Fowler v. Pitts-*

burgh, Ft. W. & C. R. Co., 35 Pa. St. 22.

Tennessee. *McGraw v. Memphis & O. R. Co.*, 45 Tenn. 434.

Washington. *Marx v. Parker*, 9 Wash. 473, 43 Am. St. Rep. 849, 37 Pac. 675.

Thus the treasurer of a corporation cannot be charged as trustee for corporate funds pledged to him to secure an indebtedness of the company to him. *Bowker v. Hill*, 60 Me. 172.

⁹³ *Neuer v. O'Fallon*, 18 Mo. 277, 59 Am. Dec. 313.

⁹⁴ *Chicago & S. E. R. Co. v. Witt*, 160 Ind. 680, 67 N. E. 519; *Louisville, N. A. & C. Ry. Co. v. Thompson*, 62 Ind. 87; *Ft. Wayne, M. & C. R. Co. v. Clark*, 59 Ind. 191; *Logansport, C. & S. W. Ry. Co. v. Byrd*, 51 Ind. 525; *Chicago & S. E. Ry. Co. v. Browers*, 27 Ind. App. 628, 61 N. E. 958; *Chicago & S. E. R. Co. v. Adams*, 26 Ind. App. 443, 59 N. E. 1087; *Chicago & S. E. Ry. Co. v. Harris*, 19 Ind. App. 137, 46 N. E. 1010; *Chicago & S. E. R. Co. v. Coulter*, 18 Ind. App. 512, 48 N. E. 388; *Chicago & S. E. Ry. Co. v. Adams*, 12 Ind. App. 317, 39 N. E. 877.

such a statute, it has been held that where the president of a corporation, at the time he was served as garnishee in an action against the corporation had, in his custody, in a safety deposit box, over which he had exclusive control, money which belonged to the corporation, the money was in his possession under the letter of the statute,⁹⁵ and that process of garnishment lies against the keeper of a tollgate belonging to an incorporated plank road company, to subject the money in his hands as the property of the company.⁹⁶

An officer or agent may be garnisheed if he holds anything as an individual belonging to the company or if he is indebted to the company.⁹⁷ And it has been held that property or funds belonging to a private corporation, in possession of a stockholder and not in his hands as a dividend, is subject to garnishment by a creditor of the corporation.⁹⁸

§ 3136. Deposits with state officials. The statutes of a number of states provide that no insurance, investment or other like corporation which has not been incorporated under the laws of such state shall carry on its business within such state until it shall have deposited with some designated state official either securities or money of a specified cash value, and provision also is usually made for the return of such deposit to the foreign corporation when it ceases to carry on its business within the state and its liability to citizens of the state have been satisfied or terminated.⁹⁹

The question whether a foreign creditor can subject such deposit to the process of foreign attachment after the corporation has ceased to do business in the state, and its liabilities to citizens of the state have been satisfied and terminated, has been before the courts for determination, and it is held that such deposit, if in the form of securities, cannot be reached by attachment proceedings, but that such deposit must be returned by the state official to the corporation.¹

§ 3137. Property of foreign corporation. The statute authorizing the attachment of property usually provides that the writ of attachment be levied upon the real and personal property of the defendant,

⁹⁵ *Clark v. Minge*, 187 Ala. 97, 65 So. 832. See also *First Nat. Bank v. Davenport & St. P. R. Co.*, 45 Iowa 120.

⁹⁶ *Central Plankroad Co. v. Sammons & Dotes*, 27 Ala. 380.

⁹⁷ *Macon Nav. Co. v. Schofield*, 111 Ga. 881, 36 S. E. 965.

⁹⁸ *Hughes v. Oregonian R. Co.*, 11 Ore. 158, 2 Pac. 94.

⁹⁹ See chapter on Foreign Corporations, *infra*.

¹ *Rollo v. Andes Ins. Co.*, 23 Gratt. (Va.) 509, 14 Am. Rep. 147.

and in the absence of any limitation as to the species of property which may be levied upon, all tangible property of the corporation, which is within the limits of the state, is subject to attachment.² This rule applies, even though the corporation has a large amount of visible, tangible property within the state.³

§ 3138. Exemption laws. In some jurisdictions, statutes exempt certain kinds of property and obligations from attachment and garnishment, and such statutes are, of course, to be given operation. A statute exempting the wages of employees of railroad companies from the process of garnishment is repealed by a statute exempting the wages of persons generally, and a provision in the later statute limiting the right of such exemption to married persons, or persons having to provide for the entire support of a family, is as applicable to railroad employees as to any other persons.⁴ Where household goods, exempt from garnishment, were levied on after being delivered to a railroad company for shipment, and not shipped, but neither the plaintiff, the officer nor the company knew that such property was exempt, and the goods were forwarded as soon as the officer learned that they were exempt, it was held that there was no right of action for the delay against either the plaintiff, the officer or the company.⁵ Execution cannot issue against the exempt property of a charitable corporation, sued in tort, notwithstanding the rendition of a judgment against such corporation.⁶

Laws which exempt certain classes of persons or of property from the operation of attachment or garnishment statutes are not part of the contracts. They pertain to the remedy and are subject to the law of the forum, and have no force outside the state. Consequently, in the case of an attachment against a foreign corporation for a debt created in another state, the exemption laws of that state cannot be applied,⁷ and in a garnishment suit it is immaterial that the principal

² South Carolina R. Co. v. McDonald, 5 Ga. 531; Poor v. Chapin, 97 Me. 295, 54 Atl. 753; Bushel v. Commonwealth Ins. Co., 15 Serg. & R. (Pa.) 173.

³ Sprague v. Universal Voting Mach. Co., 134 Ill. App. 379; McCloskey v. Snowden, 212 Pa. 249, 108 Am. St. Rep. 867, 61 Atl. 796; Madden v. Penn Elec. Light Co., 181 Pa. St. 617, 38 L. R. A. 638, 37 Atl. 817.

⁴ Burlander v. Milwaukee & St. P. R. Co., 26 Wis. 76.

⁵ Hynds v. Wynn, 71 Iowa 593, 33 N. W. 73.

⁶ Woman's Christian Nat. Library Ass'n v. Fordyce, 73 Ark. 625, 86 S. W. 417.

⁷ Stone v. Drake, 79 Ark. 384, 96 S. W. 197.

In Pierce v. Chicago & N. W. Ry. Co., 36 Wis. 283, it was held that where a corporation existing under the laws of two states has been garnished in one state in an attachment suit against a resident of the other

debtor and garnishee are both nonresidents, and that the debt garnisheed was contracted and is payable elsewhere, and in a state by the laws of which it would be exempt from garnishment, when a statute fixes the situs of the debt at the residence of the garnishee.⁸

C. Stock and Stockholders and Corporate Bonds

§ 3139. Shares of stock—At common law. By the common law, shares of stock in a corporation, being intangible property incapable of manual seizure, are not subject to attachment or execution,⁹ nor can they be subjected to garnishment process.¹⁰ It is only

state, and has suffered and satisfied a judgment against it as garnishee, and is afterwards sued in the other state by the attachment defendant for the same property or indebtedness for which it was thus garnished, it must be treated in such action as a domestic corporation, and presumed to know the exemption laws.

⁸ *Harvey v. Thompson*, 2 Ga. App. 569, 60 S. E. 11; *Baltimore & O. R. Co. v. Allen*, 58 W. Va. 388, 3 L. R. A. (N. S.) 608, 112 Am. St. Rep. 975, 52 S. E. 465.

An answer of a garnishee that it was indebted upon a policy of insurance upon the homestead of the debtor in Wisconsin, and that by the laws of that state such insurance was exempt from attachment and garnishment, and that since the commencement of garnishment proceedings it had been compelled by judgment of a court of competent jurisdiction in that state to pay the amount of such insurance to the debtor, was insufficient; the exemption law of Wisconsin could have no force without that state. *Roche v. Rhode Island Ins. Ass'n*, 2 Ill. App. 360.

⁹ *Arkansas. Deutschman v. Byrne*, 64 Ark. 111, 40 S. W. 780.

Connecticut. Barber v. Morgan, 84 Conn. 618, Ann. Cas. 1912 D 951, 80 Atl. 791.

Delaware. Fowler v. Dickson, 1 Boyce 113, 74 Atl. 601.

Kentucky. Husband v. Linehan, 163 Ky. 304, Ann. Cas. 1917 D 954, 181 S. W. 1089.

Maryland. United States Exp. Co. v. Hurlock, 120 Md. 107, Ann. Cas. 1915 A 566, 87 Atl. 834.

Michigan. Van Norman v. Jackson Circuit Judge, 45 Mich. 204, 7 N. W. 796; *Blair v. Compton*, 33 Mich. 414.

Missouri. Foster v. Potter, 37 Mo. 525.

New York. Denton v. Livingston, 9 Johns. 96, 6 Am. Dec. 264.

North Carolina. Cooper v. Dismal Swamp Canal Co., 6 N. C. 195.

Tennessee. Nashville Bank v. Ragsdale, Peck 296.

West Virginia. Lipsecomb's Adm'r v. Condon, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

¹⁰ *Alabama. Planters' & Merchants' Bank v. Leavens*, 4 Ala. 753.

Georgia. Ross v. Ross, 25 Ga. 297.

Illinois. Pease v. Chicago Crayon Co., 235 Ill. 391, 18 L. R. A. (N. S.) 1158, 14 Ann. Cas. 263, 85 N. E. 619, aff'g 138 Ill. App. 513; *Netter v. Board of Trade of Chicago*, 12 Ill. App. 607 (as to certificates of membership in a board of trade).

Missouri. Armour Bros. Banking Co. v. St. Louis Nat. Bank, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690.

Texas. Merchants' Mut. Ins. Co. v. J. H. Brower & Co., 38 Tex. 230.

when clearly authorized by statute that shares of stock can be subjected to such process.¹¹

§ 3140. — Under statutes. Shares of stock are now generally made liable by statute to process of execution, attachment and garnishment or trustee process.¹² To be within the operation of such statutes, however, it is generally considered that they should be clearly within the terms used in the statute. If the statute does not expressly authorize a levy upon shares of stock, nor attempt to prescribe any method by which a levy can be made, they are not subject.¹³

Stock has been held not to be an "indebtedness" of the corporation to the stockholder,¹⁴ and in some cases it has been held not to be within a statute subjecting "personal property" to such process,¹⁵ though the better opinion seems to be that stock is included in statutes

¹¹ *Barber v. Morgan*, 84 Conn. 618, Ann. Cas. 1912 D 951, 80 Atl. 791; *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690; *Foster v. Potter*, 37 Mo. 525.

¹² *Arkansas. Deutschman v. Byrne*, 64 Ark. 111, 40 S. W. 780.

Delaware. Holland v. Leslie, 2 Harr. 306.

Kentucky. Husband v. Linehan, 168 Ky. 304, Ann. Cas. 1917 D 954, 181 S. W. 1089.

Massachusetts. Van Tine v. Morse, 104 Mass. 275; *Howe v. Starkweather*, 17 Mass. 240.

New Jersey. Castle v. Carr, 16 N. J. L. 394.

New York. Pardee v. Leitch, 6 Lans. 303.

Ohio. National Bank v. Lake Shore & M. S. Ry. Co., 21 Ohio St. 221.

Pennsylvania. Eby v. Guest, 94 Pa. St. 160; *Weaver v. Huntingdon & B. T. M. Railroad & Coal Co.*, 50 Pa. St. 314; *Lex v. Potters*, 16 Pa. St. 295.

Tennessee. Nashville Trust Co. v. Weaver, 102 Tenn. 66, 50 S. W. 763; *Memphis Appeal Pub. Co. v. Pike*, 56 Tenn. 697.

Washington. Hardin v. White

Swan Mining & Milling Co., 26 Wash. 583, 67 Pac. 236.

The interest of a legatee in shares can be attached in an ordinary trustee process, and upon such a process the executors can be charged as his trustees; when so charged, it would be their duty, on being called on by the officer, to divest themselves of the formal title, and to make such a transfer as the by-laws of the corporation might require, in order to place the shares, on the books, in the name of the legatee. *Van Tine v. Morse*, 104 Mass. 275.

Shares of stock owned by an execution defendant in an irrigation corporation are not appurtenant to the lands owned by such execution defendant, although he irrigates such lands with water from a canal owned by such corporation, and do not pass with the lands under execution sale. *Wells v. Price*, 6 Idaho 490, 56 Pac. 266.

¹³ *Rhea v. Powell*, 24 Ill. App. 77; *Van Norman v. Jackson Circuit Judge*, 45 Mich. 204, 7 N. W. 796.

¹⁴ *Ross v. Ross*, 25 Ga. 297.

¹⁵ *Haley v. Reid*, 16 Ga. 437; *Foster v. Potter*, 37 Mo. 525.

authorizing a levy to be made on personal property generally.¹⁶ The words "rights" and "effects" in a statute authorizing the levy of an attachment or garnishment include the interest of a stockholder in a corporation,¹⁷ as also do the words "choses in action,"¹⁸ and as well, of course, when they are referred to in express language, such as "stocks, or interest in stocks."¹⁹

The interest of a member of a co-operative bank, who, under the charter and statutes, has a right to demand back the money he has paid to the corporation, together with any profits which may have accrued, deducting fines and his share of losses, is "money, due by the defendant," subject to be taken by trustee process; the relation between the corporation and member is that of debtor and creditor, or at least constitutes a contractual or quasi contractual obligation to pay money.²⁰

When liable to be taken on execution, shares of stock are subject to be taken also on attachment.²¹

The right given by statute to levy on and sell shares of stock under execution is limited to the shares of stock in the particular class or classes of corporations designated in the statute.²²

And where a statute authorizes the attachment or garnishment of an equitable interest in property, the interest in shares of corporate stock may be attached although such shares stand on the books of the corporation in the name of another.²³

¹⁶ *Edwards v. Beugnot*, 7 Cal. 162; *Pease v. Chicago Crayon Co.*, 235 Ill. 391, 18 L. R. A. (N. S.) 1158, 14 Ann. Cas. 263, 85 N. E. 619, aff'g 138 Ill. App. 513; *Old Second Nat. Bank of Bay City v. Williams*, 112 Mich. 564, 71 N. W. 150; *Puget Sound Nat. Bank of Everett v. Mather*, 60 Minn. 362, 62 N. W. 396; *Banning v. Sibley*, 3 Minn. 389.

¹⁷ *Union Nat. Bank of Chicago v. Byram*, 131 Ill. 92, 22 N. E. 842; *Evans v. Monot*, 57 N. C. 227.

¹⁸ *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

¹⁹ *Norton v. Norton*, 43 Ohio St. 509, 3 N. E. 348.

²⁰ *Atwood v. Dumas*, 149 Mass. 167, 3 L. R. A. 416, 21 N. E. 236.

²¹ *Thompson v. Wells*, 57 Ill. App. 436.

²² *Lyon v. Denison*, 80 Mich. 371, 8 L. R. A. 358, 45 N. W. 358.

²³ *United States. New York Commercial Co. v. Francis*, 83 Fed. 769.

Colorado. See *Pullen v. Headberg*, 53 Colo. 502, 127 Pac. 954, holding further that such trust can be established only by judgment, in an action to which the record holder of the stock is a party, and that a certificate by the treasurer of the corporation that stock standing upon the books in the name of another is in fact held in trust for the execution defendant, does not establish the trust, nor in any way aid in the collection of the creditor's demand.

Connecticut. *Middletown Sav. Bank v. Jarvis*, 33 Conn. 372 (under a statute authorizing an attachment to be levied on "the rights or shares which

Though a corporation has a lien on stock to the amount of debts due it by the person holding the stock, yet, if it deliver the stock, a creditor of the holder may obtain an attachment thereon,²⁴ or the corporation itself, its lien being lost by the delivery of the certificate, may levy an attachment for unpaid instalments due thereon.²⁵

And when a corporation is given a lien on its stock for debts due from the stockholders, and no special remedy is provided for the enforcement of the same, it may proceed by attachment, where a statute allows the attachment of stock.²⁶

And on the principle that the certificate of stock is not the stock itself, but evidence of its ownership, and that a right to have certificates of stock issued by the corporation is incident to the ownership of the shares, shares of stock owned by a defendant in attachment for which certificates have not been issued, may be reached by garnishment in the hands of the corporation, and then the issuance of certificates and the disposition of them controlled by the court.²⁷

When a corporation has purchased its own stock, under a statute, at a sale for delinquent assessments, it has no interest therein which it could sell and dispose of, as it is held subject to the control of the stockholders, and therefore it cannot be levied on under an execution against the corporation.²⁸

A sheriff is entitled to access to the books of the corporation to transfer stock to one to whom he has sold such stock on execution.²⁹

any person may own in the stock, etc.'').

Michigan. Gypsum Plaster & Stucco Co. v. Kent Circuit Judge, 97 Mich. 631, 57 N. W. 191.

Missouri. Tufts v. Volkening, 122 Mo. 631, 27 S. W. 522, aff'g 51 Mo. App. 7; Foster v. Potter, 37 Mo. 525.

Ohio. National Bank v. Lake Shore & M. S. Ry. Co., 21 Ohio St. 221.

See § 3142, *infra*.

Where a statute provides that "in attaching shares of stock, or the interest of a stockholder in any corporation organized under the laws of this state, the levy shall be made in the manner provided by law for the seizure of such property on execution," and the statute on executions confines the right to levy to cases where the debtor's status is that of

stockholder and legal possessor of the interest, an attachment cannot be levied on an equitable or beneficial interest of the debtor. Van Norman v. Jackson Circuit Judge, 45 Mich. 204, 7 N. W. 796.

²⁴ Kyle & Co. v. Montgomery, 73 Ga. 337.

²⁵ Lankershin Ranch, Land & Water Co. v. Herberger, 82 Cal. 600, 23 Pac. 134.

²⁶ Sabin v. Bank of Woodstock, 21 Vt. 353.

²⁷ Illinois Anglo-American Storage Battery Co. v. Long, 41 Ill. App. 333.

²⁸ Robinson v. Spaulding Gold & Silver Min. Co., 72 Cal. 32, 13 Pac. 65.

²⁹ State v. First Nat. Bank, 89 Ind. 302.

§ 3141. — **Situs of stock; domicile of corporation.** The general rule is that the situs of stock, for the purpose of execution and attachment, is in the state wherein the corporation was organized and of which it remains a resident, and that place only;³⁰ and by the weight of authority it is held, therefore, that stock cannot be levied upon in another state, and that it makes no difference that the debtor resides there, or that the certificates of stock are found there.³¹

30 United States. *Gundry v. Reakirt*, 173 Fed. 167.

Connecticut. *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250.

Illinois. *Reid Ice Cream Co. v. Stephens*, 62 Ill. App. 334.

Kentucky. *New Jersey Sheep & Wool Co. v. Traders' Deposit Bank*, 104 Ky. 90, 46 S. W. 677.

Maryland. *United States Exp. Co. v. Hurlock*, 120 Md. 107, Ann. Cas. 1915 A 566, 87 Atl. 834.

Missouri. *Caffery v. Choctaw Coal & Mining Co.*, 95 Mo. App. 174, 68 S. W. 1049.

As to the residence of corporations, see Chap. 13.

31 United States. *Pinney v. Nevills*, 86 Fed. 97.

Connecticut. *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250.

Illinois. *Reid Ice Cream Co. v. Stephens*, 62 Ill. App. 334.

Indiana. *Smith v. Downey*, 8 Ind. App. 179, 52 Am. St. Rep. 467, 35 N. E. 568, 34 N. E. 823.

Kentucky. *New Jersey Sheep & Wool Co. v. Traders' Deposit Bank*, 104 Ky. 90, 46 S. W. 677.

Maryland. *Morton v. Graffin*, 68 Md. 545, 15 Atl. 298, 13 Atl. 341.

Missouri. *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690.

New York. *Plimpton v. Bigelow*, 93 N. Y. 592.

Pennsylvania. *Christmas v. Biddle*, 13 Pa. 223.

Rhode Island. *Ireland v. Globe*

Milling & Reduction Co., 19 R. I. 180, 29 L. R. A. 429, 61 Am. St. Rep. 756, 32 Atl. 921.

Tennessee. *Moore v. Gennett*, 2 Tenn. Ch. 375.

"The general rule of law is that shares of stock in a foreign corporation owned by a non-resident defendant are not subject to attachment." *Pinney v. Nevills*, 86 Fed. 97.

In a New York case it was said that a statute allowing the attachment of shares of stock, "has an appropriate application to shares in domestic corporations. Such corporations are completely subject to the jurisdiction of our courts, and may be compelled to recognize a title to corporate shares derived under proceedings by attachment. In respect to foreign corporations such power does not exist, and it could scarcely be expected that the courts of another state would recognize a title to corporate stock in one of its own corporations, founded upon a sale under an attachment issued by our courts against a non-resident, when the only semblance of jurisdiction over the property was the service of notice in the attachment proceedings, upon an officer or agent of the corporations here. * * * The abstract entity—the corporation—is the owner and only owner of the property. We do not doubt that shares for the purpose of attachment proceedings may be deemed to be in the possession of the corporation which issued them, but only at the place where the corporation by intendment of law al-

Stock in a domestic corporation, under statutes generally, is subject to attachment, garnishment or execution, whether owned by residents or nonresidents,³² it being immaterial that the certificates of stock are not within the jurisdiction of the court.³³

A statute authorizing a levy on shares of stock in a domestic corporation cannot be extended to the ownership of shares in a foreign corporation,³⁴ and statutes authorizing the attachment of shares of

ways remains, to wit, in the state or country of its creation. In all other places it is an alien. It may send its agents abroad or transact business abroad as any other inhabitant may do, without passing personally into the foreign jurisdiction or changing its legal residence." *Plimpton v. Bigelow*, 93 N. Y. 592.

In a Connecticut case it was said of certificates of stock in a foreign corporation: "A share of stock in a corporation consists of a set of rights and duties between the corporation and the owner of the share. These rights and duties are in fact and law quite distinguishable from the certificates and the power to transfer those rights and duties. The certificate is evidence that the person therein named possesses those rights and is subject to those duties, but is not in law the equivalent of those rights and duties. They are muniments of title, but not the title itself; much less the real property. While these certificates are in themselves valuable for some purposes, and to some extent may properly be regarded as property, yet they are distinct from the holder's interest in the capital stock of the corporation, and are not goods and effects within the meaning of the statute relating to foreign attachment. They are no more subject to an attachment or a trustee process than a promissory note. The debt is subject to attachment, but the note itself, which is simply evidence of the debt, is not. So with stock. That may be at-

tached, but the certificates cannot be." *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250. See also *Pinney v. Nevills*, 86 Fed. 97; *Armour Bros. Packing Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690; *Christmas v. Biddle*, 13 Pa. 223.

³² *Wait v. Kern River Mining, Milling & Development Co.*, 157 Cal. 16, 106 Pac. 98; *Barber v. Morgan*, 84 Conn. 618, Ann. Cas. 1912 D 951, 80 Atl. 791; *Chesapeake & O. Ry. Co. v. Paine & Co.*, 29 Gratt. (Va.) 502.

³³ *Bowman v. Breyfogle*, 145 Ky. 443, Ann. Cas. 1914 B 938, 140 S. W. 694; *Cord v. Newlin*, 71 N. J. L. 438, 59 Atl. 22.

In the latter case it was said: "The certificate is only evidence of title to the right. The substance of the right is at the domicile of the corporation. Even if the situs rei were deemed to be attendant upon the person of the owner outside of the state, that would not necessarily defeat the levy of an attachment. * * * When corporate stock is so far subject to the control of the corporation that its formal transfer cannot be perfected without the action of the corporation, process of garnishment may be effectually served upon the corporation at its domicile. Such process warns the corporation not to perfect any transfer without the permission of the court, and thus subjects that matter to the jurisdiction of the court."

³⁴ *Gundry v. Reakirt*, 173 Fed. 167;

stock in corporations apply to domestic and not to foreign corporations, especially when the provisions as to the manner of making the levy show that it could probably be made only on a domestic corporation, and one within the jurisdiction of the court.³⁵ Such a statute is to be construed in view of the fundamental principle upon which all attachment proceedings rest, that the res must be actually or constructively within the jurisdiction of the court issuing the attachment.³⁶ Some courts, however, recognize the right to levy attachment, garnishment or execution upon shares of stock in a foreign corporation³⁷ which has its chief office, transacts its business, and exercises all its corporate franchises and functions in the state of the forum;³⁸ in such a case, it is a foreign corporation only in the sense that it has been created in another state, but for all practical purposes it is a corporation of the state in which it does business, and may be treated as a domestic corporation.³⁹

Thus it was held in Tennessee that since, under the statutes of that state, a foreign corporation becomes a domestic corporation upon complying with the statutes for the purpose of doing business there, shares of stock in such a corporation, which has complied with such statutes, are subject to attachment in Tennessee, although the debtor and owner of the shares is a nonresident, and the certificates of stock are in his possession beyond the limits of the state.⁴⁰ But stock in a foreign

Daniel v. Gold Hill Min. Co., 28 Wash. 411, 68 Pac. 884.

³⁵ Winslow v. Fletcher, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250; United States Exp. Co. v. Hurlock, 120 Md. 107, Ann. Cas. 1915 A 566, 87 Atl. 834; Armour Bros. Banking Co. v. St. Louis Nat. Bank, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690.

³⁶ Ireland v. Globe Milling & Reduction Co., 19 R. I. 180, 29 L. R. A. 429, 61 Am. St. Rep. 756, 32 Atl. 921.

³⁷ See Puget Sound Nat. Bank of Everett v. Mather, 60 Minn. 362, 62 N. W. 396; Young v. South Tredegar Iron Co., 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202.

³⁸ Bowman v. Breyfogle, 145 Ky. 443, Ann. Cas. 1914 B 938, 140 S. W. 604; Dean Rapid Tel. Co. v. Howell, 162 Mo. App. 100, 144 S. W. 135; Smith v. Pilot Min. Co., 47 Mo. App. 409.

³⁹ Wait v. Kern River Mining, Milling & Development Co., 157 Cal. 16, 106 Pac. 98.

⁴⁰ Young v. South Tredegar Iron Co., 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202. Lurton, J., speaking for the court, said: "In a very able opinion by the supreme court of New York, to which we have been referred by counsel, and to which much weight seems attached, it was held that the situs of the stock of a non-resident corporation was determined by the fiction as to the residence of the corporation, and that although the corporation was carrying on business in New York, and its officers and property were within that state, yet it was, in theory of law, a foreign corporation, and its stock not subject to the attachment laws of that state. Plimpton v. Bigelow, 93 N. Y. 592. But this very case concedes that if

corporation cannot be levied on merely by reason of the fact that its

the corporation, by having its officers, and by transacting business, in a state other than its domicile of origin, is deemed to be itself present as an entity in such foreign state to the same extent, and in the same sense, as it is present in the state which created it, it may be conceded that its shares might be properly attached in such foreign jurisdiction. It is, in the view we take of this case, unnecessary to determine whether the fiction as to the situs of the corporate entity ought not to yield, in the interest of justice, to the actual facts shown in this case as to the business and property of the corporation. The supreme court of the United States, in the case of Railroad Co. v. Harris, say: 'Nor do we see any reason why one state may not make a corporation of another state, as then organized and conducted, a corporation of its own, quoad hac, and property within its jurisdiction. That this may be done, was distinctly held in *Ohio & M. R. Co. v. Wheeler*, 1 Black 297.' * * * Has the legislature of Tennessee determined upon what terms, and to what extent, a foreign corporation may exercise its power in Tennessee? What is the status of the defendant corporation under the policy and legislation of this state? The act of 1877 (chapter 31) carried into Code Mil. & Ver. §§ 1992-2003, inclusive, provides, in substance, that every corporation created by the laws of any other state for the purpose of engaging in the business of manufacturing metal, timber, cotton, or wood or wool, or mining ore or coal, desiring to carry on business in this state, must first file with the secretary of state a copy of its charter, and cause an abstract of same to be registered in the county in which it proposes to engage in

business. By a subsequent section it is expressly declared that 'such corporations shall be deemed and taken to be corporations of this state, and shall be subject to the jurisdiction of the courts of this state, and may sue and be sued therein in the mode and manner that is or may be by law directed in the case of corporations created or organized under the laws of this state.' We do not think that a foreign corporation of the character defined in this act, they being mining and manufacturing corporations, are authorized to carry on business in this state, except upon compliance with this act, and upon the terms of this act. It is not, in our judgment, optional with such corporations as to whether they will or will not become domestic corporations, as required by this act. Sound reasons of public policy, in view of the rapid increase in the number of corporations, and the vast amount of wealth engaged in corporate business, demanded legislative regulation as to the terms upon which corporations of other states should be suffered to carry on business within this state. The legislation by which corporations of other states are made corporations of this state is clearly within the legislative power. * * * In view of all these facts concerning the actual situs of the business and property of this company, and in view of the character of the corporate acts that they have been exercising in Tennessee, we can but presume, in the absence of proof to the contrary, that this corporation has filed its charter with the secretary of state, and that it is lawfully, and not unlawfully, exercising its faculties within this state, under the very terms of the legislative permission by which it is here adopted; and while

officers are carrying on corporate business within the state,⁴¹ through general⁴² or local agents.⁴³

Shares of stock in a foreign corporation owned by a nonresident are not ordinarily considered subject to attachment or garnishment,⁴⁴ and under some statutes it has been held that the shares of stock owned by a nonresident in a foreign corporation cannot be garnished though they are in possession of a person within the state of the forum,⁴⁵ in trust,⁴⁶ or as security for a loan,⁴⁷ though, on the other hand, it has been held that shares of stock actually within the state, owned by nonresidents in foreign corporations, are subject to garnishment under statutes authorizing the levy of such process on personal property.⁴⁸

a foreign corporation in one sense, yet by legislative power, it is likewise a domestic corporation. The fiction that the corporate entity is in Missouri is overthrown by the fact that it is likewise a domestic corporation, and stands in all particulars as other domestic corporations. The situs of the stock of this corporation is therefore Tennessee, and it was subject to attachment as stock of a corporation originally created by this state."

⁴¹ *Gundry v. Beakirt*, 173 Fed. 167; *Plimpton v. Bigelow*, 93 N. Y. 592, rev'g 29 Hun (N. Y.) 362, aff'g 63 How. Pr. (N. Y.) 484; *Ireland v. Globe Milling & Reduction Co.*, 19 R. I. 180, 29 L. E. A. 429, 61 Am. St. Rep. 756, 32 Atl. 921.

⁴² *United States Exp. Co. v. Hurlock*, 120 Md. 107, Ann. Cas. 1915 A 566, 87 Atl. 834.

⁴³ *New Jersey Sheep & Wool Co. v. Traders' Deposit Bank*, 104 Ky. 90, 46 S. W. 677.

⁴⁴ *Ashley v. Quintard*, 90 Fed. 84; *Pinney v. Nevills*, 86 Fed. 97.

⁴⁵ *Maertens v. Scott*, 33 R. I. 356, 80 Atl. 369.

⁴⁶ *Smith v. Downey*, 8 Ind. App. 179, 52 Am. St. Rep. 467, 35 N. E. 568, 34 N. E. 823.

⁴⁷ *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250.

⁴⁸ *Puget Sound Nat. Bank of Everett v. Mather*, 60 Minn. 362, 62 N. W. 396; *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 57 L. R. A. 796, 58 N. E. 896, aff'g 47 N. Y. App. Div. 17, 61 N. Y. Supp. 1033.

In *Puget Sound Nat. Bank of Everett v. Mather*, 60 Minn. 362, 62 N. W. 396, Collins, J., said: "We may concede, without determining, that, at common law, stock itself, whether in a domestic or foreign corporation, was not subject to levy by writ of attachment or on execution; yet, when we examine the reason given for such rule in the authorities, it is certainly very doubtful if it would be applied where the certificates of stock were capable of actual seizure under the writ. * * * *Mor. Priv. Corp.* § 225. Such certificates, whether the corporation be domestic or foreign, are bought and sold in the markets of the world as personal property. Those held by the garnishee in this case were pledged to it as personal property, and were held as such. If occasion required, replevin could be brought for their recovery, or, in case of a conversion, an action would lie for their value. Certainly they are property subject to garnishment, under section 167, c. 66, Gen. St. 1878 (section 5309, Gen. St. 1894), unless the fact that they

§ 3142. — Effect of sale or transfer as security. By virtue of an attachment of shares of stock, the attachment creditor acquires a claim superior to that of a subsequent bona fide purchaser of those shares for value without notice of the attachment.⁴⁹

Under statutes generally, and especially in the absence of a statute, charter provision, or by-law providing an exclusive method of transferring shares of stock, a stock owner has a right to transfer such property to a purchaser or to a pledgee as security for a debt by the delivery of the stock certificate with a written assignment thereof, and the title of a bona fide purchaser or pledgee will not be divested by a subsequent levy on the stock under execution or attachment.⁵⁰

are certificates of stock in a foreign corporation changes their character, and, by reason of the change, we are compelled to distinguish them from like instruments issued by home corporations. Two cases are cited, as leading cases, by appellant's counsel in support of his position. One, *Plimpton v. Bigelow*, 93 N. Y. 592, is not in point, as will be seen at a glance. The other, *Winslow v. Fletcher*, 53 Conn. 390, 4 Atl. 250, may be, although the question at issue grew out of an attempt to reach a nonresident pledgor's equitable interest in stock certificates issued by a foreign corporation by what is known in Connecticut as the 'process of foreign attachment.' But, if this case was exactly in point, we should not be inclined to follow it. We ought not to adopt any rule of law which would result in discrimination between stock certificates issued by domestic and foreign corporations in favor of the latter; nor to announce any doctrine which will permit a person to bring within our borders certificates of stock in a foreign corporation, sell or hypothecate them, to treat them as personal property when seeking redress in our courts for an unlawful interference with or appropriation of the same, and then to insist that they are not within our statute which provides that 'property'

shall be subject to garnishment, or within other statutes relating to the seizure of property by virtue of writs of attachment or execution."

⁴⁹ *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913.

⁵⁰ *United States. Scott v. Pequonnock Nat. Bank of Bridgeport, Connecticut*, 15 Fed. 494.

Arkansas. *Hudson v. Bank of Pine Bluff*, 75 Ark. 493, 87 S. W. 1177.

Delaware. *Allen v. Stewart*, 7 Del. Ch. 287, 44 Atl. 786.

Idaho. *Mapleton Bank v. Standrod*, 8 Idaho 740, 67 L. R. A. 656, 71 Pac. 119.

Massachusetts. *Athol Sav. Bank v. Bennett*, 203 Mass. 480, 89 N. E. 632; *Clews v. Friedman*, 182 Mass. 555, 66 N. E. 201; *Boston Music Hall Ass'n v. Cory*, 129 Mass. 435.

Michigan. *Van Norman v. Jackson Circuit Judge*, 45 Mich. 204, 7 N. W. 796; *Newberry v. Detroit & L. S. Iron Co.*, 17 Mich. 141.

Nebraska. *Farmers' & Merchants' Nat. Bank of Galva v. Mosher*, 68 Neb. 713, 100 N. W. 133, 94 N. W. 1003, aff'g 63 Neb. 130, 88 N. W. 552.

New York. *Weller v. J. B. Pace Tobacco Co.*, 2 N. Y. Supp. 292.

Pennsylvania. *United States v. Vaughan*, 3 Binn. 394, 5 Am. Dec. 375.

Texas. *Tombler v. Palestine Ice Co.*, 17 Tex. Civ. App. 596, 43 S. W. 896.

And certainly when on a sale or pledge, the shares have been transferred on the books of the company to the purchaser or pledgee, they cannot be levied on under execution or attachment so as to affect the rights of the purchaser or pledgee.⁵¹

In many of the cases, under statutes requiring a transfer of corporate stock to be evidenced in a certain manner, as by having the transfer recorded on the books of the corporation, or in the office of the county clerk, it is held that a transfer to a purchaser or pledgee without a compliance with such statutory provisions does not transfer title as against a subsequent levy under execution or of an attachment.⁵²

In Illinois, in *People's Bank of Bloomington v. Gridley*, 91 Ill. 457, it was held that the provisions of the statute making shares of stock in a private corporation subject to levy and sale on execution, contemplate that, as against a judgment creditor, the title to stock in such corporation can only pass by transfer on the books of the company. The statute was subsequently amended, and in a later case, *Rice v. Gilbert*, 173 Ill. 348, 50 N. E. 1087, aff'g 72 Ill. App. 649, the court said: "There is but one rational conclusion as to the meaning and purpose of that amendment, and that is, that it was to give more commercial freedom to transfers of stock for purposes of collateral security than existed before, and therefore the foundation for the holding in *People's Bank v. Gridley*, 91 Ill. 457, no longer exists," and held that a pledge of stock by mere delivery of the same, with notice to the corporation, passed the title to the pledgee as against an execution subsequently levied upon it. See also *Alderton v. Conger*, 78 Ill. App. 533.

One who purchases at execution sale shares of a corporation, standing on the books of the corporation in the name of the judgment debtor, is entitled to have the certificate of such shares reissued to him as such purchaser, if at the time of the purchase

he acts in good faith, and without notice that the outstanding certificate has been assigned or pledged to some person other than the judgment debtor. *West Coast Safety Faucet Co. v. Wulff*, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622.

Shares of stock in a corporation are not bound by the delivery of a *feri facias* against their owner to the sheriff, but may be transferred before an actual levy. *Princeton Bank v. Crozer*, 22 N. J. L. 383, 53 Am. Dec. 254.

⁵¹ *Nabring v. Bank of Mobile*, 58 Ala. 204; *Feige v. Burt*, 118 Mich. 243, 74 Am. St. Rep. 390, 77 N. W. 928; *Lippitt v. American Wood Paper Co.*, 15 R. I. 141, 2 Am. St. Rep. 886, 23 Atl. 111; *Beckwith v. Burroughs*, 13 R. I. 294.

Under a statute which provides that a transfer of shares in a corporation is not valid, except as between the parties thereto, until it is regularly entered on the books of the company, an entry by the secretary of the company in the stock book that the shares had been assigned as collateral security, was sufficient to defeat a subsequent levy of an execution upon them by the creditor of the assignor. *Moore v. Marshalltown Opera-House Co.*, 81 Iowa 45, 46 N. W. 750.

⁵² *Trimble v. Vandegrift*, 7 Houst. (Del.) 451, 32 Atl. 632.

A distinction is emphasized in some of the cases between the effect of general statutory or charter provisions and provisions in by-laws requiring transfers of stock to be made on the books of the corporations. And so it has been held that when a statute or charter declares that stock shall be transferred only at the principal office of the company and on its books, they can only be thus effectually transferred as against a creditor of the vendor or pledgor,⁵³ and this, although notice of the transfer had been given to the custodian of the books prior to the levy.⁵⁴

On the other hand, a by-law declaring that the shares of stock are transferable only on the books is, by a number of courts, considered merely an arrangement of the corporation for its own convenience or protection, and though there be such a by-law, a transfer by assignment and delivery of the certificates, without any transfer on the books of the corporation, is good as against a creditor who attached the shares before notice.⁵⁵ But under a statute providing that stock shall be deemed personal property, and may be transferred in such

Though the attaching creditor had notice of the transfer of the stock, the transferee cannot hold the stock when the transfer had not been deposited with the county clerk. *Fahrney v. Kelly*, 102 Fed. 403; *Scott v. Houpt*, 73 Ark. 78, 83 S. W. 1057.

In *Masury v. Arkansas Nat. Bank*, 93 Fed. 603, rev'g 87 Fed. 381, the court said that the Arkansas statute providing for the registration of stock transfers on the books of the county clerk did not in express terms refer to transfers by way of pledge, and probably should be limited to cases of absolute sales, but held that under such a statute an attaching creditor cannot appropriate stock as against a pledgee, especially when actual notice of the pledge was given to the attaching creditor prior to his purchase of the stock at the execution sale.

⁵³ *Blanchard v. Dedham Gaslight Co.*, 12 Gray (Mass.) 213; *Fisher v. Essex Bank*, 5 Gray (Mass.) 373.

⁵⁴ *Abels v. Planters' & Merchants' Ins. Co.*, 92 Ala. 382, 9 So. 423; *Fiske v. Carr*, 20 Me. 301.

⁵⁵ *Sargent v. Essex Marine Ry. Co.*, 9 Pick. (Mass.) 202; *Reilly v. Absecon Land Co.*, 75 N. J. Eq. 71, 71 Atl. 248; *Broadway Bank v. McElrath*, 13 N. J. Eq. 24.

When, under such a by-law, the assignee of shares tendered them to the company's officers for transfer, and demanded a new certificate, it was the duty of the company then to enter the assignment, and an attachment could not be levied by the company itself on the shares for a debt due by the assignor to the company. *Sargent v. Franklin Ins. Co.*, 8 Pick. (Mass.) 90, 19 Am. Dec. 306.

In *Comeau v. Guild Farm Oil Co.*, 3 Daly (N. Y.) 218, it was held that an attachment cannot be made on shares of stock as the property of the assignor when the sale and assignment has been attended by a delivery of the certificate, notwithstanding a provision in the certificate that the stock was transferable only upon the books of the company.

manner as may be provided in the by-laws, the right of a purchaser has been held not to be affected by a subsequent sale on execution, even though the transfer was not made on the books of the company.⁵⁶

In a number of cases it has been held that, while the right of a pledgee of stock cannot be affected by a subsequent attachment or garnishment, yet the pledgor's reversionary interest may be held by the levy of such a writ,⁵⁷ unless the statutes have not displaced the common-law rule that an equitable right or interest in personal property is not attachable.⁵⁸

The question whether a transfer was made in fraud of creditors cannot be tried by a writ of mandamus, as the proper remedy is by a suit at law or a bill in equity,⁵⁹ and the good faith cannot be attacked by an execution or attachment plaintiff until he has established the relation of debtor and creditor between himself and the defendant.⁶⁰

When the owner of stock has transferred certain shares to another for the purpose of enabling him to raise money thereon, the transferee is made the apparent owner, and his creditors are thereby deceived, and an execution may be levied on such shares as the property of the transferee.⁶¹ But when shares of stock have been pledged and stand in the name of the pledgee, and are delivered by the pledgee to the pledgor to be exchanged for new shares, the pledgor is acting merely as the agent of the pledgee, and the new shares are not subject to attachment as the property of the pledgor.⁶²

⁵⁶ *George R. Barse Live-Stock Co. v. Range Valley Cattle Co.*, 16 Utah 59, 50 Pac. 630.

⁵⁷ *Mapleton Bank v. Standrod*, 8 Idaho 740, 67 L. R. A. 656, 71 Pac. 119; *Foster v. Potter*, 37 Mo. 525; *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 55 L. R. A. 796, 58 N. E. 896, aff'g 47 N. Y. App. Div. 17, 61 N. Y. Supp. 1033; *In re Early & Lane's Appeal*, 89 Pa. St. 411.

Shares of stock transferred to a creditor as security may be attached by trustee process in the hands of the transferee who may be charged as the trustee of the debtor for any surplus in his hands after discharging his own claim. *New England Marine Ins. Co. v. Chandler*, 16 Mass. 275.

⁵⁸ *Beckwith v. Burroughs*, 13 R. I. 294.

The assignee has only an equitable

interest, not subject to attachment, when shares have been assigned without being transferred on the books, under a charter which provides that the shares shall be transferred in such manner as shall be prescribed by the by-laws, and a by-law declares that the stock shall be assignable only on the books of the company. *Lippitt v. American Wood Paper Co.*, 15 R. I. 141, 2 Am. St. Rep. 886, 23 Atl. 111.

⁵⁹ *State v. Warren Foundry & Machine Co.*, 32 N. J. L. 439.

⁶⁰ *Campbell & Zell Co. v. Ross*, 187 Ill. 553, 58 N. E. 596, aff'g 86 Ill. App. 356.

⁶¹ *Le Page v. Porée*, 3 Rob. (La.) 439.

⁶² *McClung v. Colwell*, 107 Tenn. 592, 89 Am. St. Rep. 961, 64 S. W. 890.

§ 3143. — Right to dividends. An attachment or garnishment of shares of stock takes with it the dividends thereon as well as the corpus of the stock.⁶³

It has been held that merely prospective dividends which have not been declared cannot be attached,⁶⁴ but, by the weight of authority, a levy of a writ of attachment or service of a writ of garnishment creates a lien on the dividends made and not paid,⁶⁵ and also on the dividends accruing from the date of levy or service;⁶⁶ dividends upon the stock, declared while the proceedings are pending, are impounded.⁶⁷

§ 3144. — Mode of levy. When statutes authorize the levy or service of writs of execution, attachment, or garnishment, on shares of stock in corporations, there must be a particular, or at least a substantial, compliance with statute providing how the levy or service can be made. As shares of stock are intangible and invisible, and cannot be actually seized by an officer, there can be no visible change of possession, and to overcome this difficulty, statutes provide for a constructive seizure.⁶⁸

A provision in a statute which can apply only where there is an attachment of goods by actual seizure of them, is not applicable in case of an attachment of shares of stock.⁶⁹

⁶³ *Jacobus v. Monongahela Nat. Bank of Brownsville*, 35 Fed. 395.

⁶⁴ *Bowman v. Breyfogle*, 145 Ky. 443, Ann. Cas. 1914 B 938, 140 S. W. 694.

⁶⁵ *Jacobus v. Monongahela Nat. Bank of Brownsville*, 35 Fed. 395; *Norton v. Norton*, 43 Ohio St. 509, 3 N. E. 348.

⁶⁶ *Union Nat. Bank of Chicago v. Byram*, 131 Ill. 92, 22 N. E. 842.

⁶⁷ *Farmers' & Merchants' Nat. Bank of Galva v. Mosher*, 68 Neb. 713, 100 N. W. 133, 94 N. W. 1003, aff'g 63 Neb. 130, 88 N. W. 552.

⁶⁸ *Arkansas. Scott v. Haupt*, 73 Ark. 78, 83 S. W. 1057; *H. B. Claflin Co. v. Bretzfelder*, 69 Ark. 271, 62 S. W. 905; *Deutschman v. Byrne*, 64 Ark. 111, 40 S. W. 780.

California. West Coast Safety Faucet Co. v. Wulff, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622.

Connecticut. Stamford Bank v. Ferris, 17 Conn. 259.

Delaware. Fowler v. Dickson, 1 Boyce 113, 74 Atl. 601.

Idaho. Wells v. Price, 6 Idaho 490, 56 Pac. 266.

Illinois. Union Nat. Bank of Chicago v. Byram, 131 Ill. 92, 22 N. E. 842.

Iowa. Commercial Nat. Bank v. Farmers' & Traders' Nat. Bank, 82 Iowa 192, 47 N. W. 1080.

Michigan. Blair v. Compton, 33 Mich. 414.

Missouri. Foster v. Potter, 37 Mo. 525.

Texas. Harrell v. Mexico Cattle Co., 73 Tex. 612, 11 S. W. 863.

Wisconsin. O. L. Packard Mach. Co. v. Laev, 100 Wis. 644, 76 N. W. 596.

⁶⁹ *Athol Sav. Bank v. Bennett*, 203 Mass. 480, 89 N. E. 632.

Some of the statutes require notice to be given to certain officers of the corporation or to the custodian of the books of transfer,⁷⁰ and when such is the case, neither the corporation nor the officers can waive the formal requirements of the statute.⁷¹ Such statutes generally require a written notice or a copy of the warrant or writ to be served upon the officer of the corporation designated by the statute,⁷² but when the

70 Alabama. *Abels v. Planters' & Merchants' Ins. Co.*, 92 Ala. 382, 9 So. 423.

Arkansas. *H. B. Claflin Co. v. Bretzfelder*, 69 Ark. 271, 62 S. W. 905.

Colorado. *Pullen v. Headberg*, 53 Colo. 502, 127 Pac. 954.

Delaware. *Fowler v. Dickson*, 1 Boyce 113, 74 Atl. 601.

Illinois. *People v. Goss & Phillips Mfg. Co.*, 99 Ill. 355, rev'g 4 Ill. App. 510.

Iowa. *Moore v. Marshalltown Opera-House Co.*, 81 Iowa 45, 46 N. W. 750.

Louisiana. *Harris v. Bank of Mobile*, 5 La. Ann. 538.

New Hampshire. *Abbott v. Kimball*, 68 N. H. 303, 38 Atl. 1051.

New York. *Mechanics' & Traders' Bank v. Dakin*, 50 Barb. 587, 33 How. Pr. 316, rev'd 51 N. Y. 519.

Tennessee. *Memphis Appeal Pub. Co. v. Pike*, 56 Tenn. 697.

Texas. *Wagner v. Marple*, 10 Tex. Civ. App. 505, 31 S. W. 691.

It is not a sufficient levy on stock to make an inventory of it, and return it with the *feri facias*, but to bind it the sheriff must notify the defendant and also some proper officer of the company of the levy. *Princeton Bank v. Crozer & Moore*, 22 N. J. L. 383, 53 Am. Dec. 254.

The notice cannot be directed to the officer individually; it must be directed to the corporation and served on an officer designated in the statute. *Moorar v. Walker*, 46 Iowa 164.

71 Fowler v. Dickson, 1 Boyce (Del.) 113, 74 Atl. 601.

72 Arkansas. *H. B. Claflin Co. v.*

Bretzfelder, 69 Ark. 271, 62 S. W. 905.

Colorado. *Pullen v. Headberg*, 53 Colo. 502, 127 Pac. 954.

Illinois. *Union Nat. Bank of Chicago v. Byram*, 131 Ill. 92, 22 N. E. 842.

Iowa. *Moore v. Marshalltown Opera-House Co.*, 81 Iowa 45, 46 N. W. 750.

New Hampshire. *Abbott v. Kimball*, 68 N. H. 303, 38 Atl. 1051.

New York. *Mechanics' & Traders' Bank v. Dakin*, 50 Barb. 587, 33 How. Pr. 316, rev'd 51 N. Y. 519.

Wisconsin. *O. L. Packard Mach. Co. v. Laev*, 100 Wis. 644, 76 N. W. 596.

The word "clerk," in the statute, means the officer having the custody of the books and records of the company, and as the secretary is but another name for the same officer, he is a proper officer of the company with whom to leave a copy of an execution by the sheriff, in order to effect a levy upon the shares of a stockholder in the company. The statute requiring an attested copy of an execution to be delivered to the clerk of the corporation does not require the clerk of the court to verify such copy, and attest it by the seal of the court; the sheriff holding the execution may properly certify to the correctness of the copy. *People v. Goss & Phillips Mfg. Co.*, 99 Ill. 355, rev'g 4 Ill. App. 510.

The levy of an attachment is not good if the warrant is left with a person not an officer or managing agent, who forwards it by mail to

statute does not require that written notice or copy shall be given, oral notice has been deemed sufficient.⁷³

If a statute requires the corporate officer to give the sheriff a certificate or make disclosure of the number of shares of stock which the defendant owns, this is in order to enable the sheriff to intelligently levy his writ,⁷⁴ but this requirement forms no part of the service of the process, and therefore the omission of the sheriff to request a certificate does not invalidate an attachment of the stock,⁷⁵ and the refusal of an officer to certify to the shares held by an execution defendant in no way affects the lien acquired by a valid levy thereon.⁷⁶

A general statute prescribing the mode of attaching and selling on execution shares in incorporated companies, applies to any corporation where no mode is prescribed in its charter,⁷⁷ but when a charter prescribes a particular manner in which the shares of stock may be levied on and sold, such charter provision supersedes the general law on the same subject.⁷⁸

When the certificate of stock is in the possession of a third person, such as a pledgee, it is not sufficient to serve the warrant of attachment or summons in garnishment upon such third person only; such notice must be served upon the corporation⁷⁹ unless the stock is that of a foreign corporation and is owned by a nonresident, in which case it may be levied upon by service of notice upon the person within the state who has possession of the certificate.⁸⁰

§ 3145. Enforcement of statutory or subscription liability of stockholder—In general. An action against a director to enforce his

such an agent, by whom it is received. *Pardee v. Leitch*, 6 Lans. (N. Y.) 303.

⁷³ *Abels v. Planters' & Merchants' Ins. Co.*, 92 Ala. 382, 9 So. 423.

⁷⁴ *Mann v. Peer*, 4 Pennew. (Del.) 279, 55 Atl. 335; *Thompson v. Wells*, 57 Ill. App. 436.

⁷⁵ *Barber v. Morgan*, 84 Conn. 618, Ann. Cas. 1912 D 951, 80 Atl. 791.

The statute does not make it the duty of the sheriff to return the certificate required by statute of the officer of the corporation, who is the keeper of the record or accounts of the shares or interest of the stockholders, along with his return of the manner in which he executed the writ. *Thompson v. Wells*, 57 Ill. App. 436.

⁷⁶ *Pullen v. Headberg*, 53 Colo. 502, 127 Pac. 954.

⁷⁷ *Hussey v. Manufacturers' & Mechanics' Bank*, 10 Pick. (Mass.) 415.

⁷⁸ *Titcomb v. Union Marine & Fire Ins. Co.*, 8 Mass. 326.

⁷⁹ *Presnall v. Stockyards Nat. Bank* (Tex. Civ. App.), 151 S. W. 873; *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392; *O. L. Packard Mach. Co. v. Laev*, 100 Wis. 644, 76 N. W. 596.

⁸⁰ *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 55 L. R. A. 796, 58 N. E. 896, aff'g 47 N. Y. App. Div. 17, 61 N. Y. Supp. 1033; *Lowenthal v. Hodge*, 120 N. Y. App. Div. 304, 105 N. Y. Supp. 120.

statutory liability for an excess of indebtedness over the amount of capital stock paid in, assented to by him, may be commenced by garnishment or trustee process under a statute authorizing such process in actions founded on a contract, express or implied.⁸¹ And under statutes generally, an unpaid subscription for stock, or a balance due thereon, is assets of the corporation liable for its debts, and accessible to the process of garnishment,⁸² notwithstanding it is not enforceable by the corporation itself because payable in property at a fictitious valuation in violation of a constitutional provision.⁸³

The assignee of an insolvent corporation may sue out an attachment in a proper case to collect an unpaid subscription,⁸⁴ and a resident creditor of a foreign corporation may subject the liability of a resident stockholder for a balance due on his stock subscription.⁸⁵

The fact that the plaintiff is himself a defaulting stockholder does not prevent him from subjecting another stockholder to the amount of his unpaid subscription.⁸⁶

A statute garnishment of subscriptions does not have a retrospective effect so as to authorize such a proceeding in a suit commenced before its passage.⁸⁷

The liability being for an amount due on the original subscription, it is immaterial what amount one purchasing from the original holder paid; he is not liable in garnishment at the suit of a creditor of the corporation unless the original holder has not fully paid for it.⁸⁸

A charter providing for the forfeiture of stock for omission to pay the balance certainly does not work a release of the stockholder when the company had not claimed the forfeiture, as such a provision is a means which the law gives to the company to protect itself,⁸⁹ and it is doubt-

⁸¹ *Field v. Haines*, 28 Fed. 919.

⁸² *Alabama*. *Davis v. Montgomery Furnace & Chemical Co.*, 8 So. 496; *Wooldridge v. Holmes*, 78 Ala. 568.

Illinois. *Pease v. Underwriters' Union*, 1 Ill. App. 287.

Mississippi. *King v. Elliott*, 5 Smedes & M. 428.

North Carolina. *Cooper v. Adel Security Co.*, 122 N. C. 463, 30 S. E. 348.

Pennsylvania. *Peterson v. Sinclair*, 83 Pa. St. 250.

⁸³ *Joseph v. Davis* (Ala.), 10 So. 830.

⁸⁴ *Kohler v. Agassiz*, 99 Cal. 9, 33 Pac. 741.

⁸⁵ *McNelus v. Stillman*, 172 N. Y. App. Div. 307, 158 N. Y. Supp. 428; *Doak v. Stahlman* (Tenn. Ch. App.), 58 S. W. 741; *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751.

⁸⁶ *Schaeffer v. Phoenix Brewery Co.*, 4 Mo. App. 115.

⁸⁷ *De Mony v. Johnston*, 7 Ala. 51; *Bingham v. Rushing*, 5 Ala. 403.

⁸⁸ *Trotter Bros. v. Blount*, 162 Ala. 289, 50 So. 130.

⁸⁹ *Bröde v. Firemen's Ins. Co. of New Orleans*, 10 Rob. (La.) 440.

ful whether a forfeiture declared by the company could prejudice the rights of creditors.⁹⁰

Where the subscription is made with the privilege of discharging the same by the conveyance of certain specified property, then owned by the subscriber, when called for by the board of directors, but after making the subscription the subscriber disposes of all of the specified property, a creditor of the corporation may, by garnishment, subject the unpaid subscription to the payment of the debt due such creditor, under a statute making subscriptions to capital stock payable in money, or in labor or property at its money value,⁹¹ but where a stockholder conveyed property to a corporation in payment for stock, he is not liable on garnishment when there remained no unpaid subscription, and, without proof of consideration, the court could not say that the stock was fictitious or in violation of the constitution or statute.⁹² And when one, over his own signature, agreed to take certain shares of the capital stock of a corporation "to be paid by" another, he may be made personally liable to the creditors of the corporation on process of garnishment, under the rule that when one in writing contracts in his own name for the act of another, he becomes thereby personally bound, unless it appears from the contract itself that he did not intend to bind himself personally.⁹³ The California Constitution makes each stockholder proportionately liable for the corporation's debts, and an action against a stockholder to enforce the liability thereby imposed upon him is an action upon a "contract" within the meaning of the attachment statute.⁹⁴

An execution cannot be issued against a stockholder after the judgment against the corporation has become dormant.⁹⁵

In garnishment against a stockholder, the creditor has the burden of showing that there is still something due on the stock.⁹⁶

§ 3146. — As a statutory remedy generally. Concurrent remedies, by motion for execution and by action at law, are sometimes provided by statutes, and these have been held not to be exclusive of an action in equity to reach an unpaid subscription,⁹⁷ though, on the contrary,

⁹⁰ *Cucullu v. Union Ins. Co.*, 2 Rob. (La.) 571.

⁹¹ *Enslen v. Nathan*, 136 Ala. 412, 34 So. 929.

⁹² *Roman v. Dimmick*, 123 Ala. 366, 26 So. 214.

⁹³ *Langford v. Ottumwa Water-Power Co.*, 59 Iowa 283, 13 N. W. 303.

⁹⁴ *Kennedy v. California Sav. Bank*,

97 Cal. 93, 33 Am. St. Rep. 163, 31 Pac. 846.

⁹⁵ *Chenault v. Chappell*, 8 Kan. App. 807, 57 Pac. 553.

⁹⁶ *Trotter Bros. v. Blount*, 162 Ala. 289, 50 So. 130.

⁹⁷ *Shields v. Hobart*, 172 Mo. 491, 95 Am. St. Rep. 529, 72 S. W. 669; *Steam Stone-Cutter Co. v. Scott*, 157

it has been held that a statute giving a special and particular remedy is exclusive of all other remedies, legal and equitable, and must be pursued.⁹⁸

Some statutes give a remedy to enforce the personal liability of stockholders by suit and not by motion, while other statutes give such a remedy by motion, dependent in some instances upon the classes of corporations to which the statutes refer.⁹⁹ Still other early statutes authorized the arrest of stockholders as a remedy for the collection of claims against certain classes of insolvent corporations.¹

Under a statute making stockholders liable to creditors of a corporation to the extent of their unpaid stock, to be proceeded against "at the same time," as in cases of garnishment, it is not essential that stockholders should be proceeded against at the same time the suit is brought against the corporation, as in garnishee proceedings under the attachment act, but the intention of the act is to give the remedy as ample and complete as in cases of garnishment, including the process after judgment.²

The provisions of a general statute, authorizing executions to issue, under certain circumstances, as against stockholders, when, by law, such stockholders are personally liable for the debts, or a portion of

Mo. 520, 57 S. W. 1076; *Rood v. Crocus Hill Min. Co.*, 157 Mo. App. 405, 139 S. W. 222.

⁹⁸ *Haskins v. Harding*, Fed. Cas. No. 6,196a.

If the remedy is by *seire facias*, that must be followed. *Whitney v. Hammond*, 44 Me. 305.

Under a charter providing that the persons and property of the members of a corporation should, at all times, be liable for all debts due by said corporation, on a return of *nulla bona* to an execution against the corporation, *seire facias* will not lie, as the members are original debtors, and liable in the same manner as though there had been no incorporation. *Southmayd v. Russ*, 3 Conn. 52.

⁹⁹ *Haskins v. Harding*, 2 Dill. 99, Fed. Cas. No. 6,196.

¹ *Southmayd v. Russ*, 3 Conn. 52; *Richmond v. Willis*, 13 Gray (Mass.) 182; *Leland v. Marsh*, 16 Mass. 389; *Nichols v. Thomas*, 4 Mass. 232; *In*

re Penniman, 11 R. I. 333, *aff'd* 103 U. S. 714, 26 L. Ed. 602.

² *Coalfield Co. v. Peck*, 98 Ill. 139, *rev'g* 3 Ill. App. 619. See also *Pease v. Underwriters' Union*, 1 Ill. App. 287, wherein it was held that if the cause is commenced and conducted according to the statute, simultaneously with the suit, the whole proceeding will constitute but one case, and upon the trial of the issues formed upon the answers of the garnishees, the court will take judicial notice of the judgment against the principal debtor; but where the creditor, having obtained judgment against the corporation, seeks to enforce the liability of the stockholder by a subsequent independent proceeding of garnishment in the usual manner upon such judgment, the proceeding is essentially different, and proof of the judgment originally obtained against the corporation must be made upon the trial of the issues against the garnishee.

the debts, of the corporation, may be resorted to in all cases when the stockholders are personally liable under the charter, unless some specific and exclusive mode is otherwise provided by the charter.³ Such a statute is not unconstitutional by reason of the exemption from its operation of cases where the suit is for labor, and the action is brought by the person who performed the labor; the statute is general in its application to the class to which it is intended to apply.⁴

When a statute incorporating a company contains a personal liability clause as to stockholders therein, a later general statute to facilitate the collection of debts against corporations and the stockholders thereof, does not repeal the charter provisions.⁵ But a statute requiring an action to be brought against the stockholder supersedes a previous statute authorizing stockholders to be brought in on *scire facias*.⁶

A constitutional liability of stockholders in a corporation on a judgment obtained against the corporation, is not self-executing, but requires legislative action to provide a remedy for its enforcement, and consequently a statute providing for the appointment of a receiver on the issue of an execution and its return *nulla bona* is exclusive of any other remedy, and on a return of *nulla bona* to an execution against the corporation, an execution cannot be issued against a stockholder.⁷

§ 3147. — Proceedings on motion. In some cases it is said that a motion for execution against a stockholder is independent in its nature,⁸ the debtor corporation not being a necessary party to the motion,⁹ and that it is a civil action within the meaning of the statute of limitations.¹⁰

Under other statutes such a proceeding is considered as not an original but a supplemental one, and is regarded as a substitute for a suit in equity to accomplish the same end, and the proceeding thereunder must follow, as near as may be, the equity practice.¹¹

³ *Heard v. Sibley*, 52 Ga. 310.

⁴ *Ripley v. Evans*, 87 Mich. 217, 49 N. W. 504.

⁵ *Force Bros. & Co. v. Dahlonga Tanning & Leather Mfg. Co.*, 22 Ga. 86.

⁶ *Bayliss v. Swift*, 40 Iowa 648; *Donworth v. Coolbaugh*, 5 Iowa 300.

⁷ *Henley v. Stevenson*, 67 Kan. 4, 72 Pac. 518.

⁸ *United States Nat. Bank of Atchi-*

son v. Magnuson, 57 Kan. 573, 47 Pac. 518; *Howell v. Manglesdorf*, 33 Kan. 194, 5 Pac. 759; *Fox v. First Nat. Bank*, 9 Kan. App. 18, 57 Pac. 241.

⁹ *Fox v. First Nat. Bank*, 9 Kan. App. 18, 57 Pac. 241.

¹⁰ *Crissey v. Morrill*, 125 Fed. 878.

¹¹ *Paxon v. Talmage*, 87 Mo. 13, *aff'd* 14 Mo. App. 585; *Erschine v. Loewenstein*, 82 Mo. 301, *aff'd* 11 Mo. App. 595; *Rood v. Crocus Hill Min.*

On a motion for execution, the stockholder is considered, under some statutes, so far a privy in law that he may bring error to reverse it,¹² such a proceeding being distinguishable in this respect from an attachment, as a stockholder whose property has been attached does not thereby become a party to the main suit.¹³

The motion can only be made in the court where the judgment against the corporation was rendered, and from which execution on such judgment might issue,¹⁴ and the proceeding is summary.¹⁵

A motion is sufficient which shows the rendition of a judgment against the corporation, the issue of execution thereon, a return of such execution nulla bona, and the name of a stockholder, with the amount of stock held by him in such corporation, and written notice to the stockholder.¹⁶

When the motion, treated as a petition, has been amended without exception, the defendant cannot subsequently object that the amendment changed the cause of action.¹⁷

If the person against whom the execution is issued is not in fact the holder of stock on which there is an unpaid subscription, or if the execution is for an amount in excess of the unpaid subscription, he may have relief under a statute providing for testing the legality of executions.¹⁸

§ 3148. — Notice and proceedings thereon. In this summary proceeding to enforce the individual liability of stockholders, some statutes require notice to be served upon one against whom an order for execution is sought,¹⁹ while under other statutes no service of

Co., 157 Mo. App. 405, 139 S. W. 222; Bonet Const. Co. v. Central Amusement Co., 153 Mo. App. 185, 132 S. W. 270; Ollesheimer v. Thompson Mfg. Co., 44 Mo. App. 172; Coquard v. Prendergast, 35 Mo. App. 237; Paxon v. Talmage, 14 Mo. App. 585, aff'd 87 Mo. 13; Marks v. Hardy, 12 Mo. App. 596; Schaeffer v. Phoenix Brewery Co., 4 Mo. App. 115.

¹² Came v. Brigham, 39 Me. 35; Rankin v. Sherwood, 33 Me. 509; Merrill v. Suffolk Bank, 31 Me. 57, 50 Am. Dec. 649.

¹³ Rankin v. Sherwood, 33 Me. 509; Whitman v. Cox, 26 Me. 335.

¹⁴ McClelland v. Cragun, 54 Kan. 599, 38 Pac. 776; Paxon v. Talmage,

87 Mo. 13, aff'g 14 Mo. App. 585.

¹⁵ Hood v. French, 37 Fla. 117, 19 So. 165.

¹⁶ Hood v. French, 37 Fla. 117, 19 So. 165.

¹⁷ Nichols v. Stevens, 123 Mo. 96, 45 Am. St. Rep. 514, 27 S. W. 613, 25 S. W. 578, aff'd 157 U. S. 370, 39 L. Ed. 736.

¹⁸ Armour Fertilizer Works v. Parrish Vegetable & Fruit Co., 63 Fla. 64, 58 So. 231. See also Force Bros. & Co. v. Dahlonga Tanning & Leather Mfg. Co., 22 Ga. 86.

¹⁹ Wilson v. Seligman, 144 U. S. 41, 36 L. Ed. 338, aff'g 36 Fed. 154; Warner v. Imbeau, 63 Kan. 415, 65

process upon, or notice of the suit to, the stockholders is required or necessary.²⁰ Under these latter statutes, the stockholder is deemed charged with knowledge that under the statute, upon the return of *nulla bona* upon an execution issued against the corporation, an execution may be issued against him for the unpaid subscription to the stock he holds.²¹

When notice is required, it partakes of the nature of an original process, and a proper service thereof is essential,²² and it may be served on a stockholder in any county in the state,²³ but the service of such notice beyond the jurisdiction of the court, and outside the state, will not confer jurisdiction upon the court, nor support an order charging him with personal liability,²⁴ nor authorize it to award an execution against the property of the stockholder that may be found within the state.²⁵

A notice of such a motion, which fairly apprises the person sought to be charged with the nature and terms of the order to be applied for, the names of the parties to the proceeding, the court before whom the application is to be made, the time and place of such application, signed by the attorneys for the moving party, and duly served by a constable, is sufficient.²⁶

Several separate judgments held by one creditor against a corporation cannot be included in one notice to a stockholder.²⁷ And a stockholder notified of an application for an order for execution against him, must appear and defend.²⁸

Where the statute requires notice by publication against the stock-

Pac. 648; *United States Nat. Bank of Atchison v. Magnuson*, 57 Kan. 573, 47 Pac. 518; *McClelland v. Cragun*, 54 Kan. 599, 38 Pac. 776; *Wells v. Robb*, 43 Kan. 201, 23 Pac. 148; *Howell v. Manglesdorf*, 33 Kan. 194, 5 Pac. 759; *Chaffin v. Cummings*, 37 Me. 76; *Wilson v. St. Louis & S. F. Ry. Co.*, 108 Mo. 588, 32 Am. St. Rep. 624, 18 S. W. 286.

²⁰ *Armour Fertilizer Works v. Parrish Vegetable & Fruit Co.*, 63 Fla. 64, 58 So. 231; *Mason v. Force Bros. Co.*, 30 Ga. 99.

²¹ *Armour Fertilizer Works v. Parrish Vegetable & Fruit Co.*, 63 Fla. 64, 58 So. 231.

²² *United States Nat. Bank of Atchison v. Magnuson*, 57 Kan. 573, 47

Pac. 518; *Howell v. Manglesdorf*, 33 Kan. 194, 5 Pac. 759.

²³ *McClelland v. Cragun*, 54 Kan. 599, 38 Pac. 776.

²⁴ *Wilson v. Seligman*, 144 U. S. 41, 36 L. Ed. 338, aff'g 36 Fed. 154; *Wilson v. St. Louis & S. F. Ry. Co.*, 108 Mo. 588, 32 Am. St. Rep. 624, 18 S. W. 286.

²⁵ *Howell v. Manglesdorf*, 33 Kan. 194, 5 Pac. 759.

²⁶ *McClelland v. Cragun*, 54 Kan. 599, 38 Pac. 776; *Wells v. Robb*, 43 Kan. 201, 23 Pac. 148.

²⁷ *United States Nat. Bank of Atchison v. Magnuson*, 57 Kan. 573, 47 Pac. 518.

²⁸ *Warner v. Imbeau*, 63 Kan. 415, 65 Pac. 648.

holders, the fact that notice was given need not appear of record, as if it was not given, the remedy is by affidavit of illegality.²⁹

§ 3149. — Return to execution against corporation. The return of an officer on the execution against the corporation must be taken as true, as against the stockholder proceeded against.³⁰

Where there is a demand upon an officer of the corporation that he point out corporate property on which to levy, and the officer refuses, these facts may properly be shown by the return on the execution; and where the execution has been lost, it is competent to prove by parol what the return showed, but not to contradict the return by showing that no demand has been made.³¹ And, on objection that the officer serving the execution did not make his certificate that he could not find corporate property on a first execution, the facts necessary to render the stockholders personally liable, can as well be ascertained and certified upon a second execution.³²

§ 3150. — Showing exhaustion of corporate property. Under a statute making a stockholder liable, on notice, for services rendered the corporation, upon return of an execution against the corporation unsatisfied, a return of nulla bona is sufficient to fix the liability of a stockholder who had received notice.³³

When the method of recovering an unpaid balance on stock is by a motion for execution against the stockholder, the issuing of an execution against the corporation and the return of the same nulla bona is a condition precedent to jurisdiction of the motion,³⁴ and the record

²⁹ *Stone v. Davidson*, 56 Ga. 179.

³⁰ *Came v. Brigham*, 39 Me. 35; *Ripley v. Evans*, 87 Mich. 217, 49 N. W. 504.

³¹ *Singer v. Given*, 61 Iowa 93, 15 N. W. 858. See also *Stone v. Davidson*, 56 Ga. 179, that the fact that the president did not give the information required by the statute may be shown by affidavit of illegality.

³² *Whitney v. Hammond*, 44 Me. 305.

³³ *Card v. Groesbeck*, 140 N. Y. App. Div. 30, 124 N. Y. Supp. 372.

³⁴ *Beers v. Bunker*, 6 Kan. App. 697, 50 Pac. 505; *Chaffin v. Cummings*, 37 Me. 76; *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo.

133, 28 Am. St. Rep. 405, 17 S. W. 644; *Paxon v. Talmage*, 87 Mo. 13, aff'g 14 Mo. App. 586.

In *Marks v. Hardy*, 12 Mo. App. 595, it was said that a return of nulla bona on the execution is not necessary, but that it may be shown by any competent evidence that the corporation has no goods on which a levy could be made.

A statutory condition that there should be a demand on an officer of the corporation by the officer who holds the execution, to show him property sufficient to satisfy the amount due thereon, must be complied with. *Stone v. Wiggins*, 5 Mete. (Mass.) 316.

of the case in which the motion is made must show that the corporate property has been exhausted.³⁵ It has been held, however, that it is not necessary that the return should negative the existence of any property whatever, but that it is sufficient if it is a fair and substantial return nulla bona, and, if the officer make part of the debt, and return the writ nulla bona as to the residue, that lays a sufficient foundation to proceed against the stockholder for the balance.³⁶

On a garnishment bill seeking to recover judgment against a corporation and alleging the indebtedness of a stockholder on account of an unpaid subscription, it must appear that the petitioner has exhausted his remedy against the corporation.³⁷

Under another statute, however, authorizing proceedings by judgment against the individual stockholders on the return unsatisfied of an execution issued upon a judgment rendered against the corporation to the county in which its principal office is situated, it is not necessary to issue and have returned unsatisfied an execution to any other county in the state, although it may appear that the corporation had property or effects situate in such other county.³⁸

And when a statute makes a stockholder directly liable to creditors of the corporation for an unpaid balance on his stock, a creditor may sue the corporation and garnish the stockholder at the same time without obtaining a judgment and having execution returned nulla bona,³⁹ and such a statute has been said to make the stockholders liable as sureties to the extent of the amount unpaid on the stock, without regard to the question whether or not the corporation is insolvent.⁴⁰

§ 3151. — Limit and extent of liability and lien. The liability of the stockholder, under the statute, is limited by the amount of his subscription unpaid at the time of service of the garnishee summons or return of execution against the corporation unsatisfied,⁴¹ and judg-

³⁵ *Carey Lumber Co. v. Neal*, 3 Kan. App. 399, 42 Pac. 925.

³⁶ *Marks v. Hardy*, 86 Mo. 232.

³⁷ *Doak v. Stahlman* (Tenn. Ch. App.), 58 S. W. 741.

³⁸ *Ripley v. Evans*, 87 Mich. 217, 49 N. W. 504.

³⁹ *Lester v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518; *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725, aff'g 105 Ill. App. 271.

⁴⁰ *Texas, G. & N. Ry. Co. v. Berlin*

(Tex. Civ. App.), 165 S. W. 62.

⁴¹ *Pease v. Underwriters' Union*, 1 Ill. App. 287; *Cucullu v. Union Ins. Co.*, 2 Rob. (La.) 571.

A stockholder of a corporation which had conveyed its property to a new corporation who, in payment for his stock, took stock in the new corporation, and also bonds and cash, is not liable under the statute, when the stock taken had no market value, and the bonds and cash equaled the

ment on a motion for execution against a stockholder should not exceed the liability of the shareholder on such shares, exclusive of interest, though it will carry interest from the date of its rendition.⁴²

Some early statutes provided for an execution to be levied upon the property of an owner of shares to the amount of his stock, for debts contracted during his ownership.⁴³

A statute providing for the payment of the debts due to banks by the debtors, even when garnisheed, in the notes of such banks, does not apply to the indebtedness of delinquent stockholders, for stock unpaid is such indebtedness as can only be discharged in specie, whether to a bank or to a garnishee.⁴⁴

When the writ has been served at the time of suing out summons, the service of the writ upon the stockholder prevents further payment to the corporation for such stock and holds the same in abeyance, to await the result of the trial of the original cause,⁴⁵ and when an attachment execution has been issued on an unpaid subscription, it has been held that the creditor has a lien thereon prior to that of an assignee in bankruptcy appointed under subsequent bankruptcy proceedings.⁴⁶ This liability, as among the several stockholders, is several and not joint, and if one is required to pay more than his proportionate share of the debt asserted, he may in an action against the remaining stockholders require them to contribute.⁴⁷ The fact that a garnishment writ runs against two or more of them, does not convert the proceedings into a suit against them as joint debtors.⁴⁸

§ 3152. — Necessity of assessment or call. A stockholder is liable to be garnisheed on a judgment recovered against the company, when he owes the company for unpaid stock, upon which a call has been made and notice given,⁴⁹ and when due and payable, a stock subscription may be garnisheed to the extent that it is unpaid, though the corporation has not insisted on the payment.⁵⁰ And it has been

value of his stock in the old company. *Thomson-Houston Elec. Co. v. Dallas Consol. Traction Ry. Co.*, 54 Fed. 1001.

⁴² *Coquard v. Prendergast*, 47 Mo. App. 243.

⁴³ *Chaffin v. Cummings*, 37 Me. 76.

⁴⁴ *King v. Elliott*, 5 Smedes & M. (Miss.) 428.

⁴⁵ *Pease v. Underwriters' Union*, 1 Ill. App. 287.

⁴⁶ *In re Glen Iron Works*, 20 Fed. 674, aff'g 17 Fed. 324.

⁴⁷ *Pease v. Underwriters' Union*, 1

Ill. App. 287; *Brode v. Firemen's Ins. Co. of New Orleans*, 8 Rob. (La.) 244; *Cueullu v. Union Ins. Co.*, 2 Rob. (La.) 571; *Mountain Lake Land Co. v. Blair*, 109 Va. 147, 63 S. E. 751.

⁴⁸ *Curry v. Woodward*, 53 Ala. 371.

⁴⁹ *Faull v. Alaska Gold & Silver Min. Co.*, 14 Fed. 657; *Meints v. East St. Louis Co-operative Rail-Mill Co.*, 89 Ill. 48.

⁵⁰ *Bohrer v. Adair*, 61 Neb. 824, 86 N. W. 495.

held that although the subscription is, by its terms, payable on the call of the directors, and no such call has in fact been made, a balance due may be garnisheed,⁵¹ on the theory that the subscription is to be regarded as having been payable on demand,⁵² especially if the arrangement as to payment, between the corporation and the stockholder, would be a fraud upon the creditors of the corporation.⁵³ The weight of authority, however, seems to be that where a company has no right of action against a stockholder for unpaid stock without a formal assessment or call, his liability to third persons for this portion of the subscription cannot be enforced by the process of garnishment.⁵⁴

Provision is made, by some statutes, for the enforcement of the liability of a stockholder for unpaid stock, which is not due according to the terms of his subscription, and for which no calls have been made, by a special execution.⁵⁵ But where a statute provides that a creditor of a corporation may, by garnishment, subject the unpaid subscription of a stockholder without regard to whether the corporation can maintain suit against the stockholder for such subscription or not, this gives the creditor the right to subject by garnishment the unpaid subscription without regard to whether a call had been previously made by the board of directors or not.⁵⁶

Under the prevailing rule it has been said that upon insolvency the uncalled and unpaid subscriptions constitute a trust fund to be administered for the benefit of all the creditors.⁵⁷

§ 3153. — Time of fixing of stockholder's liability. The liability of the stockholder to the creditor of the corporation becomes fixed at

⁵¹ *Scott v. Windham*, 73 Miss. 76, 16 So. 206.

⁵² *McNelus v. Stillman*, 172 N. Y. App. Div. 307, 158 N. Y. Supp. 428.

⁵³ *In re Glen Iron Works*, 20 Fed. 674, aff'g 17 Fed. 324.

⁵⁴ *Alabama*. *Teague v. Le Grand*, 85 Ala. 493, 7 Am. St. Rep. 64, 5 So. 287.

Colorado. *Universal Fire Ins. Co. v. Tabor*, 16 Colo. 531, 27 Pac. 890.

Louisiana. *Brown v. Union Ins. Co.*, 3 La. Ann. 177.

Missouri. *Simpson v. Reynolds*, 71 Mo. 594; *Hannah v. Moberly Bank*, 67 Mo. 678.

Nevada. *McKelvey v. Crockett*, 18 Nev. 238, 2 Pac. 386.

Pennsylvania. *In re Lane's Appeal*, 105 Pa. St. 49, 51 Am. Rep. 166.

⁵⁵ *Hannah v. Moberly Bank*, 67 Mo. 678.

To enforce the payment of a subscription, for which a call has not been made, a creditor of the corporation may bring a suit in the nature of a creditors' suit against the corporation and the delinquent stockholder, and, upon a judgment rendered against them, execution may be issued against the stockholder. *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 28 Am. St. Rep. 405, 17 S. W. 644.

⁵⁶ *Enslen v. Nathan*, 136 Ala. 412, 34 So. 929; *Curry v. Woodward*, 53 Ala. 371; *Paschall v. Whitsett*, 11 Ala. 472; *Bingham v. Rushing*, 5 Ala. 403.

⁵⁷ *In re Lane's Appeal*, 105 Pa. St. 49, 51 Am. Rep. 166.

the time of the return of the execution, against the corporation *nulla bona*,⁵⁸ and from that date the stockholder ceases to have the power to cast off his liability by transferring his shares to a third person.⁵⁹

Under some statutes containing personal liability clauses, that liability continues notwithstanding a transfer of the stock, unless the stockholder so transferring shall discharge himself from liability by a compliance with the provisions of the statute, such as publishing a notice of the transfer.⁶⁰

Under other statutes the question of the liability of one who has transferred stock depends upon whether the transfer was *bona fide*, to a solvent party and with the assent of the corporation. And in such a case the transferee would be liable and answerable if solvent, and if insolvent and the corporation was insolvent at the time of the transfer the transferor would be liable.⁶¹

Where a statute authorizes the issue of execution only against persons who were stockholders of the corporation at the time the execution was returned *nulla bona*, the question whether a transfer of the stock was fraudulent or not cannot be tried in the summary proceeding provided for by the statute.⁶²

§ 3154. — Stock issued as full paid. One who, in good faith, purchases stock entered as full paid on the records of the corporation, in the absence of anything to put him on inquiry, is not liable to creditors of the corporation as the holder of unpaid stock,⁶³ but a transfer of stock known by the transferee not to have been fully paid for, makes him liable as garnishee for the debts of the corporation.⁶⁴

And in a jurisdiction maintaining the distinction between actions at law and suits in equity, a garnishment proceeding will not lie to recover the unpaid balance on shares of stock where the amount received as payment in full was much less than the face value thereof, until after the agreement to that end has been set aside by a bill in equity.⁶⁵

⁵⁸ *Skrainka v. Allen*, 76 Mo. 384, rev'g 7 Mo. App. 434; *Coquard v. Prendergast*, 35 Mo. App. 237.

⁵⁹ *Skrainka v. Allen*, 76 Mo. 384, rev'g 7 Mo. App. 434.

⁶⁰ *Mason v. Force Bros. & Co.*, 30 Ga. 99; *Force Bros. & Co. v. Dahlonga Tanning & Leather Mfg. Co.*, 22 Ga. 86.

⁶¹ *Henderson v. Mayfield Woolen Mills*, 153 Ala. 625, 45 So. 211.

⁶² *Parkinson Sugar Co. v. Topeka Sugar Co.*, 8 Kan. App. 79, 54 Pac. 331.

⁶³ *Ersine v. Loewenstein*, 82 Mo. 301, aff'g 11 Mo. App. 595; *Mechanics' Sav. Inst. v. Potthoff*, 9 Mo. App. 574.

⁶⁴ *Trendley v. St. Louis & B. Rapid-Transit Co.*, 84 Ill. App. 109.

⁶⁵ *Sangamon Coal-Min. Co. v. Richardson*, 33 Ill. App. 277.

A stockholder who has paid for the stock subscribed by him in property at an agreed valuation, cannot be made liable as garnishee for the difference between the real value of the property and the face value of the stock subscribed and received by him, as only such money demands can be subjected by process of garnishment as the defendant in judgment could in its own name and right recover of the garnishee in an action of debt or indebitatus assumpsit.⁶⁶ But the liability of a paid-up stockholder to the corporation for the amount of an assessment which has been levied upon his stock is a debt founded on contract and is subject as such to garnishee process.⁶⁷

§ 3155. — **Set-off of claim against corporation.** In such a proceeding, the stockholder may plead, by way of set-off, or in diminution of his liability, any bona fide indebtedness of the corporation to him existing at the time when his liability to the creditor became fixed by the return of the execution against the corporation nulla bona.⁶⁸ Before his liability becomes fixed he may discharge it by a voluntary payment, to the full extent of his statutory liability, of a bona fide claim of a creditor of the corporation,⁶⁹ but the liability so fixed cannot be escaped by the subsequent acquisition of a claim against the corporation.⁷⁰ In a federal court, however, where the distinctive remedies and defenses at law and in equity are maintained, a stockholder cannot interpose as a set-off claim against the corporation which does not constitute a legal defense as against the plaintiff, but he must proceed by a bill in equity to have the amount of his set-off adjudicated and deducted from the amount of his liability as stockholder.⁷¹

§ 3156. — **Effect of death of stockholder.** The statute does not authorize an execution against the estate of a stockholder who died before the commencement of the action against the corporation,⁷²

⁶⁶ *Nicrosi v. Irvine*, 102 Ala. 648, 48 Am. St. Rep. 92, 15 So. 429.

When stock has been issued as full paid, and it is sought to enforce further liability of a stockholder upon the ground that the stock was in fact issued for property at an overvaluation, there is no debt due for which an attachment will lie until an order has been made by the court of chancery ascertaining the amount of the stockholder's liability. *Gilson v. Appleby*, 80 N. J. L. 542, 77 Atl. 1084.

⁶⁷ *Marshall v. Wentz*, 28 Cal. App. 540, 153 Pac. 244.

⁶⁸ *Hood v. French*, 37 Fla. 117, 19 So. 165; *Jerman's Adm'r v. Benton*, 79 Mo. 148; *Rood v. Crocus Hill Min. Co.*, 157 Mo. App. 405, 139 S. W. 222; *Merchants' Ins. Co. v. Hill*, 12 Mo. App. 148, aff'd 86 Mo. 466; *Webber v. Leighton*, 8 Mo. App. 502.

⁶⁹ *Hood v. French*, 37 Fla. 117, 19 So. 165.

⁷⁰ *Coquard v. Prendergast*, 35 Mo. App. 237.

⁷¹ *Crissey v. Morrill*, 125 Fed. 878.

⁷² *Child v. Coffin*, 17 Mass. 64. See also *Bacon v. Pomeroy*, 104 Mass. 577; *Dane v. Dane Mfg. Co.*, 14 Gray

though, while a motion and execution cannot be used to enforce the liability against the estate of a deceased stockholder,⁷³ the motion may be regarded and treated as a demand against the estate, and may be classed as such.⁷⁴

§ 3157. Corporate bonds. Registered coupon bonds of foreign corporations actually located within the state and within the jurisdiction of the court, are property within the meaning of the statute and are liable to attachment.⁷⁵ But money deposited with brokers for the payment of certain interest coupons on corporate bonds, is fixed with an irrevocable trust, and part of the fund not paid out by the brokers, because some coupons have not been presented, is not subject to attachment as the property of the corporation, though the appropriation and deposit of the money to that purpose was not known to the holders of the coupons.⁷⁶

A statute which authorizes unpaid subscriptions for stock to be reached by garnishment by a creditor of the corporation, without regard to whether the corporation can maintain suit against the stockholder for such subscription or not has no application to bonds issued by the corporation and for which it was understood the stockholder was not to pay anything, since it cannot be pretended that they constitute any part of any unpaid subscription of garnishee's stock.⁷⁷

Corporate bonds, not sold and negotiated, but merely pledged by it as collateral security, when discharged and surrendered are not property of the company liable to be reached by garnishment against an officer of the company receipting for the same, but who in fact never received them, as, being its own promises, the company had no property in the bonds.⁷⁸ But when a company has received a number of its own mortgage bonds from a debtor in the payment of his debt, not for the purpose of canceling the same, but with the intention of again putting them in circulation as securities, they are the property of the company, and as such are subject to the levy of an execution against its property.⁷⁹

(Mass.) 488; *Ripley v. Sampson*, 10 Pick. (Mass.) 371.

⁷³ *Achenbach v. Western Newspaper Union*, 2 Kan. App. 357, 42 Pac. 734; *Cummings v. Wright*, 11 Mo. App. 348.

⁷⁴ *Marks v. Hardy*, 86 Mo. 232.

⁷⁵ *De Bearn v. Prince De Bearn*, 115 Md. 668, 36 L. R. A. (N. S.) 421, 81 Atl. 223. See also *De Bearn v.*

De Bearn, 119 Md. 418, 86 Atl. 1049.

⁷⁶ *Rogers Locomotive & Machine Works v. Kelley*, 88 N. Y. 234.

⁷⁷ *Roman v. Dimmick*, 123 Ala. 366, 26 So. 214.

⁷⁸ *Galena & S. W. R. Co. v. Stahl*, 103 Ill. 67.

⁷⁹ *Hetherington v. Haydon*, 11 Iowa 335.

D. Particular Classes of Corporations

§ 3158. Banks—In general. Under the rule that property in possession of a pledgee cannot be levied on under attachment for the pledgor's debts, where a bank discounted a draft for the price of goods, to which a bill of lading for the goods was attached, the goods, upon the refusal of the consignee to receive them, cannot be levied on under an attachment in favor of the consignor's creditor, as they are in the constructive possession of the bank as pledgee; the attaching creditor cannot require the bank to look to other property upon which it has a lien for the payment of its debt.⁸⁰ And when all debts and credits of a defendant in possession of another person are attachable by garnishment, a note held by a bank as collateral security for a debt of a defendant in attachment, is a credit, and the interest of the defendant therein is attachable by garnishment of the bank, and the lien of the attachment upon the note transfers itself to the money collected thereon by the garnishee.⁸¹

Where a bank, holding a promissory note for collection, accepts a certified check in payment, it is chargeable as garnishee for the amount thereof less any indebtedness to it of the payee of the note.⁸²

§ 3159. — Deposits generally. Deposits in a bank may be the subject of garnishment,⁸³ notwithstanding the defendant is a nonresi-

⁸⁰ *Sabel v. Planters' Nat. Bank of Richmond*, Virginia, 110 Ky. 299, 61 S. W. 367.

⁸¹ *Deering & Co. v. Richardson-Kimball Co.*, 109 Cal. 73, 41 Pac. 801.

⁸² *Midway Five Oil Co. v. Citizens Nat. Bank of Los Angeles*, 25 Cal. App. 366, 143 Pac. 800.

⁸³ *Birmingham Nat. Bank v. Mayer*, 104 Ala. 634, 16 So. 520; *Caldwell Banking & Trust Co. v. Porter*, 52 Ore. 318, 95 Pac. 1, rehearing denied 97 Pac. 541; *Nichols v. Schofield*, 2 R. I. 123.

One indebted to a nonresident cannot place money on deposit in a bank, in defiance of his creditor's wishes, for the purpose of conferring jurisdiction in attachment upon the court where the bank is located. *Saxony Mills v. Wagner*, 94 Miss. 233, 23 L.

R. A. (N. S.) 834, 136 Am. St. Rep. 575, 19 Ann. Cas. 199, 47 So. 899.

The plaintiff in trustee process against a savings bank, where the depositor is the principal defendant is not bound by a rule of the bank that "no payment will be made without the presentation of the deposit book," etc.; the statute does not make the liability of the bank to be charged as trustee depend upon the plaintiff's complying with the rules of the bank, which are intended to regulate the conduct of a depositor in his relations with the bank. *Maloney v. Casey*, 164 Mass. 124, 41 N. E. 104.

A deposit by a corporation is the same as one by an individual, and is liable to attachment by a creditor of the corporation. *Farmers' & Mechanics' Nat. Bank v. Ryan*, 64 Pa. St. 236.

dent,⁸⁴ and where a writ of garnishment is served upon a bank, and the answer of the garnishee discloses that the defendant had made a general deposit, the garnishee cannot avoid liability on the ground that the plaintiff had not demanded payment before the issue of the garnishment.⁸⁵

To make the bank liable as garnishee, there must be an actual deposit in the bank subject to the depositor's check at the time of the service of the summons of garnishment on the bank,⁸⁶ or, under some statutes, at the time of the answer.⁸⁷

Where a deposit is in the name of a husband or his wife, "or the survivor of them," and it appears that one-half belongs to each, in an action against the husband the garnishee is chargeable for only one-half.⁸⁸

In answer to a garnishment summons, a bank cannot retain money on deposit to the credit of the judgment debtor, to be applied on an unmatured note executed by him, which it holds, as, in an action by such defendant for his balance, the bank could not set off such unmatured indebtedness against the defendant.⁸⁹

But when there is a present liability on the part of the depositor to the bank, the bank is liable on such process only for the balance due the depositor, and in the case of the payment by it of a note of

⁸⁴ *Presnall v. Stockyards Nat. Bank* (Tex. Civ. App.), 151 S. W. 873.

⁸⁵ *Birmingham Nat. Bank v. Mayer*, 104 Ala. 634, 16 So. 520.

⁸⁶ *Foster v. Swasey*, 2 Woodb. & M. (U. S.) 217, Fed. Cas. No. 4,985; *Rice v. Third Nat. Bank*, 97 Mich. 414, 56 N. W. 776.

A credit on the books of a bank created by the formal discount of a note and bookkeeping entries for convenience in disbursing the money according to a special arrangement, on which the bank might but was not required to honor the depositor's checks, did not create the relation of debtor and creditor, and the fund was not liable to garnishment as the property of the depositor. *McKenna v. Rickey*, 155 Wis. 432, 144 N. W. 991.

⁸⁷ *Curtis v. Parker & Co.*, 136 Ala. 217, 33 So. 935; *R. C. Neely Co. v. Bank of Waynesboro*, 7 Ga. App. 390, 66 S. E. 1099.

If a bank, under summons of garnishment, receives deposits of the defendant and pays them on his checks, it is liable to the garnishing creditor for the amount deposited up to the time of the filing of the answer, under a statute making a garnishee answerable for "what he has become indebted to the defendant, or what property or effects of his he has received or got possession of, belonging to the defendant, between the time of the service and the answer." *Mayer & Lowenstein v. Chattahoochee Nat. Bank*, 51 Ga. 325.

⁸⁸ *Catlow v. Whipple* (R. I.), 83 Atl. 753.

⁸⁹ *First Nat. Bank of Birmingham v. Minge*, 186 Ala. 405, 64 So. 957; *Birmingham Nat. Bank v. Mayer*, 104 Ala. 634, 16 So. 520; *Elzy v. Morrison*, 180 Ill. App. 711; *Presnall v. Stockyards Nat. Bank* (Tex. Civ. App.), 151 S. W. 873.

the depositor and on which the bank's liability as indorser was fixed by protest and by the insolvency of the maker, it is liable only for the amount of the deposit remaining in its hands after the payment of the note.⁹⁰

One bank is chargeable on trustee process for money deposited by another bank on an understanding that the depositor had a right to withdraw any balance which might be due to it upon giving fifteen days' notice of its intention to do so; in such case there is a debt absolutely due, although payment of it could not, by the mere action of the depositor, be insisted upon as a right until a future period.⁹¹

But where a depositor has placed money in a bank to the credit of a creditor under an arrangement with him that it should be so deposited and a certificate taken in the name of the creditor, the deposit is not then subject to garnishment against the depositor.⁹² And where the rule of law obtains, that as between the maker and the holder of a check, the check transfers the deposit pro tanto, and that the holder of the check may maintain an action thereon against the bank on which it was drawn, after a check has been given upon full consideration, the deposit is not subject to garnishment at the suit of another creditor of the maker.⁹³

On the principle that, while an attachment creates a lien, a garnishment does not, it has been held that the mere service of a summons of garnishment in a common-law suit, upon a bank in which a corporation debtor had funds on deposit, does not create such a lien on the funds in the hands of the garnishee as, ipso facto, to give him a right of priority of payment over other creditors without regard to the date when their respective judgments should be obtained.⁹⁴

§ 3160. — Deposits by agents, officers or trustees. Money deposited by an agent in his own name is subject to garnishment in an action by his creditor,⁹⁵ unless the principal and equitable owner of

⁹⁰ *Rosenberg v. First Nat. Bank of Texarkana* (Tex. Civ. App.), 27 S. W. 897.

⁹¹ *Clapp v. Hancock Bank*, 1 Allen (Mass.) 394.

⁹² *Cook v. Robinson*, 194 Fed. 753.

⁹³ *Farrington v. F. E. Fleming Commission Co.*, 94 Neb. 108, 47 L. R. A. (N. S.) 742, 142 N. W. 297.

⁹⁴ *Patterson v. Beck*, 133 Ga. 701, 66 S. E. 911.

⁹⁵ *Jackson v. Bank of United States*, 10 Pa. St. 61. But see *Home Land & Loan Co. v. Routh*, 123 Ark. 360, Ann. Cas. 1917 C 1142, 185 S. W. 467, as authority for the proposition that the rule is to the contrary where the evidence warrants the conclusion that the deposit was made in good faith and it does not appear the credit was extended in the belief that the deposit actually belonged to the agent.

the fund asserts his right thereto⁹⁶ or the bank and creditor have notice of the principal's ownership of the fund,⁹⁷ and if a bank, at the time of the service of process, knows that a fund on deposit belongs to the principal defendant, it will be liable as garnishee, notwithstanding the deposit stands in the name of a third person as agent.⁹⁸

In a number of cases it has been held that a deposit in a bank by a depositor as "agent," is prima facie the property of his principal, and is not liable to attachment for the debt of the agent.⁹⁹

Another line of decisions lays down the rule that a deposit in a bank to the credit of the depositor as "agent" shows such prima facie title in him as to authorize the service of a writ of garnishment,¹ subject however to claim and proof on the part of the principal that it is not the money of the agent and that the writ of garnishment should be discharged.²

The question of the actual ownership of the deposit can be determined on an answer and traverse in the garnishment proceeding.³

And where funds belonging to one person are deposited in a bank by another person in his own name as "Trustee," and the bank is summoned as garnishee of the depositor, it may submit to the process, and the owner of the money has no recourse on the bank, especially when he had notice of the garnishment immediately after service of the writ, and thus had ample opportunity to appear and maintain his right.⁴

§ 3161. — Certificates of deposit. A certificate of deposit payable on demand to order is, after presentment and refusal of payment, past due and non-negotiable paper, and the debt evidenced

⁹⁶ *Packer v. Crary*, 121 Iowa 388, 96 N. W. 870; *Morrill v. Raymond*, 28 Kan. 415, 42 Am. Rep. 167.

⁹⁷ *Morrill v. Raymond*, 28 Kan. 415, 42 Am. Rep. 167.

⁹⁸ *Ferry v. Home Sav. Bank*, 114 Mich. 321, 68 Am. St. Rep. 487, 72 N. W. 181; *Connor v. Third Nat. Bank of Detroit*, 90 Mich. 328, 51 N. W. 523.

Money, the property of a railroad company, deposited by an officer to his credit as "Supt." may be garnished in a suit against the railroad company. *Gregg v. Farmers' & Merchants' Bank*, 80 Mo. 251.

⁹⁹ *Des Moines Cotton Mill Co. v. Cooper*, 93 Iowa 654, 61 N. W. 1084; *Jones v. Bank of Northern Liberties*, 44 Pa. St. 253; *Bank of Northern Liberties v. Jones & Cole*, 42 Pa. St. 536.

¹ *Silsbee State Bank v. French Market Grocery Co.*, 103 Tex. 629, 34 L. R. A. (N. S.) 1207, 132 S. W. 465.

² *Ingersoll & Co. v. First Nat. Bank*, 10 Minn. 396; *Proctor v. Greene*, 14 R. I. 42.

³ *Petty v. Dunlap Hardware Co.*, 99 Ga. 300, 25 S. E. 697.

⁴ *Randall v. Way*, 111 Mass. 506.

thereby is the subject of garnishment,⁵ but where a certificate has been transferred before garnishment against the rights of the original holder is served on the bank, the process does not attach.⁶

§ 3162. — Paper deposited for collection. Where a draft or bill of exchange is deposited for collection⁷ or bears a restrictive indorsement retaining title,⁸ or is deposited under an agreement that it is to be charged back on failure of collection,⁹ this imports only a limited ownership, as in case of a bailment, and such paper is subject to garnishment for the debts of the customer, to the extent of his interest at the time garnishment notice is served.

And where a bank, having received a check from the defendant, with authority to collect for deposit and use, has had the check certified by the bank on which it is drawn, before the garnishment, it is liable to the defendant for the amount of the check, as for money had and received, and that liability may be reached by garnishment.¹⁰

But where a customer deposits a draft with a bank for deposit to his credit, and the same is entered to his credit and forwarded to another bank for collection, under a course of dealing whereby the depositor of the draft has the right to and does check against it,

⁵ *Exchange Bank v. Gulick*, 24 Kan. 359.

The proceeds of a cashier's check made payable to the sheriff and, after indorsement by him, deposited with the clerk of court for the purpose of securing the release of seized property belonging to the person at whose instance the check was issued, are not subject to garnishment by a judgment creditor of such person. *Beaston v. Portland Trust & Savings Bank*, 89 Wash. 627, Ann. Cas. 1917 B 488, 155 Pac. 162.

⁶ *Karp v. Citizens' Nat. Bank of Saginaw*, 76 Mich. 679, 43 N. W. 680.

A Louisiana stockholder in a bank, "domiciled" in Mississippi, who is also a creditor of the bank for money deposited therein, is not estopped to proceed against the bank or its assignees or receivers for the collection of the debt due him, or to attach real estate belonging to the bank and located in Louisiana, by reason of the

fact that he has previously accepted a certificate of deposit in lieu of his money and consented to delay in payment, when, by the action of the bank, in making an assignment to which he was not an actual party, all debts are matured, and other creditors, not stockholders, are left at liberty so to proceed and attach. *Painter v. Bank of Osyka*, 140 La. 457, 73 So. 266.

⁷ *Central Ry. Co. v. First Nat. Bank*, 73 Ga. 383; *Washington Brick, Lime & Manufacturing Co. v. Traders' Nat. Bank*, 46 Wash. 23, 123 Am. St. Rep. 912, 89 Pac. 157.

⁸ *Freeman v. Exchange Bank of Macon*, 87 Ga. 45, 13 S. E. 160.

⁹ *W. J. Barton Seed, Feed & Implement Co. v. Mercantile Nat. Bank*, 128 Tenn. 320, 160 S. W. 848.

¹⁰ *National Commercial Bank v. Miller & Co.*, 77 Ala. 168, 54 Am. Rep. 50.

the title to the draft passes to the first bank, and when collected by the second bank the proceeds are the property of the first bank and not subject to garnishment at the instance of a creditor of the depositor.¹¹ Where a draft for the purchase price of goods sold, to which is attached a non-negotiable bill of lading, is discounted by a bank which credits the account of the drawer and forwards the draft and bill of lading, the drawee, after paying the former and receiving the latter, cannot, in an action against the drawer for a breach of warranty of the goods sold, attach the proceeds of the draft in the hands of the collecting bank as the property of the drawer.¹²

Under the rule that the situs of a debt due to a nonresident is the domicile of the creditor, unless a statute declares the contrary, where a bank receives a draft for collection from a nonresident, and does not retain the money collected as a separate and distinct fund held for remittance, but collects it in the ordinary course of its banking business and intermingles its proceeds with its general funds, intending merely to account to the defendant in attachment for the amount of the draft, then the relation of debtor and creditor exists between the bank and the defendant, and that debt cannot be reached by attachment and garnishment, for the reason that it is due and payable to a nonresident of the state. But if the garnishee bank keeps the proceeds separate and distinct as a fund belonging to the nonresident defendant, the proceeds are subject to the writ of garnishment.¹³ A bank deposit which results from the collection of a note by the bank and the placing of the note's proceeds to the payee's account is not subject to garnishment by a creditor of the payee when such proceeds are less than the amount of the payee's indebtedness to the bank.¹⁴

§ 3163. — Specific property on deposit. Property deposited in a safe-deposit box of a bank, trust or safety deposit company is the depositor's property in the hands of and in charge of the company, and, in an action against the depositor, the company may be garnished therefor, as "goods, chattels, and credits,"¹⁵ "personal property or

¹¹ Fourth Nat. Bank of Cincinnati v. Mayer, 89 Ga. 108, 14 S. E. 891.

¹² American Nat. Bank v. Warren, 96 N. Y. Misc. 265, 160 N. Y. Supp. 413.

¹³ Nashville Produce Co. v. Sewell, 121 Ga. 278, 48 S. E. 945.

¹⁴ Farmers' & Merchants' State

Bank of Teague v. Setzer, — Tex. Civ. App. —, 185 S. W. 596.

¹⁵ Washington Loan & Trust Co. v. Susquehanna Coal Co., 26 App. Cas. (D. C.) 149; United States v. Graff, 67 Barb. (N. Y.) 304, 4 Hun (N. Y.) 634.

effects,"¹⁶ or "deposits of money" of the defendant,¹⁷ whether or not any of the officers of the company were informed as to the contents of the package deposited with the company.¹⁸ In such a case, the company could be required to disclose whether or not it had in its possession, or under its control, a safe-deposit box of the defendant.¹⁹ There is authority to the contrary, however,²⁰ especially under a statute which authorizes the use of garnishment process when the relation of debtor and creditor exists between the principal defendant and the garnishee.²¹

§ 3164. National banks—Attachment. An act of congress, relating to national banking associations, declares that "no attachment, injunction or execution, shall be issued against such association or its property before final judgment in any suit, action or proceeding, in any state, county, or municipal court." ²²

In considering this statute, Mr. Chief Justice Waite, speaking for the Supreme Court of the United States, said: "It is clear to our minds that [it] * * * operates as a prohibition upon all attachments against national banks under the authority of the courts. * * * It stands now * * * as the paramount law of the land that attachments shall not issue from state courts against national banks, and writes into all attachment laws an exemption in favor of national banks. Since the act of 1873 all the attachment laws of the state

¹⁶ *Trowbridge v. Spinning*, 23 Wash. 48, 54 L. R. A. 204, 83 Am. St. Rep. 806, 62 Pac. 125.

¹⁷ *Rozelle v. Rhodes*, 116 Pa. St. 129, 2 Am. St. Rep. 591, 9 Atl. 160.

¹⁸ *Tillinghast v. Johnson*, 34 R. I. 136, 41 L. R. A. (N. S.) 764, Ann. Cas. 1914 A 960, 82 Atl. 788.

¹⁹ *Washington Loan & Trust Co. v. Susquehanna Coal Co.*, 26 App. Cas. (D. C.) 149.

²⁰ *Bottom v. Clarke*, 7 Cush. (Mass.) 487.

²¹ *Wood v. Edgar*, 13 Mo. 451.

²² U. S. Rev. St. § 5242, Act of Congress of June 3, 1864, c. 106, § 57, 13 Stat. L. 116, as amended by Act of March 3, 1873, c. 269, § 2, 7 Stat. L. 603. U. S. Rev. St. § 5242, 5 Fed. St. Ann. p. 188, is not repealed by the Act of July 12, 1882, § 4, 22 Stat. L. 162. *Van Reed v. People's Nat. Bank*,

198 U. S. 554, 49 L. Ed. 1161, 3 Ann. Cas. 1154, aff'g 173 N. Y. 314, 66 N. E. 16; *Raynor v. Pacific Nat. Bank*, 93 N. Y. 371.

The statute is valid. *Dennis v. First Nat. Bank of Seattle*, 127 Cal. 453, 78 Am. St. Rep. 79, 59 Pac. 777, the court saying: "If Congress has power to authorize the creation of the national banks, it has power to protect them, and to regulate their trade and intercourse with others, by granting them special immunities, and protecting them against suits or proceedings in state courts by which their efficiency would be impaired." To the same effect see *Chesapeake Bank v. First Nat. Bank*, 40 Md. 269, 17 Am. Rep. 601; *Freeman Mfg. Co. v. National Bank of the Republic*, 160 Mass. 398, 35 N. E. 865.

must be read as if they contained a provision in express terms that they were not to apply to suits against a national bank.”²³ Before the enactment of this amendment to the original statute providing for the incorporation of national banking associations, it had been held that the property of a national bank created under the original act, attached at the suit of an individual creditor, after the bank had become insolvent, could not be subjected to sale for the payment of his demand, against the claim for the property by a receiver of the bank subsequently appointed.²⁴ For some time after the enactment of this provision, it was held by a number of courts that an attachment was prohibited if the bank was insolvent or in contemplation of insolvency,²⁵ but it was finally authoritatively decided that an attachment on the property of a national bank cannot be issued out of a state court whether the bank is solvent or insolvent.²⁶ And though the

²³ *Pacific Nat. Bank v. Mixter*, 124 U. S. 721, 31 L. Ed. 567.

²⁴ *Selma First Nat. Bank v. Colby*, 21 Wall. (U. S.) 609, 22 L. Ed. 687; *Cadle v. Tracy*, 11 Blatchf. (U. S.) 101, Fed. Cas. No. 2,279. To the contrary, see *Harvey v. Allen*, 16 Blatchf. (U. S.) 29, Fed. Cas. No. 6,177; *First Nat. Bank v. Colby*, 46 Ala. 435, rev'd 21 Wall. (U. S.) 609, 22 L. Ed. 687; *Woodward v. Ellsworth*, 4 Colo. 580; *Cooke v. State Nat. Bank*, 3 Abb. Pr. N. S. (N. Y.) 339, 50 Barb. (N. Y.) 339, aff'd 1 Lans. (N. Y.) 494; *Bowen v. First Nat. Bank*, 34 How. Pr. (N. Y.) 408.

²⁵ *McDonald v. First Nat. Bank of Marquette*, 41 Ill. App. 368; *Raynor v. Pacific Nat. Bank*, 93 N. Y. 371; *National Shoe & Leather Bank v. Mechanics' Nat. Bank*, 89 N. Y. 467; *Robinson v. National Bank*, 81 N. Y. 385, 37 Am. Rep. 508, 59 How. Pr. (N. Y.) 218, aff'g 19 Hun (N. Y.) 477, 58 How. Pr. (N. Y.) 306; *Market Nat. Bank v. Pacific Nat. Bank*, 64 How. Pr. (N. Y.) 1, rev'd 30 Hun (N. Y.) 50; *People's Bank v. Mechanics' Nat. Bank*, 27 Hun (N. Y.) 53, aff'g 62 How. Pr. (N. Y.) 422; *Holmes & Durham v. National Bank*, 18 S. C. 31, 44 Am. Rep. 558.

²⁶ *Van Reed v. People's Nat. Bank*, 198 U. S. 554, 49 L. Ed. 1161, 3 Ann. Cas. 1154, aff'g 173 N. Y. 314, 105 Am. St. Rep. 666, 66 N. E. 16. See also:

United States. *Garner v. Second Nat. Bank of Providence*, 66 Fed. 369.

Alabama. *Merchants' Laclede Bank of St. Louis, Missouri v. Troy Grocery Co.*, 144 Ala. 605, 39 So. 476.

California. *Dennis v. First Nat. Bank of Seattle*, 127 Cal. 453, 78 Am. St. Rep. 79, 59 Pac. 777.

Georgia. *Planters' Loan & Savings Bank v. Berry*, 91 Ga. 264, 18 S. E. 137.

Massachusetts. *Freeman Mfg. Co. v. National Bank of Republic*, 160 Mass. 398, 35 N. E. 865.

Minnesota. *First Nat. Bank of Kasson v. La Due*, 39 Minn. 415, 40 N. W. 367.

New York. *Raynor v. Pacific Nat. Bank*, 93 N. Y. 371; *McBride v. Illinois Nat. Bank*, 128 App. Div. 503, 112 N. Y. Supp. 794; *Bank of Montreal v. Fidelity Nat. Bank*, 49 Hun 607, 1 N. Y. Supp. 852, aff'd 112 N. Y. 667, 20 N. E. 414; *Rhoner v. First Nat. Bank of Allentown*, 14 Hun 126; *Central Nat. Bank v. Richland Nat. Bank*, 52 How. Pr. 136.

statute does not in express terms refer to attachments in suits begun in the circuit courts of the United States, it nevertheless operates as such a prohibition.²⁷ Such an attachment and seizure is void and no jurisdiction is obtained thereby.²⁸ It does not operate as notice to the defendant, and is insufficient to confer upon the court jurisdiction of the party or subject-matter.²⁹

A bond with sureties given to dissolve such an attachment creates no liability against the sureties, as it is void,³⁰ and the giving of such a bond is not an appearance in the attachment case so as to make valid a judgment entered upon the bond in that case, against the bank and the sureties executing the bond.³¹

The service of a garnishment summons or trustee writ upon a third person, and thus preventing the defendant national bank from receiving whatever may be in the hands of the garnishee or trustee, is in legal effect attaching its property.³²

The act of congress providing that the jurisdiction of suits brought by or against any association established under any law

North Carolina. Willard Mfg. Co. v. Geo. H. Tierney & Co., 130 N. C. 611, 41 S. E. 871.

Tennessee. Rosenheim Real Estate Co. v. Southern Nat. Bank (Tenn. Ch. App.), 46 S. W. 1026.

Vermont. Safford v. First Nat. Bank of Plattsburgh, 61 Vt. 373, 17 Atl. 748.

In *Searles v. Smith Grain Co.*, 80 Miss. 688, 32 So. 287, it was held that an attachment in chancery by a resident consignee, after paying the draft, against the nonresident consignor and a nonresident national bank which had purchased the draft with a bill of lading attached, to subject the proceeds of the draft in the hands of a resident state bank to his demand for damages arising out of the consignor's breach of contract for the sale of the property consigned, is not an attachment against the national bank within the meaning of the federal statute.

²⁷ *Pacific Nat. Bank v. Mixer*, 124 U. S. 721, 31 L. Ed. 721.

²⁸ *First Nat. Bank of Kasson v. La Due*, 39 Minn. 415, 40 N. W. 367.

²⁹ *Safford v. First Nat. Bank of Plattsburgh*, 61 Vt. 373, 17 Atl. 748.

In *Norris v. Merchants' Nat. Bank of Deadwood, Dakota*, 30 Ill. App. 54, it was held that the prohibition is a personal one and may be waived by appearance, but in *Merchants' Laclede Nat. Bank v. Troy Grocery Co.*, 144 Ala. 605, 39 So. 476, the court said that the above case is contrary to the weight of authority. And in *Planters' Loan & Savings Bank v. Berry*, 91 Ga. 264, 18 S. E. 137, it was held that the giving of a bond to dissolve an attachment is not an appearance in the attachment case so as to make valid a judgment entered upon the bond in that case, against the bank and the sureties executing the bond.

³⁰ *Pacific Nat. Bank v. Mixer*, 124 U. S. 721, 31 L. Ed. 721; *Planters' Loan & Savings Bank v. Berry*, 91 Ga. 264, 18 S. E. 137.

³¹ *Planters' Loan & Savings Bank v. Berry*, 91 Ga. 264, 18 S. E. 137.

³² *Safford v. First Nat. Bank of Plattsburgh*, 61 Vt. 373, 17 Atl. 748.

providing for national banking associations shall be the same as, and not other than, the jurisdiction of suits by or against banks not organized under any law of the United States, which do or might do banking business where such national banking association may be doing business when such suits may be begun, does not enlarge the right of attachment against national banks.³³ Before the passage of this act circuit courts of the United States had jurisdiction of suits against national banks because they were corporations of federal origin. It was the purpose of this legislation to deprive such banks of the right to invoke the jurisdiction of the federal courts simply upon the ground that they were created by and exercised their powers under the acts of congress.³⁴ It regulated the jurisdiction of the courts to entertain such actions against corporations of this character, and had nothing to do with the kind and character of remedies which could be had against them.³⁵

§ 3165. — Execution. The above act of congress prohibits the issue of attachments and executions "before final judgment," and there is nothing in the statutes exempting the tangible assets of a national bank from levy under execution upon final judgment, and before the comptroller of the currency, under the provisions of the national banking act, has put the bank into the hands of a receiver.³⁶ And the shares of stock in a national bank may be levied upon and sold under execution issued against the owner thereof, when the levy and sale will not interfere with the operation of the bank as a governmental agency.³⁷

§ 3166. — Garnishment. The United States statute above referred to does not prohibit the garnishment of such a bank.³⁸ And

³³ Van Reed v. People's Nat. Bank, 198 U. S. 554, 49 L. Ed. 1161, construing section 4 of Act of July 12, 1882, 5 Fed. St. Ann. p. 91.

³⁴ Van Reed v. People's Nat. Bank, 198 U. S. 554, 49 L. Ed. 1161; Continental Nat. Bank v. Buford, 191 U. S. 119, 48 L. Ed. 119; Petri v. Commercial Nat. Bank, 142 U. S. 644, 35 L. Ed. 1144.

³⁵ Van Reed v. People's Nat. Bank, 198 U. S. 554, 49 L. Ed. 1161.

³⁶ Kimball v. Dunn, 89 Fed. 782.

³⁷ Oldacre v. Butler, 116 Ala. 652, 23 So. 3; In re Braden's Estate, 165 Pa. St. 184, 30 Atl. 746.

³⁸ Earle v. Conway, 178 U. S. 456, 44 L. Ed. 1149, aff'g Conway v. Chestnut St. Nat. Bank, 189 Pa. St. 610, 42 Atl. 303; Earle v. Pennsylvania, 178 U. S. 449, 44 L. Ed. 1146, rev'g on another point Com. v. Chestnut St. Nat. Bank, 189 Pa. St. 606, 42 Atl. 300; Corn Exch. Bank of Chicago v. Blye, 101 N. Y. 303, 4 N. E. 635.

In Sowles v. National Union Bank of Swanton, Vermont, 82 Fed. 696, it was held that an attachment cannot be levied on shares of stock in a national bank when the state statutes do not cover such property, and that

a national bank may be summoned as garnishee in a proceeding in a court of the state where it is doing business.³⁹ The fact that the bank has gone into voluntary liquidation will not relieve it from liability to be summoned as a garnishee.⁴⁰ A receiver of such a bank may be garnisheed, and may thus be notified, by service upon him of an attachment issued from a state court, of the nature and extent of the interest asserted or sought to be acquired by the plaintiff in the attachment in the assets in his custody.⁴¹ Such process, however, does not create any lien upon specific assets of the bank in the hands of the receiver, nor disturb his custody of those assets, but the bank's assets will be held by the receiver and comptroller of the currency subject to any interest which the plaintiff may have legally acquired therein as against his debtor under the attachment issued on the judgment in his favor in the state court.⁴² And with respect to the shares of stock in national banks, it has been held that as the laws of the United States provide for their transfer, and what the effect of the transfer shall be, this might exclude any effect of transfer proceedings by attachment under state laws.⁴³

§ 3167. Insurance companies—On life policy. The amount due on a life insurance policy payable upon the death of the assured to his

it is very doubtful whether any attachment could operate on such property in view of the provisions of the federal statute.

A statute which exempts from attachment by trustee process negotiable paper transferred before due to a bank within the state, does not work a discrimination against banks without the state from which they are protected by art. 4, § 2 of Fed. Const. or by art. 14, § 1 of Amendments; the incidental discrimination touches only the general business relations of national banks, and does not impair their utility as agencies of the federal government. *Hawley v. Hurd*, 72 Vt. 122, 52 L. R. A. 195, 82 Am. St. Rep. 922, 47 Atl. 401.

³⁹ *Earle v. Conway*, 178 U. S. 456, 44 L. Ed. 1149; *Birmingham Nat. Bank v. Mayer*, 104 Ala. 634, 16 So. 520; *Corn Exch. Bank of Chicago v. Blye*, 101 N. Y. 303, 4 N. E. 635;

Conway v. Chestnut St. Nat. Bank, 189 Pa. St. 610, 42 Atl. 303, *aff'd* Com. v. Chestnut St. Nat. Bank, 189 Pa. St. 606, 42 Atl. 300, *rev'd* on another point *Earle v. Pennsylvania*, 178 U. S. 449, 44 L. Ed. 1146.

⁴⁰ *Birmingham Nat. Bank v. Mayer*, 104 Ala. 634, 16 So. 520.

⁴¹ *Earle v. Conway*, 178 U. S. 456, 44 L. Ed. 1149, *aff'g* *Conway v. Chestnut St. Nat. Bank*, 189 Pa. St. 610, 42 Atl. 303.

⁴² *Earle v. Conway*, 178 U. S. 456, 44 L. Ed. 1149, *aff'g* *Conway v. Chestnut St. Nat. Bank*, 189 Pa. St. 610, 42 Atl. 303; *Earle v. Pennsylvania*, 178 U. S. 449, 44 L. Ed. 1146, *rev'g* *Com. v. Chestnut St. Nat. Bank*, 189 Pa. St. 606, 42 Atl. 300.

⁴³ *Sowles v. National Union Bank of Swanton, Vermont*, 82 Fed. 696. See also *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369.

legal representatives, is not subject to garnishment on a judgment obtained against the deceased; no action could have been maintained by the deceased in his lifetime, and the title to the money exists only in the legal representatives.⁴⁴ But an interest in a life insurance policy not yet matured and on which premiums are to be paid, but which under the law has a surrender value, is subject to attachment.⁴⁵ And the liability of a domestic corporation upon a policy of life insurance held by a nonresident, the policy being held by a resident pledgee and having a cash surrender value, is property within the state, which may at law be reached by garnishment or trustee process, or in equity by a decree in the nature of a judgment in rem.⁴⁶

The safety fund of a beneficiary association cannot be attached on trustee process by claimants for death losses.⁴⁷ Nor can that part of the assets of a corporation known as the beneficiary fund or mortuary fund, which is exempt from execution under statute, be subjected to liability under garnishment process.⁴⁸

§ 3168. — On fire policy generally. Where a loss has been sustained by fire, and the amount of the loss has been ascertained or fixed by an award, the amount due under the policy thereby assumes the character of a debt due from the insurance company to the assured, and is subject to garnishment or trustee process.⁴⁹

⁴⁴ *Day v. New England Life Ins. Co.*, 111 Pa. St. 507, 56 Am. Rep. 297, 4 Atl. 748.

⁴⁵ *Kratzenstein v. Lehman*, 19 N. Y. App. Div. 228, 46 N. Y. Supp. 71.

⁴⁶ In *Columbia Bank v. Equitable Life Assur. Soc. of United States*, 79 N. Y. App. Div. 601, 80 N. Y. Supp. 428, it was held that where, by the express provisions of a policy, it was agreed that, previous to the completion of the tontine dividend period, the policy should have no surrender value in cash or paid up policy, and that neither the assured, nor those for whose benefit the policy was issued, could have any right to receive anything from the insurer, but should forfeit all premiums that had been paid upon the policy, the insured has no attachable interest in the policy until the expiration of the period.

⁴⁷ *Palmer v. Northern Mut. Relief Ass'n*, 175 Mass. 396, 78 Am. St. Rep. 503, 56 N. E. 828; *Burdon v. Massachusetts Safety Fund Ass'n*, 147 Mass. 360, 1 L. R. A. 146, 17 N. E. 874; *Brenizer v. Supreme Council, Royal Arcanum*, 141 N. C. 409, 6 L. R. A. (N. S.) 235, 53 S. E. 835.

⁴⁸ *Lake v. Minnesota Masonic Relief Ass'n*, 61 Minn. 107, 63 N. W. 263.

⁴⁹ *Hanover Fire Ins. Co. v. Connor*, 20 Ill. App. 297; *Swamscott Mach. Co. v. Partridge*, 25 N. H. 369 (holding further that the insurance company may retain the amount of all sums properly assessed upon the premium note of the principal debtor, for losses sustained prior to the time of the disclosure); *Boyle v. Franklin Fire Ins. Co.*, 7 Watts & S. (Pa.) 76.

Where a company has issued a policy of insurance upon a vessel "for whom it concerns," and a loss has ac-

And a member of a mutual fire insurance company may be garnished on a judgment obtained against the company, when he was indebted to the company on a premium note for his proportion of losses sustained.⁵⁰ But where the amount recoverable in case of loss is made payable to the mortgagee as his interest may appear, the same must to that extent be deemed already appropriated for the payment or security of the mortgagee, and not subject to garnishment by the creditors of the mortgagor.⁵¹

As insurance money on a homestead is not subject to the payment of debts of a general character, money due to the owner of a homestead for loss sustained by fire in the destruction of the home building is not subject to garnishment by one who held an unsatisfied mechanic's lien on the building before its destruction.⁵² And an insurance company having sustained a loss in one state, which has been adjusted and is payable there, cannot be garnished in another state where it has neither property nor money of the debtor subject to the process of the court.⁵³

In some cases it is held that a claim for a loss on a policy of insurance, which is merely unadjusted, is subject to the process of garnishment or foreign attachment,⁵⁴ especially when proof of loss has been furnished to the company and such proof has not been objected to,⁵⁵ while, on the other hand, it is held that a claim which is unliquidated is not chargeable under such process, as the question as to the amount due on the loss cannot be determined in such a proceeding,⁵⁶ and that the judgment creditor is not entitled to a judgment,

the share of money payable by the company to one of the several owners, may be held by attachment on trustee process, by a creditor of such part owner of the vessel, although his name is not in the policy. *City Bank v. Adams*, 45 Me. 455.

The proceeds of a policy of fire insurance on goods acquired, and used in a mercantile business conducted under the name "—— Company," without a sign disclosing the real owner, and burned while in such use, is liable to garnishment by the creditors of the party conducting such business, under a statute requiring the name of the principal or partner of one trading as "agent," "factor" or "company" to be disclosed, otherwise the property used or acquired to

be liable for the debts of the person transacting the business. *Meridian Land & Industrial Co. v. Ormond*, 82 Miss. 758, 35 So. 179.

⁵⁰ *Hays v. Lycoming Fire Ins. Co.*, 99 Pa. St. 621, 98 Pa. St. 184.

⁵¹ *Mansfield v. Stevens*, 31 Minn. 40, 16 N. W. 455.

⁵² *Cameron v. Fay*, 55 Tex. 58.

⁵³ *American Cent. Ins. Co. of St. Louis v. Hettler*, 37 Neb. 849, 40 Am. St. Rep. 522, 56 N. W. 711.

⁵⁴ *Knox v. Protection Ins. Co.*, 9 Conn. 430, 25 Am. Dec. 33; *Sexton v. Phoenix Ins. Co.*, 132 N. C. 1, 43 S. E. 479.

⁵⁵ *Crescent Ins. Co. v. W. R. Moore & Co.*, 63 Miss. 419.

⁵⁶ *Bucklin v. Powell*, 60 N. H. 119; *McKean v. Turner*, 45 N. H. 203.

ment ordering the company to adjust the loss within a given delay, or else pay his judgment.⁵⁷

But though the claim has not been adjusted and is disputed by the company, there may be circumstances which will cause the amount claimed to be subject to garnishment, as where the conduct of the adjuster has been such as to constitute a waiver of the insurer's right to demand an appraisal.⁵⁸

And under a statute providing that a garnishment binds the effects of the defendant in the possession of the garnishee at the time of the service of the writ, or at any other time, the amount due on a policy of fire insurance is subject to such a writ, though at the time of the attachment it was uncertain but was rendered certain at the time of the answer to interrogatories.⁵⁹

Where the indebtedness which may be garnished is one which is absolute in its nature and payable at some time beyond any contingency, an amount claimed under a policy of insurance is not subject to the process until the provisions of the policy as to notice, proofs of loss, etc., have been substantially complied with or waived by the insurer,⁶⁰ though even then it has been observed that the issuance of a writ, before the making of proof of loss, is not strictly speaking an action for the recovery of a debt, but is more in the nature of a bill of discovery, and may be filed in anticipation that a debt or other obligation will mature at some future time.⁶¹

When a mutual fire insurance company is divided into several distinct and independent classes, an execution on a judgment in favor of a member of a certain class can run only against the property and funds of the company belonging to that class.⁶²

§ 3169. — On fire policy containing option to rebuild. When a policy gives the company an option to repair, rebuild or replace the

⁵⁷ *Katz & Barnett v. Sorsby*, 34 La. Ann. 588.

⁵⁸ *Glen Falls Ins. Co. v. Hite*, 83 Ill. App. 549.

⁵⁹ *Franklin Fire Ins. Co. v. West*, 8 Watts & S. (Pa.) 350.

⁶⁰ *United States. Lovejoy v. Hartford Fire Ins. Co.*, 11 Fed. 63.

Illinois. Hanover Fire Ins. Co. v. Connor, 20 Ill. App. 297.

Maine. Nickerson v. Nickerson, 80 Me. 100, 12 Atl. 880; *Davis v. Davis*, 49 Me. 282.

Minnesota. Gies v. Bechtner & Kottman, 12 Minn. 279.

Mississippi. Crescent Ins. Co. v. W. R. Moore & Co., 63 Miss. 419.

Wisconsin. Dowling v. Lancashire Ins. Co., 89 Wis. 96, 61 N. W. 76.

⁶¹ *Phenix Ins. Co. of Brooklyn v. Willis*, 70 Tex. 12, 8 Am. St. Rep. 566, 6 S. W. 825.

⁶² *Naill v. Insurance Co.*, 47 Kan. 223, 27 Pac. 854, rev'g *Kansas Farmers' Mut. Fire Ins. Co. v. Amick*, 45 Kan. 74, 25 Pac. 211; *Kansas Farmers' Mut. Fire Ins. Co. v. Amick*, 45 Kan. 738, 26 Pac. 944; *Judkins v. Union Mut. Fire Ins. Co.*, 39 N. H. 172.

property, it is held in some cases that the rights of the insured are not subject to garnishment so long as the option has not been exercised by the company and before the time has elapsed,⁶³ especially under statutes requiring that there must be an absolute liability at the time of service,⁶⁴ while in other jurisdictions it is considered that though the company has the option to rebuild the property, the claim may be garnished, but the attachment is subject to all the equities existing against the creditor,⁶⁵ or, it has been suggested, the court may on motion retain the case until the expiration of the period limited for rebuilding.⁶⁶

Where the company determines to adjust a claim by exercising its right under the policy to rebuild, there is, of course, nothing due which can be the subject of attachment.⁶⁷

§ 3170. — On employer's liability policy. Where by the entry of judgment against an employer in an action for damages by an injured employee, the indebtedness of an insurance company becomes absolute on a policy insuring the employer against liability for such injuries, such indebtedness is subject to garnishment in a subsequent garnishment proceeding.⁶⁸

But under a policy whereby the insurer agrees to indemnify the assured "against loss," it has been held that there is no claim against the insurer until a judgment against the insured has been paid, and that consequently there is nothing that can be the subject of garnishment proceedings as against the insurer.⁶⁹

§ 3171. Public service corporations generally. Where a corporation is charged with public duties, and is in the exercise of its franchises

⁶³ *Thorp v. Preston*, 42 Mich. 511, 4 N. W. 227; *Dowling v. Lancashire Ins. Co.*, 89 Wis. 96, 61 N. W. 76.

⁶⁴ *Godfrey v. Macomber*, 128 Mass. 188; *Martz v. Detroit Fire & Marine Ins. Co.*, 28 Mich. 201.

⁶⁵ *Girard Fire & Marine Ins. Co. v. Field, Merritt & Co.*, 45 Pa. St. 129.

Under such a policy, when the property in question was merchandise, and at the time of service of the writ the option had not been exercised by the company, it was held that the indebtedness could not be considered uncertain and contingent, and therefore not subject to garnishment, merely

because of an option on the part of the insurer to pay in merchandise rather than in money. *Hanover Fire Ins. Co. v. Connor*, 20 Ill. App. 297.

⁶⁶ *Hurst v. Home Protection Fire Ins. Co.*, 81 Ala. 174, 1 So. 209.

⁶⁷ *Stone v. Mutual Fire Ins. Co. of Montgomery County*, 74 Md. 579, 14 L. R. A. 684, 22 Atl. 1051.

⁶⁸ *Fritchie v. Miller's Pennsylvania Extract Co.*, 197 Pa. 401, 47 Atl. 351; *Hoven v. Employers' Liability Assur. Corporation*, 93 Wis. 201, 32 L. R. A. 388, 67 N. W. 46.

⁶⁹ *Allen v. Gilman, McNeil & Co.*, 137 Fed. 136, judgment affirmed *Allen*

and the performance of such duties, it is a general rule that a judgment creditor cannot levy upon and sell any of its property which has been dedicated by it to corporate purposes, and which is essential to enable it to exercise its franchises and perform its duties to the public, unless the right to do so is expressly given by statute; and it is immaterial whether the property was acquired under the power of eminent domain, or by purchase or donation.⁷⁰ This rule is applied to railroads,⁷¹ bridge,⁷² canal,⁷³ turnpike or plank-road,⁷⁴ and water companies,⁷⁵ and also to the property of a market house associa-

v. *Ætna Life Ins. Co.*, 145 Fed. 881, 7 L. R. A. (N. S.) 958.

⁷⁰ *Hart v. Burnett*, 15 Cal. 590; *Indianapolis & C. Gravel Road Co. v. State*, 105 Ind. 37, 4 N. E. 316; *Palestine v. Barnes*, 50 Tex. 538.

“As a general rule, the property of all private corporations is as subject to legal process for the satisfaction of debt as is the property of natural persons. An exception obtains, however, when the corporation is created to serve public purposes, charged with public duties, and is in the exercise of its franchise and in the performance of its duties. Then, on considerations of public policy, without regard to the nature or quality of the estate or interest of the corporation, according to the weight of authority, such property as is necessary to enable it to discharge its duties to the public, and effectuate the objects of its incorporation, is not subject to execution at law. The only remedy of a judgment creditor is to obtain the appointment of a receiver, and the sequestration of its income or earnings. * * * The exemption from levy is maintainable, however, only upon the theory that the corporation is created for the furtherance of public purposes, of such importance to the public that there must not be private interference with such of the corporate property as is essential to effectuate these purposes; and presupposes that to these purposes, the property is being applied. Property

not necessary to effectuate these purposes, if acquired by gift or purchase, may be taken by legal process for the satisfaction of debts. 2 Mor. Priv. Corp. § 1,125. And so may personal property be employed, and necessarily employed in the exercise of corporate franchises.” *Gardner v. Mobile & N. W. R. Co.*, 102 Ala. 635, 48 Am. St. Rep. 84, 15 So. 271.

As to service or levy of process on the franchise of a public service corporation, see § 3134, *supra*.

⁷¹ See § 3172, *infra*.

⁷² *McPheeters v. Merimac Bridge Co.*, 28 Mo. 465; *Overton Bridge Co. v. Means*, 33 Neb. 857, 29 Am. St. Rep. 514, 51 N. W. 240.

⁷³ *Gue v. Tide-Water Canal Co.*, 24 How. (U. S.) 257, 16 L. Ed. 635; *Brady v. Johnson*, 75 Md. 445, 20 L. R. A. 737, 26 Atl. 49; *Sherman County Irrigation, Water Power & Improvement Co. v. Drake*, 65 Neb. 699, 91 N. W. 512; *Spear v. Allison*, 20 Pa. St. 200; *Susquehanna Canal Co. v. Bonham*, 9 Watts & S. (Pa.) 27, 42 Am. Dec. 315.

⁷⁴ *Winchester & L. Turnpike Road Co. v. Vimont*, 5 B. Mon. (Ky.) 1; *Ammant v. New Alexandria & P. Turnpike Road*, 13 Serg. & R. (Pa.) 210, 15 Am. Dec. 593; *Baxter v. Nashville & H. Turnpike Co.*, 78 Tenn. 488.

⁷⁵ *Louisville Water Co. v. Hamilton*, 81 Ky. 517, 5 Ky. L. Rep. 557.

In Pennsylvania such property may be sold under a special writ of *feri facias*, provided for by statute. *Bell*

tion,⁷⁶ and to that of a corporation organized "to protect life and property in or contiguous to burning buildings, and to remove and take charge of such property."⁷⁷ But authority to sell such property of a corporation to satisfy a judgment is expressly given by statute in some jurisdictions,⁷⁸ and when authority is given, it refers to the particular class or classes of corporations designated in the statute,⁷⁹ and, to avoid a dismemberment of the property, it should be sold as an entirety.⁸⁰

And it has been held that the interest of a corporation in an electric plant, erected for the use of a city under a contract which has been declared void, is not exempt from sale on execution issued upon the decree obtained in such suit, on the ground that such plant is devoted to public use.⁸¹ The statement of the rule suggests its limitation, and indicates that property not essential to the exercise of the corporate franchise may be levied and sold under execution.⁸²

§ 3172. Railroad companies—Property generally. As has been stated, the rule that the property of a public service corporation, necessary to enable it to exercise its franchises, is not subject to execution or attachment, unless there is special statutory authority therefor, is applied to railroad companies. This includes the right of way, and land and buildings owned and actually used by a railroad company in the operation of its railroad.⁸³

v. Wood, 181 Pa. St. 175, 37 Atl. 201;
Guest v. Merion Water Co., 142 Pa. St.
610, 12 L. R. A. 324, 21 Atl. 1001.

⁷⁶ *Palestine v. Barnes*, 50 Tex. 538.

⁷⁷ *In re Boyd* (Pa.), 15 Atl. 736.

⁷⁸ *Evangelical Lutheran St. John's
Orphan Home v. Buffalo Hydraulic
Ass'n*, 64 N. Y. 561, aff'g 4 Hun (N.
Y.) 419.

⁷⁹ *Indianapolis & C. Gravel Road
Co. v. State*, 105 Ind. 37, 4 N. E. 316.

⁸⁰ *Vermeule v. York Water Co.*, 112
Me. 437, 92 Atl. 513.

⁸¹ *Campbell v. Western Elec. Co.*,
113 Mich. 333, 71 N. W. 644.

⁸² *Ammant v. New Alexandria & P.
Turnpike Road*, 13 Serg. & R. (Pa.)
210, 15 Am. Dec. 593; *Franklin & C.
Turnpike Co. v. Young*, 8 Humph.
(Tenn.) 103.

⁸³ *United States. East Alabama R.
Co. v. Doe*, 114 U. S. 340, 29 L. Ed. 136;

Georgia v. Atlantic & G. R. Co., 3
Woods 434, Fed. Cas. No. 5,351.

Alabama. *Gardner v. Mobile & N.
W. R. Co.*, 102 Ala. 635, 48 Am. St.
Rep. 84, 15 So. 271; *Northern Ala-
bama R. Co. v. Lowery*, 3 Ala. App.
511, 57 So. 260.

Indiana. *Louisville, N. A. & C. Ry.
Co. v. Boney*, 117 Ind. 501, 3 L. R. A.
435, 20 N. E. 432.

Maryland. *McColgan v. Baltimore
Belt R. Co.*, 85 Md. 519, 36 Atl. 1026.

Michigan. *Hackley v. Mack*, 60
Mich. 591, 27 N. W. 871.

North Carolina. *Gooch v. McGee*,
83 N. C. 59, 35 Am. Rep. 558, overrul-
ing *State v. Rives*, 27 N. C. 297.

Pennsylvania. *Youngman v. Elmira
& W. R. Co.*, 65 Pa. St. 278; *Leedom v.
Plymouth R. Co.*, 5 Watts & S. 265.

When the property and revenues of
a railroad company are pledged by

Land occupied by a railroad as an easement only, is not subject to sale under execution⁸⁴ separate from the franchise.⁸⁵ Property of a railroad is not exempt from execution or attachment, however, when not in actual use,⁸⁶ nor is such property as is not necessary to enable it to exercise its franchise and perform its duties to the public.⁸⁷

Land owned by a railroad company and not dedicated to or necessary for railroad purposes,⁸⁸ and the portion of a railroad, owned in fee, which the company has abandoned for any purpose of public service, is subject to levy of execution.⁸⁹

And where a railroad company has become inert, and has ceased all use of its franchises and all performance of its public duties, lands owned by it in fee, as a right of way or otherwise, are subject to be levied upon under an execution at law.⁹⁰

Railroad ties, rails, lumber, water pipe, iron pipe and other personal property, necessary to be kept in stock for emergency purposes, it

mortgage to secure the payment of certain outstanding bonds, and the earnings of the road are insufficient to discharge the interest as it accrues thereon, the revenues so pledged are not subject to attachment or execution by the other judgment creditors of the corporation, and an attachment or execution of the same will be restrained by injunction on application to a court of equity. *Dunham v. Isett*, 15 Iowa 284.

⁸⁴ *Western Pennsylvania Ry. Co. v. Johnston*, 59 Pa. St. 290.

⁸⁵ *East Alabama R. Co. v. Doe*, 114 U. S. 340, 29 L. Ed. 136.

⁸⁶ *Louisville, N. A. & C. Ry. Co. v. Boney*, 117 Ind. 501, 3 L. R. A. 435, 20 N. E. 432; *Overton Bridge Co. v. Means*, 33 Neb. 857, 29 Am. St. Rep. 514, 51 N. W. 240; *Johnson Co. v. Miller*, 174 Pa. St. 605, 52 Am. St. Rep. 833, 34 Atl. 316; *Reynolds v. Reynolds Lumber Co.*, 169 Pa. St. 626, 47 Am. St. Rep. 935, 32 Atl. 537.

⁸⁷ *United States. Farmers' Loan & Trust Co. v. St. Joseph & D. C. R. Co.*, 3 Dill 412, Fed. Cas. No. 4,669.

Indiana. Louisville, N. A. & C. Ry.

Co. v. Boney, 117 Ind. 501, 3 L. R. A. 435, 20 N. E. 432.

Michigan. Hackley v. Mack, 60 Mich. 591, 27 N. W. 871.

New York. Beardsley & Kirkland v. Ontario Bank, 31 Barb. 619.

Ohio. Lane v. Baughman, 17 Ohio St. 642, 93 Am. Dec. 653; *Coe v. Peacock*, 14 Ohio St. 187; *Coe v. Knox County Bank of Mount Vernon*, 10 Ohio St. 412; *Coe v. Columbus, P. & I. R. Co.*, 10 Ohio St. 372, 75 Am. Dec. 518.

Pennsylvania. In re Philadelphia & R. R. Co., 3 Atl. 838.

⁸⁸ *Shamokin Valley R. Co. v. Livermore*, 47 Pa. St. 465, 86 Am. Dec. 552 (town lots).

A canal basin is not a legitimate incident to a railroad having no authorized canal connection, and may be levied on and sold. *Plymouth R. Co. v. Colwell*, 39 Pa. St. 337, 80 Am. Dec. 526.

⁸⁹ *Benedict v. Heineberg*, 43 Vt. 231.

⁹⁰ *Gardner v. Mobile & N. W. R. Co.*, 102 Ala. 635, 48 Am. St. Rep. 84, 15 So. 271.

has been held, cannot be levied on under execution,⁹¹ but otherwise as to rails purchased, but not used and not needed for present use.⁹²

Though on a somewhat different principle it has been held that electric goods and supplies, and fireproof safes owned by a street railway company, are subject to attachment or execution, although necessary to operations under the franchise, as such property does not emanate mediately or immediately from the state.⁹³

Where an attachment was properly levied on land owned by a railroad, the fact that the property was subsequently purchased by a railroad company and used as part of its railroad property does not release the property from the attachment, as the purchaser took it cum onere, and a creditor who has attached railroad property, and who has bid upon the property of the railroad under a mortgage covering its property in another state, is not estopped to insist upon his attachment lien.⁹⁴

Statutes in some states authorize the sale of railroad property under execution in the same manner as the property of individuals,⁹⁵ or under the conditions, in the particular manner or class of actions prescribed by the statute.⁹⁶

⁹¹ *Margo v. Pennsylvania R. Co.*, 213 Pa. 468, 110 Am. St. Rep. 559, 5 Ann. Cas. 511, 62 Atl. 1081.

⁹² *Johnson Co. v. Miller*, 174 Pa. St. 605, 52 Am. St. Rep. 833, 34 Atl. 316.

⁹³ *Risdon Iron & Locomotive Works v. Citizens' Traction Co.*, 122 Cal. 94, 68 Am. St. Rep. 25, 54 Pac. 529.

In *Northern Pac. R. Co. v. Shimmell*, 6 Mont. 161, 9 Pac. 889, it was held that an office safe at a depot, in which the agent deposits and keeps his daily receipts and valuable papers, cannot be seized on execution.

⁹⁴ *Chapman v. Pittsburg & S. R. Co.*, 26 W. Va. 299.

⁹⁵ *Arthur v. Commercial & Railroad Bank*, 9 Smedes & M. (Miss.) 394, 48 Am. Dec. 719.

⁹⁶ *Atlanta v. Grant, Alexander & Co.*, 57 Ga. 340; *Hart v. Benton-Bellefontaine Ry. Co.*, 7 Mo. App. 446; *Good v. Sherman*, 37 Tex. 660; *Weddington v. Carver*, 45 Tex. Civ. App. 68, 100 S. W. 786.

A judgment creditor may, under statute, obtain an execution levy on

the franchise of a street railway company and the rights and privileges of the company thereunder, "so far as they relate to the receiving of toll," and upon "all other corporate property real and personal." *Williams v. East Wareham, O. B. & P. I. St. Ry. Co.*, 171 Mass. 61, 50 N. E. 646; *Ward v. Salem St. Ry. Co.*, 108 Mass. 332.

A street railway company is a "corporation authorized to receive toll" within the meaning of a statute which provides for the sale on execution of the property and franchise of such a corporation. *McKee v. Grand Rapids & L. St. Ry. Co.*, 41 Mich. 274, 50 N. W. 469, 1 N. W. 873.

In *Pennsylvania*, property of a railroad company, necessary to enable it to perform its duties to the public, cannot be sold under an ordinary writ of fieri facias, but such property may be sold under a special writ of fieri facias provided for by statute. *Margo v. Pennsylvania R. Co.*, 213 Pa. 468, 110 Am. St. Rep. 559, 5 Ann. Cas. 511, 62 Atl. 1081; *Smith v. Altoona &*

§ 3173. — Rolling stock. The weight of authority recognizes the rolling stock of a railroad company to be personal property and subject as such to levy and sale under execution⁹⁷ unless the company has become insolvent or has mortgaged its property.⁹⁸

Under a statute which declares the rolling stock to be a fixture, a judgment is a lien from the time it is rendered, upon a railroad and upon the rolling stock, and upon a bill in equity a decree for a sale to satisfy the judgment passes title to the purchaser.⁹⁹ And such property is subject to the process of attachment or garnishment, in the cases provided for by statute, and when not in actual use.¹

A statute making such property liable to attachment against a mortgagor on a claim for an injury sustained on the railroad by negligence of the corporation, or for services rendered, or materials furnished to keep the road in repair, or to operate the same, or for liabilities as a common carrier, gives no right to attach such property of a railroad company upon a claim against a lessee of the railroad.²

The question whether the attachment of cars belonging to a foreign corporation and temporarily within the state in the course of interstate transportation, is a burden upon interstate commerce, or in conflict with the interstate commerce acts, is one upon which the state

P. C. R. Co., 182 Pa. St. 139, 37 Atl. 930; Greensburg Fuel Co. v. Irwin Natural Gas Co., 162 Pa. St. 78, 29 Atl. 274; In re Philadelphia & B. C. R. Co.'s Appeal, 70 Pa. St. 355; Leedom v. Plymouth R. Co., 5 Watts & S. (Pa.) 265.

A sale of the franchise and property of a railroad under ordinary writ of fieri facias will be set aside upon the application of a party in interest if made at the proper time, but after confirmation by the court, it cannot be attacked and overturned collaterally years afterward. In re Lusk's Appeal, 108 Pa. St. 152.

⁹⁷ Louisville, N. A. & C. Ry. Co. v. Boney, 117 Ind. 501, 3 L. R. A. 435, 20 N. E. 432; Hoyle v. Plattsburgh & M. R. Co., 54 N. Y. 314, 13 Am. Rep. 595; Randall v. Elwell, 52 N. Y. 521, 11 Am. Rep. 747; Beardsley & Kirkland v. Ontario Bank, 31 Barb. (N. Y.) 619; Coe v. Columbus, P. & I. R. Co., 10 Ohio St. 372, 75 Am. Dec. 518.

⁹⁸ Central Trust Co. of New York v. Moran, 56 Minn. 188, 29 L. R. A. 212, 57 N. W. 471; Loudenschlagër v. Benton, 3 Grant (Pa.) 384.

⁹⁹ Milwaukee & M. R. Co. v. James, 6 Wall. (U. S.) 750, 18 L. Ed. 854.

¹ Risdon Iron & Locomotive Works v. Citizens' Traction Co., 122 Cal. 94, 68 Am. St. Rep. 25, 54 Pac. 529; Hall v. Carney, 140 Mass. 131, 3 N. E. 14; Boston, C. & M. R. R. v. Gilmore, 37 N. H. 410, 72 Am. Dec. 336.

An act making a demand by the officer for other property upon which to make the attachment prerequisite to the right to attach engines and cars in transit or about to be placed in transit applies also to the attachment of such engines and cars by trustee process. Cox v. Central Vermont R. Co., 187 Mass. 596, 73 N. E. 885.

² Cox v. Central Vermont R. Co., 187 Mass. 596, 73 N. E. 885.

courts have entertained different views. Some of the state courts have been of the opinion that the attachment and garnishment statutes could have no operation upon such cars,³ while other state courts have maintained that the levy of such process on such property is not a burden upon interstate commerce or its agencies.⁴ The question has been set at rest, however, by the Supreme Court of the United States, which has held that the attachment or garnishment of such a car can be considered only an occasional and temporary interference with interstate commerce, and that a sudden assertion of the laws of the state can be met after short delay and without much, if any, embarrassment to the continuity of transportation.⁵ As consistent with this rule, it has been held that a car belonging to a foreign railroad company which is in possession of a railroad company in the state under an agreement for continuing transportation or for return transportation is not subject to garnishment, the rights of the domestic company to the use of the car being superior to the right of an attaching creditor,⁶ and that a garnishee railroad is under no obligation to bring to the state and deliver to an attaching officer a railroad car on a sidetrack in another state.⁷

3 *United States.* *Johnson v. Union Pac. R. Co.*, 145 Fed. 249.

Illinois. *Michigan Cent. R. Co. v. Chicago & M. L. S. R. Co.*, 1 Ill. App. 399.

Massachusetts. *Koontz v. Baltimore & O. R. Co.*, 220 Mass. 285, L. R. A. 1915 D 838, 107 N. E. 973.

Minnesota. *Connery v. Quincy, O. & K. C. R. Co.*, 92 Minn. 20, 64 L. R. A. 624, 104 Am. St. Rep. 659, 2 Ann. Cas. 347, 99 N. W. 365.

Rhode Island. *Johnson v. Union Pac. R. Co.*, 29 R. I. 80, 132 Am. St. Rep. 799, 69 Atl. 298.

South Carolina. *Seibels v. Northern Cent. R. Co.*, 80 S. C. 133, 16 L. R. A. (N. S.) 1026, 61 S. E. 435; *Shore & Bro. v. Baltimore & O. R. Co.*, 76 S. C. 472, 11 Ann. Cas. 909, 57 S. E. 526.

West Virginia. *Wall v. Norfolk & W. R. Co.*, 52 W. Va. 485, 64 L. R. A. 501, 94 Am. St. Rep. 948, 44 S. E. 294.

Wisconsin. *Chicago & N. W. Ry. Co. v. Forrest County*, 95 Wis. 80, 70 N. W. 77.

4 *Southern R. Co. v. Brown*, 131 Ga. 245, 62 S. E. 177; *Southern Flour & Grain Co. v. Northern Pac. Ry. Co.*, 127 Ga. 626, 9 L. R. A. (N. S.) 853, 119 Am. St. Rep. 356, 9 Ann. Cas. 437, 56 S. E. 742; *Cavanaugh v. Chicago, R. I. & P. R. Co.*, 75 N. H. 243, 72 Atl. 694; *De Rochemont v. New York Cent. & H. River R. R.*, 75 N. H. 158, 29 L. R. A. (N. S.) 529, 139 Am. St. Rep. 673, 71 Atl. 868. See also *Koontz v. Baltimore & O. R. Co.*, 220 Mass. 285, L. R. A. 1915 D 838, 107 N. E. 973.

5 *Davis v. Cleveland, C., C. & St. L. R. Co.*, 217 U. S. 157, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907.

6 *Southern Flour & Grain Co. v. Northern Pac. Ry. Co.*, 127 Ga. 626, 9 L. R. A. (N. S.) 853, 119 Am. St. Rep. 356, 9 Ann. Cas. 437, 56 S. E. 742.

7 *Cox v. Central Vermont R. Co.*, 187 Mass. 596, 73 N. E. 885.

§ 3174. — Goods in carrier's possession—In general. Goods in possession of a common carrier are subject to attachment⁸ or garnishment as the property of the owner.⁹ As a condition to taking the property from the carrier under such process, the transportation and other charges of the carrier must be paid.¹⁰ The property must be within the jurisdiction of the court,¹¹ and so, property actually outside of the state, in the custody of a common carrier which is a domestic corporation, cannot be reached by garnishing the carrier within the state.¹² So also, it has been held that a carrier engaged in interstate commerce, having in its possession for shipment goods to be delivered to the consignor or upon his order, cannot be garnisheed when the notice of garnishment is served while the goods, in actual transit, are in a foreign county although still within the state.¹³ It is generally, however, only when the goods are not in course of transportation that such process can be levied upon them, that is, when the transit has not yet begun or is completed,¹⁴ though there are

⁸ *Hause & Son v. Judson*, 34 Ky. 7, 29 Am. Dec. 377; *Hett v. Boston & M. R. R.*, 69 N. H. 139, 44 Atl. 910; *Livingston v. Miller*, 48 Hun (N. Y.) 232.

In *Western Ry. Co. v. Thomas & Prescott*, 60 Ga. 313, 27 Am. Rep. 411, the agent of a railroad company obstructed an officer in levying an attachment upon goods loaded upon one of the trains of the company, and removed the goods out of the state by running out the train; and it was held that there was no cause of action against the company at the instance of the plaintiff in attachment. The agent was guilty of a penal offense, and if the officer could have made the levy had there been no resistance, then, in contemplation of law, he could have made it in spite of the resistance. He can command assistance, and must do it at his peril when he is in a situation to require it.

⁹ *Stiles v. Davis & Barton*, 1 Black (U. S.) 101, 17 L. Ed. 33; *Malott v. Johnson*, 37 Ind. App. 678, 77 N. E. 866; *Rosenbush v. Bernheimer*, 211 Mass. 146, Ann. Cas. 1913 A 1317, 97 N. E. 984; *Letts-Spencer Grocery Co.*

v. Missouri Pac. R. Co., 138 Mo. App. 352, 122 S. W. 10.

¹⁰ *Thompson v. Rose*, 16 Conn. 71, 41 Am. Dec. 121; *Clifford v. Brockton Transp. Co.*, 214 Mass. 466, Ann. Cas. 1914 B 909, 101 N. E. 1092; *Wolfe v. Crawford*, 54 Miss. 514.

¹¹ *Illinois Cent. R. Co. v. Cobb*, 48 Ill. 402; *Pittsburgh, C., C. & St. L. Ry. Co. v. Cox*, 36 Ind. App. 291, 114 Am. St. Rep. 377, 73 N. E. 120; *Landa v. Holck*, 129 Mo. 663, 50 Am. St. Rep. 459, 31 S. W. 900.

¹² *Montrose Pickle Co. v. Dodson & Hills Mfg. Co.*, 76 Iowa 172, 2 L. R. A. 417, 14 Am. St. Rep. 213, 40 N. W. 705.

¹³ *Dart Mfg. Co. v. Carr*, 174 Iowa 471, L. R. A. 1916 E 449, 156 N. W. 714.

¹⁴ *Illinois*. *Illinois Cent. R. Co. v. Cobb*, 48 Ill. 402.

Indiana. *Pittsburgh, C., C. & St. L. Ry. Co. v. Cox*, 36 Ind. App. 291, 114 Am. St. Rep. 377, 73 N. E. 120.

Minnesota. *Cooley v. Minnesota Transfer Ry. Co.*, 53 Minn. 327, 39 Am. St. Rep. 609, 55 N. W. 141.

Missouri. *Landa v. Holck*, 129 Mo. 663, 50 Am. St. Rep. 459, 31 S. W.

authorities holding that a common carrier may be summoned in garnishment in action against the owner of the goods actually in transit.¹⁵ And to relieve the carrier from liability to the owner, the levy or seizure must have been made without laches, connivance, or collusion on its part,¹⁶ and on a valid writ.¹⁷

900; *A. C. L. Haase & Sons Fish Co. v. Merchants' Dispatch Transp. Co.*, 143 Mo. App. 42, 122 S. W. 362.

New Mexico. *Santa Fé Pac. R. Co. v. Bossut*, 10 N. M. 322, 62 Pac. 977.

Wisconsin. *Bates v. Chicago, M. & St. P. Ry. Co.*, 60 Wis. 296, 50 Am. Rep. 369, 19 N. W. 72.

A garnishment cannot be levied so as to bind a foreign railroad company as to a passenger's trunk at the time en route with the passenger by service of the process upon the agent at the starting point unless it is made to appear that the agent at that place had authority to control the custody or disposition of the trunk at the point of destination. *Western Ry. Co. v. Thornton & Acee*, 60 Ga. 300.

Goods in a train already made up, standing on a siding at the place of shipment, are not liable to garnishment. *Stevenot v. Eastern Ry. Co.*, 61 Minn. 104, 28 L. R. A. 600, 63 N. W. 256. And in *Baldwin v. Great Northern Ry. Co.*, 81 Minn. 247, 51 L. R. A. 640, 83 Am. St. Rep. 370, 83 N. W. 986, it was held that property loaded on a car, standing on a siding but not placed on a train, is not subject to such process. In this case the court said: "The contract between the parties for transportation had been completed, the bill of lading had been delivered to the consignors, and it was the privilege of the carrier, under the statute last cited (Gen. St. 1894, § 5325), to retain the consigned property and fulfill its contract with the shippers which alone entitled it to compensation for carriage. For this reason the plaintiff's creditor in the garnishee suit could not arrest it by that process so as to deprive the defend-

ant of its right under such contract." But in *Malott v. Johnson*, 37 Ind. App. 678, 77 N. E. 866, it was held that a car of goods awaiting shipment, but not yet placed on a train, is subject to garnishment.

¹⁵ *Rosenbush v. Bernheimer*, 211 Mass. 146, Ann. Cas. 1913 A 1317, 97 N. E. 984; *Adams v. Scott*, 104 Mass. 164.

¹⁶ *Western & A. R. Co. v. Ohio Valley Banking & Trust Co.*, 107 Ga. 512, 33 S. E. 821.

If a carrier accepts property upon agreement to transport it to a certain destination, and diverts the shipment to a different point in another state where the property is attached upon an alleged claim against the shipper, and the shipper thereby loses the property, the carrier is liable therefor as for conversion. *Lincoln Grain Co. v. Chicago, B. & Q. R. Co.*, 91 Neb. 203, 135 N. W. 443.

Where goods owned by defendants were fraudulently consigned by third parties to such third parties as consignees in order for such owners to evade legal proceedings, but the garnishee railroad company knew nothing of such facts but supposed such third parties were the real owners, collusion by such company is not shown. *Pittsburgh, C. & St. L. Ry. Co. v. Cox*, 36 Ind. App. 291, 114 Am. St. Rep. 377, 73 N. E. 120.

¹⁷ *Georgia Southern & F. R. Co. v. Knight*, 11 Ga. App. 489, 75 S. E. 823; *Simpson v. Dufour*, 126 Ind. 322, 22 Am. St. Rep. 590, 26 N. E. 69; *Merz v. Chicago & N. W. Ry. Co.*, 86 Minn. 33, 90 N. W. 7; *Automatic Merchandising Co. v. Delaware & H. Co.*, 233 Pa. 581, 82 Atl. 939.

Goods are not attachable as the property of the consignor when the bill of lading with draft has been transferred to a bona fide holder for value.¹⁸ And when the goods, under the conditions of the transportation, become the property of the carrier, they are not subject to attachment as being the property of the consignee.¹⁹

The levy of an attachment or service of a writ of garnishment in such a case does not constitute an interference with interstate commerce,²⁰ and a statute authorizing such process does not impair the obligation of contracts, nor deprive the carrier of its property right secured by the contract without due process of law.²¹

§ 3175. — Necessity of notice to shipper. It is the duty of the carrier, in case of seizure under process, to notify the shipper promptly of the pendency of the legal proceedings in order to enable him to make a proper defense.²²

Under some authorities, on failure of the carrier to notify the shipper, it becomes absolutely liable for failure to transport and deliver the goods under its contract, but whether this be so or not, it at least assumes the burden of proving the regularity of all the proceedings on which the attachment rested.²³ But when notice has been given by the carrier to the shipper or owner, it may suppose that the owner will take all the steps necessary to protect his rights in the property.²⁴

§ 3176. — Garnishment of debt due by company. A foreign railway company doing business in the state may be garnisheed on a

¹⁸ *Western & A. R. Co. v. Ohio Valley Banking & Trust Co.*, 107 Ga. 512, 33 S. E. 821; *Neill v. Rogers Bros. Produce Co.*, 41 W. Va. 37, 23 S. E. 702.

Unless a statute has declared a through bill of lading to be non-negotiable as in the case of the uniform bills of lading act. *Rosenbush v. Bernheimer*, 211 Mass. 146, Ann. Cas. 1913 A 1317, 97 N. E. 984.

The negotiation and delivery by a consignor to his own order of the bill of lading with draft attached to a bank vests the legal title to the shipment in the bank, which cannot be defeated by a garnishment on the part of a creditor of the shipper

against the purchaser. *Reed v. Racine Boat Co.*, 156 Iowa 12, 137 N. W. 458.

¹⁹ *Hamilton v. Chicago, M. & St. P. Ry. Co.*, 103 Iowa 325, 72 N. W. 536.

²⁰ *Rosenbush v. Bernheimer*, 211 Mass. 146, Ann. Cas. 1913 A 1317, 97 N. E. 984; *Landa v. Holck*, 129 Mo. 663, 50 Am. St. Rep. 459, 31 S. W. 900.

²¹ *Rosenbush v. Bernheimer*, 211 Mass. 146, Ann. Cas. 1913 A 1317, 97 N. E. 984.

²² *Merz v. Chicago & N. W. R. Co.*, 86 Minn. 33, 90 N. W. 7.

²³ *Taugher v. Northern Pac. R. Co.*, 21 N. D. 111, 129 N. W. 747.

²⁴ *Jewett v. Olsen*, 18 Ore. 419, 17 Am. St. Rep. 745.

debt due and payable in the state to a nonresident who has been served by such publication as the statutes of the state prescribe,²⁵ and when, by statute, the residence of the debtor of the principal defendant governs without regard to the place the debt was contracted or is payable, a foreign railroad corporation, owning and operating a railroad in the state, may be proceeded against as garnishee without reference to the jurisdiction in which debts due from it were contracted or are payable.²⁶

But a foreign railroad company, operating no railroad in the state and doing no business therein other than maintaining, jointly with other railroads, an agency relating to through freight service, and for the soliciting of freight for such company, to be handled on its lines without the state, is beyond the territorial jurisdiction of the courts of the state within which such agency is located and not subject to garnishment.²⁷

And it has been held that a foreign railroad company having its principal place of business outside the state, does not reside within the state of the forum within the meaning of the statute though it operates a line of railway therein, and cannot be charged as garnishee in respect of a debt due the principal defendant for services rendered wholly in another state and payable there.²⁸

Money collected by a local railroad company, belonging to a foreign railroad company, is subject to garnishment, though it may have been collected in the course of interstate commerce.²⁹

²⁵ *Louisville & N. R. Co. v. Deer*, 200 U. S. 176, 50 L. Ed. 426; *St. Louis Southwestern R. Co. v. Vanderberg*, 91 Ark. 252, 120 S. W. 993; *Kansas City, P. & G. R. Co. v. Parker*, 69 Ark. 401, 86 Am. St. Rep. 205, 63 S. W. 996; *Holt v. Ladd*, 71 Vt. 204, 44 Atl. 69.

Under a statute which does not recognize the right to garnishee a foreign corporation, a foreign railroad corporation cannot be charged by trustee process, though it has leases of railroads in the state. *Gold v. Housatonic R. Co.*, 1 Gray (Mass.) 424.

²⁶ *Harvey v. Thompson*, 128 Ga. 147, 9 L. R. A. (N. S.) 765, 57 S. E. 104; *Harvey v. Thompson*, 2 Ga. App. 569, 60 S. E. 11; *Baltimore & O. R. Co.*

v. Allen, 58 W. Va. 388, 3 L. R. A. (N. S.) 608, 112 Am. St. Rep. 975, 52 S. E. 465.

²⁷ *Pennsylvania R. Co. v. Rogers*, 52 W. Va. 450, 62 L. R. A. 178, 44 S. E. 300.

²⁸ *Craig v. Gunn*, 67 Vt. 92, 27 L. R. A. 511, 30 Atl. 860; *Towle v. Wilder*, 57 Vt. 622.

²⁹ *Davis v. Cleveland, C., C. & St. L. R. Co.*, 217 U. S. 157, 54 L. Ed. 708, 27 L. R. A. (N. S.) 823, 18 Ann. Cas. 907, rev'g 146 Fed. 403; *Johnson v. Union Pac. R. Co.*, 145 Fed. 249, distinguishing *Philadelphia & S. S. Co. v. Pennsylvania*, 122 U. S. 326, 30 L. Ed. 1200; *Johnson v. Union Pac. R. Co.*, 29 R. I. 80, 132 Am. St. Rep. 799, 69 Atl. 298.

The superintendent of a railroad which is the property of the state is not subject to garnishment process.³⁰

E. Insolvency, Dissolution and Receivership

§ 3177. Effect of insolvency. By the great weight of authority, the mere fact that a corporation is insolvent does not prevent a creditor who is aware of such insolvency, and in the absence of fraud or irregularity, from obtaining a lien over other creditors by issuing and levying an execution or attachment,³¹ even though such creditor occupies a fiduciary relation to the corporation,³² unless there is some express statutory regulation in that regard.³³ It has been held to be so even when the attachment was suggested by directors of the corporation who had guaranteed the claims of such creditor.³⁴ This rule is generally based upon the principle that in the absence of equity jurisdiction, lawfully assumed, the assets of an insolvent corporation do not constitute a trust fund for pro rata distribution among all its creditors.³⁵ Such a lien, when perfected,

³⁰ *Dobbin v. Orange & A. R. Co.*, 37 Ga. 240.

³¹ *United States. White, Potter & Paige Mfg. Co. v. Henry B. Pettes Importing Co.*, 30 Fed. 864.

Colorado. Breen v. Merchants' & Mechanics' Bank, 11 Colo. 97, 17 Pac. 280.

Kentucky. Louisville Banking Co. v. Etheridge Mfg. Co., 43 S. W. 169.

Pennsylvania. Reynolds v. Reynolds Lumber Co., 169 Pa. St. 626, 47 Am. St. Rep. 935, 32 Atl. 537; *Reed v. Penrose's Ex'x*, 36 Pa. St. 214, 2 Grant 472.

Texas. Moon Bros. Carriage Co. v. Waxahachie Grain & Implement Co., 89 Tex. 511, 35 S. W. 1047, aff'g 13 Tex. Civ. App. 103, 35 S. W. 337; *Warr & Lindsley Shoe Co. v. Thompson*, 89 Tex. 501, 35 S. W. 473; *Mallette v. Ft. Worth Pharmacy Co.*, 21 Tex. Civ. App. 267, 51 S. W. 859; *American Nat. Bank of Dallas v. Dallas Tin-ware Mfg. Co.*, 15 Tex. Civ. App. 631, 39 S. W. 955; *Farmers & Merchants Nat. Bank v. Waco Electric Railway & Light Co.* (Tex. Civ. App.), 36 S.

W. 131; *Rogers v. East Line Lumber Co.*, 11 Tex. Civ. App. 108, 33 S. W. 312; *Florsheim Bros. Dry Goods Co. v. Wettermark*, 10 Tex. Civ. App. 102, 30 S. W. 505; *Harrigan v. Quay* (Tex. Civ. App.), 27 S. W. 897.

Wisconsin. Ballin v. Merchants' Exch. Bank, 89 Wis. 278, 27 L. R. A. 357, 46 Am. St. Rep. 834, 61 N. W. 1118.

³² *Title Insurance & Trust Co. v. California Development Co.*, 171 Cal. 173, 152 Pac. 542.

³³ *White, Potter & Paige Mfg. Co. v. Henry B. Pettes Importing Co.*, 30 Fed. 864; *Ridge Turnpike Co. v. Peddle*, 4 Pa. St. 490.

³⁴ *Emanuel v. Barnard*, 71 Neb. 756, 99 N. W. 666.

³⁵ *Jones v. Bank of Leadville*, 10 Colo. 464, 17 Pac. 272; *Moon Bros. Carriage Co. v. Waxahachie Grain & Implement Co.*, 89 Tex. 511, 35 S. W. 1047, aff'g 13 Tex. Civ. App. 103, 35 S. W. 337; *Ballin v. Merchant's Exch. Bank*, 89 Wis. 278, 27 L. R. A. 357, 46 Am. St. Rep. 834, 61 N. W. 1118.

entitles the creditor acquiring it to a preference over other unsecured creditors.³⁶

A lien by execution or attachment, however, cannot ordinarily be obtained by a director to the exclusion of or preference over other creditors of the corporation, as the directors of an insolvent corporation are usually regarded as trustees of the assets for the benefit of creditors,³⁷ though it has been held that a director may obtain such a preference by attachment under special circumstances, as where he had recently become a director and had loaned the company money, and, while knowing of its failing circumstances, was in no way responsible therefor.³⁸ One of the courts, in a very recent case, has even gone so far as to declare that "the law seems too well settled that until a corporation becomes not only insolvent, but has likewise ceased to be a going concern, it has the power to prefer its creditors by executing a mortgage or otherwise, and that a diligent creditor of such corporation, although he be a director, can in good faith secure such preference over other creditors by attachment or garnishment, etc."³⁹

If, after service of a writ of garnishment, the garnishee corporation goes into voluntary liquidation, it cannot avoid liability, since the plaintiff is entitled to judgment for the amount which the garnishee owed the defendant, though he can only share ratably in the assets of the garnishee in collecting the judgment.⁴⁰

³⁶ *Roseboom v. Whittaker*, 132 Ill. 81, 23 N. E. 339, aff'g 33 Ill. App. 442; *Louisville Banking Co. v. Etheridge Mfg. Co. (Ky.)*, 43 S. W. 169.

³⁷ *La Grange Butter-Tub Co. v. National Bank of Commerce*, 122 Mo. 154, 43 Am. St. Rep. 558, 26 S. W. 710; *Tennant v. Appleby (N. J. Ch.)*, 41 Atl. 110.

Where a foreign corporation doing business in the state is financially embarrassed to the actual knowledge of its president, and such corporation, through the latter, negotiates with the local attorneys of certain of its general creditors and urges that no legal action be taken against it pending efforts of its stockholders' committee to reorganize its affairs and represents that if sufficient capital is not raised to pay its debts, its affairs will be liquidated, the local attorneys for the corporation to whom, pending

such negotiations, the president assigns his unsecured claim against the corporation for collection for his account, cannot, by attachment, secure a preferential lien upon all of the tangible assets of the corporation in the state as against the other intervening general creditors. *McCormick v. Cornell & Wardlaw*, — Tex. Civ. App. —, 193 S. W. 1083.

³⁸ *Rollins v. Shaver Wagon & Carriage Co.*, 80 Iowa 380, 20 Am. St. Rep. 427, 45 N. W. 1037.

³⁹ *McCormick v. Cornell & Wardlaw*, — Tex. Civ. App. —, 193 S. W. 1083. See also *Title Insurance & Trust Co. v. California Development Co.*, 171 Cal. 173, 152 Pac. 542; *A. B. Frank Co. v. Berwind*, — Tex. Civ. App. —, 47 S. W. 681.

⁴⁰ *Birmingham Nat. Bank v. Mayer*, 104 Ala. 634, 16 So. 520.

On the other hand, in some jurisdictions no race of diligence is permitted between creditors of an insolvent corporation, under a rule constituting the assets of an insolvent corporation a trust fund for the benefit of all its creditors, and an attachment by a creditor having knowledge of the condition of the corporation may be set aside, although insolvency proceedings had not been instituted.⁴¹

Even though, as has been stated, according to the rule laid down in some jurisdictions, mere insolvency does not prevent a creditor from obtaining a preference by execution or attachment, yet it is generally considered that when an insolvent corporation suspends business, makes an assignment, or does any other overt act indicating positive and assured insolvency, its assets become so far a trust fund for the benefit of all its creditors that one of them cannot obtain a preference over others by such process.⁴²

§ 3178. Effect of dissolution or forfeiture of charter. At common law, upon the dissolution of a corporation, an execution on a judgment theretofore obtained by or against it cannot be issued.⁴³ It is only by virtue of some statute authorizing it or some principle of equity requiring it that this result may be avoided, or that pending proceedings may be further prosecuted, or judgments already rendered enforced.⁴⁴ When, however, execution has been levied and

⁴¹ Walker v. Miller, 59 Fed. 869; Washington Liquor Co. v. Alladis Café Co., 28 Wash. 176, 68 Pac. 444; Compton v. Schwabacher Bros. & Co., 15 Wash. 306, 46 Pac. 338.

⁴² Voightman & Co. v. Southern R. Co., 123 Tenn. 452, Ann. Cas. 1912 C 211, 131 S. W. 982; Memphis Barrel & Heading Co. v. Ward, 99 Tenn. 172, 63 Am. St. Rep. 825, 42 S. W. 13; McClaren v. Union Roller Mill & Elevator Co., 95 Tenn. 696, 35 S. W. 88; Levins v. W. O. Peoples Grocery Co. (Tenn. Ch. App.), 38 S. W. 733. And see the cases above cited. See also Calumet Paper Co. v. Haskell Show Printing Co., 144 Mo. 331, 66 Am. St. Rep. 425, 45 S. W. 1115, that the property of a corporation is not subject to garnishment, when the corporation is hopelessly insolvent, and has turned the property over to a bailee

in trust for the benefit of its creditors and stockholders.

⁴³ MacRae v. Kansas City Piano Co., 69 Kan. 457, 77 Pac. 94; May v. State Bank of North Carolina, 2 Rob. (Va.) 56, 40 Am. Dec. 726.

Though as a general rule a judgment against a defunct corporation is void, yet the persons who own the stock and continue the business, and appear in and defend a suit brought against the corporation in its corporate name, are estopped to object to a sale of property to satisfy the judgment rendered therein. Droege v. Emery (Ky.), 105 S. W. 374.

A judgment in favor of a corporation, if properly assigned, may be enforced after the corporation has ceased. Leach v. Thomas, 27 Ill. 457.

⁴⁴ MacRae v. Kansas City Piano Co., 69 Kan. 457, 77 Pac. 94.

property taken at the suit of a corporate plaintiff before the termination of its corporate existence, the proceeding does not abate.⁴⁵

This rule as to the abatement of proceedings by and against a dissolved corporation applies where the corporate existence has been terminated by the expiration or forfeiture of its charter, and there can be no attachment for debt against it.⁴⁶

And the dissolution of a corporation by expiration or repeal of its charter or a decree of forfeiture of its charter, rendered pending attachment proceedings against it as defendant and before judgment therein, dissolves the attachment,⁴⁷ and this has been held to be so as to both foreign and domestic corporations.⁴⁸

To obtain a lien by an attachment of the property of the corporation, it must appear that the levy was made prior to a judgment dissolving the corporation.⁴⁹

A debt due a corporation is not subject to garnishment after the dissolution or forfeiture of franchise,⁵⁰ but where a corporate defendant had a legal existence at the time the garnishee was summoned, it does not affect the rights of the plaintiff that the charter of the defendant has expired when a motion is made to discharge the garnishee.⁵¹

And it has been held that where a statute provides that upon dissolution of a corporation a proceeding shall be by the name of its directors or managers as trustees of the corporation, such a writ cannot be issued against a debtor of the corporation on a judgment rendered against the corporation, when the corporation had been dis-

⁴⁵ *Boyd v. Hankinson*, 92 Fed. 49, rev'g 83 Fed. 876; *Kimball v. Grafton Bank*, 20 N. H. 347.

⁴⁶ *Stiles v. Laurel Fork Oil & Coal Co.*, 47 W. Va. 838, 35 S. E. 986.

⁴⁷ *Wilcox v. Continental Life Ins. Co.*, 56 Conn. 468, 16 Atl. 244; *Bowker v. Hill*, 60 Me. 172; *Farmers' & Mechanics' Bank v. Little*, 8 Watts & S. (Pa.) 207, 42 Am. Dec. 293.

⁴⁸ *Morgan v. New York Nat. Building & Loan Ass'n*, 73 Conn. 151, 46 Atl. 877.

In *Hammond v. National Life Ass'n*, 58 N. Y. App. Div. 453, 69 N. Y. Supp. 585, aff'g 31 N. Y. Misc. 182, 65 N. Y. Supp. 407, it was held that though a foreign corporation may

have been dissolved by judgment in its home state, and a receiver appointed, this does not take away the title of the corporation to its assets in the state of the former so far as to deprive the courts of the latter state of the right to control these assets for the benefit of domestic creditors. For such purpose the court may issue a writ of attachment.

⁴⁹ *People v. Mutual Ben. Life Ass'n*, 86 Hun (N. Y.) 219, 33 N. Y. Supp. 191.

⁵⁰ *Curry v. Woodward*, 53 Ala. 371; *Paschall v. Whitsett*, 11 Ala. 472.

⁵¹ *Lindell v. Benton & Kennerly*, 6 Mo. 361.

solved by operation of law prior to the rendition of the judgment and without substitution of proper parties as trustees.⁵²

§ 3179. Effect of receivership—Levy under process before appointment of receiver. The appointment of a receiver does not affect liens in so far as they give priority, acquired by execution, attachment, or garnishment before the application for the receiver,⁵³ nor is the creditor's lien affected by the appointment of a receiver before the issue of execution, where the execution is issued before the receiver files his bond and takes possession;⁵⁴ nor is the lien of a judgment postponed to the rights of the receiver because it was entered after the filing of a bill for his appointment, if the entry of the judgment preceded the service of process in the receivership proceeding,⁵⁵ unless by express statute such an appointment has the effect of dissolving attachments and levies of execution made within a specified time prior to the appointment or commencement of the suit,⁵⁶ such a statute applying to attachments of real estate in proceedings begun in the federal as well as in the state courts.⁵⁷

A statute prohibiting an insolvent corporation or its officers from making any transfer of its property in contemplation of insolvency or any discrimination among its creditors, does not require such cor-

⁵² *MacRae v. Kansas City Piano Co.*, 69 Kan. 457, 77 Pac. 94.

⁵³ *Illinois*. *Life Ass'n of America v. Fassett*, 102 Ill. 315.

Massachusetts. *Garham v. Mutual Aid Society*, 161 Mass. 357, 37 N. E. 447; *Folger v. Columbian Ins. Co.*, 99 Mass. 267, 96 Am. Dec. 747, aff'd 20 Wall. (U. S.) 1, 22 L. Ed. 307.

New Jersey. *Squire v. Princeton Lighting Co.*, 72 N. J. Eq. 883, 15 L. R. A. (N. S.) 657, 68 Atl. 176; *Van Steenberg v. E. R. Parsil Button Co.* (N. J. Ch.), 34 Atl. 135.

New York. *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400, 15 N. E. 65; *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347; *Bennett v. Complete Elec. Const. Co.*, 8 App. Div. 301, 40 N. Y. Supp. 1139; *Patten v. Accessory Transit Co.*, 4 Abb. Pr. 139, rev'd 4 Abb. Pr. 235, 13 How. Pr. 502.

North Carolina. *Pelletier v. Green-*

ville Lumber Co., 123 N. C. 596, 68 Am. St. Rep. 837, 31 S. E. 855; *Kruger v. Bank of Commerce of Buffalo, New York*, 123 N. C. 16, 31 S. E. 270.

Pennsylvania. *Hays v. Lycoming Fire Ins. Co.*, 99 Pa. St. 621 (in which case the court said that the receiver, could show what the corporation could show, if not dissolved, for the purpose of defeating the attachment).

Washington. *State v. Superior Court of Chehalis County*, 8 Wash. 659, 35 Pac. 1092, 8 Wash. 210, 25 L. R. A. 354, 35 Pac. 1087.

⁵⁴ *In re Lewis & Fowler Mfg. Co.*, 89 Hun (N. Y.) 208, 34 N. Y. Supp. 983.

⁵⁵ *Wheeler v. Walton & Whann Co.*, 65 Fed. 720.

⁵⁶ *Hubbard v. Hamilton Bank*, 7 Metc. (Mass.) 340.

⁵⁷ *Morgan v. New York Nat. Building & Loan Ass'n*, 73 Conn. 151, 46 Atl. 877.

poration to defend any suit brought against it for the sole purpose of defeating a preference.⁵⁸

The property or funds attached or levied on are usually delivered or paid over to the receiver by the order of the court without prejudice to the rights of the attaching parties, the receiver taking the property subject to all valid attachments.⁵⁹

And when an attachment has been issued before the appointment of a receiver, but thereafter an amended attachment affidavit is filed, the attachment lien, as to the rights of the receiver, dates from the issuing.⁶⁰

§ 3180. — Levy after appointment of receiver. When a receiver has been appointed for a corporation by a court having jurisdiction of the subject-matter and of the parties, and the court, by the receiver, has taken actual or constructive possession of the property of the corporation, the property is in the custody of the law, and is not subject to execution, attachment or garnishment by creditors of the corporation.⁶¹

The order appointing a receiver places the property in the jurisdiction of the court so as to prevent a lien attaching by execution or attachment.⁶² An attachment of the property or the levy of an exe-

⁵⁸ *Varnum v. Hart*, 119 N. Y. 101, 23 N. E. 183.

⁵⁹ *Bisbee v. Mt. Battie Mfg. Co.*, 107 Me. 185, 77 Atl. 778; *Cobb v. Camden Sav. Bank*, 106 Me. 178, 20 Ann. Cas. 547, 76 Atl. 677; *Kittredge v. Osgood*, 161 Mass. 384, 37 N. E. 369; *In re Atlas Iron Const. Co.*, 19 N. Y. App. Div. 415, 46 N. Y. Supp. 467. But see *Bennett v. Complete Elec. Const. Co.*, 8 N. Y. App. Div. 301, 40 N. Y. Supp. 1139, holding that the possession is in the sheriff and not in the receiver.

⁶⁰ *Breene v. Merchants' & Mechanics' Bank*, 11 Colo. 97, 17 Pac. 280.

⁶¹ *United States v. Moore v. Southern States Land & Timber Co.*, 83 Fed. 399.

Georgia. *Morgan v. Gibian*, 115 Ga. 145, 41 S. E. 495.

Illinois. *Roseboom v. Whittaker*, 132 Ill. 81, 23 N. E. 339, aff'g 33 Ill. App. 442; *Richards v. People*, 81 Ill. 551.

Kansas. *Missouri Pac. Ry. Co. v. Love*, 61 Kan. 433, 59 Pac. 1072.

Montana. *Gardner v. Caldwell*, 16 Mont. 221, 40 Pac. 590.

New York. **In re Christian Jensen Co.*, 128 N. Y. 550, 28 N. E. 665; *Robinson v. Columbia Spinning Co.*, 23 App. Div. 499, 49 N. Y. Supp. 4; *Thomas v. Merchants' Bank*, 9 Paige 216.

North Carolina. *Skinner v. Maxwell*, 68 N. C. 400.

Texas. *Reisner v. Gulf, C. & S. F. Ry. Co.*, 89 Tex. 656, 33 L. R. A. 171, 59 Am. St. Rep. 84, 36 S. W. 53; *Texas Trunk Ry. Co. v. Lewis*, 81 Tex. 1, 26 Am. St. Rep. 776, 16 S. W. 647.

⁶² *Maynard v. Bond*, 67 Mo. 315; *In re Christian Jensen Co.*, 128 N. Y. 550, 28 N. E. 665; *Mosher v. Supreme Sitting of Iron Hall*, 88 Hun (N. Y.) 394, 34 N. Y. Supp. 816; *Skinner v. Maxwell*, 68 N. C. 400; *Reisner v. Gulf, C. & S. F. R. Co.*, 89 Tex. 656,

uction in such a case is a contempt of court, and cannot be regarded as creating a lien.⁶³

Although a creditor may have a paramount lien on land or other property of a corporation by virtue of a judgment recovered before the appointment of a receiver of the property of the corporation, or even by virtue of an execution levied before the appointment of the receiver, he cannot sell the property after the appointment, without leave of the court.⁶⁴ The court will grant leave, however, when it is equitable to do so.⁶⁵

§ 3181. — Property in other states. The courts of the state in which the receiver was appointed will not necessarily recognize and give effect to attachments and executions levied in other states after the appointment of the receiver. Where a receiver of a corporation is appointed in the state of the corporation's domicile, and creditors are enjoined from proceeding against it in other states, or even without an injunction, and a creditor who is a citizen of the state, or who, although not a citizen, is within the jurisdiction, goes into another state, and there attaches property of the corporation, the court by which the receiver was appointed may punish him for contempt, or compel him to relinquish the advantage so obtained, or both.⁶⁶

Where a receiver is appointed for a corporation, a nonresident creditor who has attached property of the corporation in another state before appointment of the receiver, may avail himself of the benefit of the security thus obtained, and, if it proves insufficient to satisfy his claim in full, he may present his claim for the balance in

33 L. R. A. 171, 59 Am. St. Rep. 84, 36 S. W. 53.

⁶³ *Farmers' Loan & Trust Co. v. Bankers' & Merchants' Tel. Co.*, 148 N. Y. 315, 31 L. R. A. 403, 51 Am. St. Rep. 690, 42 N. E. 707.

⁶⁴ *Wiswall v. Sampson*, 14 How. (U. S.) 52, 14 L. Ed. 322; *Wheeler v. Walton & Whann Co.*, 65 Fed. 720; *Walling v. Miller*, 108 N. Y. 173, 2 Am. St. Rep. 400, 15 N. E. 65; *Chautauque County Bank v. Risley*, 19 N. Y. 369, 75 Am. Dec. 347; *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 Am. St. Rep. 837, 31 S. E. 855; *Skinner v. Maxwell*, 68 N. C. 400; *Ellis v. Vernon Ice, Light & Water Co.*, 86 Tex. 109, 23 S. W. 858.

⁶⁵ *Pelletier v. Greenville Lumber Co.*, 123 N. C. 596, 68 Am. St. Rep. 837, 31 S. E. 855.

⁶⁶ *United States v. Vermont Cent. R. Co.*, 46 Fed. 792.

Illinois. *Sercomb v. Catlin*, 128 Ill. 556, 15 Am. St. Rep. 147, 21 N. E. 606, aff'g 30 Ill. App. 258.

Massachusetts. *Dehon v. Foster*, 4 Allen 545.

New York. *Farmers' Loan & Trust Co. v. Bankers' & Merchants' Tel. Co.*, 148 N. Y. 315, 31 L. R. A. 403, 51 Am. St. Rep. 690, 42 N. E. 707.

Rhode Island. *Chafee v. Quidnick Co.*, 13 R. I. 442.

the same manner as any other creditor. In such a case the net proceeds are all for which he is accountable in reduction of his demand. If, however, the attachment was levied and the property sold after the appointment of the receiver, and with actual or constructive notice thereof, the creditor will be allowed to come in and share with other creditors only after he renounces the benefit of the attachment, and accounts for the property, the measure of his liability in such case being the value of the property at the time of the attachment, with interest.

In some states the statutes expressly dissolve attachments made within a certain time prior to the appointment of the receiver; but these statutes do not apply to attachments in other states.⁶⁷

§ 3182. — Property taken out of state. If the property of a corporation within a state has come into the actual or constructive possession of a receiver appointed by the courts of such state, and is taken temporarily out of the state in the course of business carried on by the receiver, it cannot be attached or taken on execution in the other state. By comity, the courts of the latter state will recognize and protect the possession and title of the receiver.⁶⁸ The same is true where property in the possession of a receiver is fraudulently or illegally taken out of the state.⁶⁹

§ 3183. — Property of foreign corporation. When a foreign corporation has property within a state, creditors of that state may reach and subject the same to the payment of their claims by execution, attachment or garnishment, notwithstanding the fact that a receiver of the property of the corporation has been appointed in the state of its domicile.⁷⁰

⁶⁷ Ward v. Connecticut Pipe Mfg. Co., 71 Conn. 345, 42 L. R. A. 706, 71 Am. St. Rep. 207, 41 Atl. 1057.

⁶⁸ Pond v. Cooke, 45 Conn. 126, 29 Am. Rep. 668; Chicago, M. & St. P. R. Co. v. Keokuk Northern Line Packet Co., 108 Ill. 317, 48 Am. Rep. 557. But see Humphreys v. Hopkins, 81 Cal. 551, 6 L. R. A. 792, 15 Am. St. Rep. 76, 22 Pac. 892, holding the contrary, on the ground that property found within the state may be attached to enforce a demand of a citizen of the state against the owner.

⁶⁹ Paradise v. Farmers' & Merchants' Bank, 5 La. Ann. 710.

⁷⁰ Arkansas. Choctaw Coal & Mining Co. v. Williams-Echols Dry Goods Co., 75 Ark. 365, 5 Ann. Cas. 569, 87 S. W. 632.

Illinois. Chicago, M. & St. P. R. Co. v. Keokuk Northern Line Packet Co., 108 Ill. 317, 48 Am. Rep. 557.

Indiana. Catlin v. Wilcox Silver-Plate Co., 123 Ind. 477, 8 L. R. A. 62, 18 Am. St. Rep. 338, 24 N. E. 250; Gray v. Covert, 25 Ind. App. 561, 81 Am. St. Rep. 117, 58 N. E. 731.

But where a temporary receiver of a foreign corporation has been appointed in a state in which such corporation has property and assets, such state not being the state of domicile of the corporation, the property in that state is not subject to such process after the appointment of the temporary receiver,⁷¹ and the court appointing a receiver of the assets within the state of a foreign corporation may forbid any levy upon the property at the suit of a resident creditor.⁷²

The rule that courts which have appointed receivers over property situated in a foreign jurisdiction may either restrain or punish persons who interfere with the receiver's possession of such property, even though the interference consists in attaching it under process obtained from some court in the foreign state, is usually applied only to such person as was either a party to the litigation in which the receiver has been appointed, or in privity with a party, or was otherwise subject to the jurisdiction of the court by virtue of his residence or citizenship.⁷³ Consequently, courts have refused to sustain attachments or garnishments by a citizen of the state in which the receiver was appointed, and who, with other creditors, was enjoined by the court from prosecuting suits against the corporation,⁷⁴ unless there is a statute in the state in which the attachment is issued recognizing the right to issue and levy process in such a case;⁷⁵ and under the

Kentucky. *Zacher v. Fidelity Trust & Safety-Vault Co.*, 109 Ky. 441, 59 S. W. 493.

Maine. *Hunt v. Columbian Ins. Co.*, 55 Me. 290, 92 Am. Dec. 592.

Massachusetts. *Taylor v. Columbian Ins. Co.*, 14 Allen 353.

New York. *Willitts v. Waite*, 25 N. Y. 577.

Pennsylvania. *Bagby v. Atlantic, M. & O. R. Co.*, 86 Pa. St. 291.

When, under a statute, a creditor files a bill and sues out an attachment against an insolvent foreign corporation for the purpose of winding it up, such creditor obtains no priority over other creditors; and when the court comes to administer the assets they are distributed pro rata, or according to the liens or preferences existing by contract, or such other liens as exist upon them, and thus to all creditors alike, resident and nonresident. *Taylor v. Life Ass'n of America*, 13 Fed. 493.

⁷¹ *Mosher v. Supreme Sitting Order of Iron Hall*, 88 Hun (N. Y.) 394, 34 N. Y. Supp. 816.

⁷² *Woerishoffer v. North River Const. Co.*, 99 N. Y. 398, 2 N. E. 47.

⁷³ *Schindelholz v. Cullum*, 55 Fed. 885.

⁷⁴ *Bagby v. Atlantic, M. & O. R. Co.*, 86 Pa. St. 291; *Gilman v. Ketcham*, 84 Wis. 60, 23 L. R. A. 52, 36 Am. St. Rep. 899, 54 N. W. 395.

When creditors were not enjoined, the mere appointment of a receiver of a foreign corporation by a court of its home state does not prevent a citizen of that state from attaching its property in another state. *City Ins. Co. of Providence v. Commercial Bank of Bristol*, 68 Ill. 348.

⁷⁵ *Bank v. Motherwell Iron & Steel Co.*, 95 Tenn. 172, 29 L. R. A. 164, 31 S. W. 1002.

general rule of comity, the courts of one state will assist a foreign receiver of a foreign corporation, and will not permit property in the state and in possession of such foreign receiver to be levied on at the suit of a creditor resident in a third state.⁷⁶ Of course, the appointment of a receiver of a foreign corporation in its home state cannot affect the lien of an execution or attachment levied prior to the appointment,⁷⁷ and if an attachment has been levied on the property of a foreign corporation, the lien is not displaced by the subsequent appointment of a receiver by a court of the district in which the property is situated.⁷⁸

F. Practice and Procedure

§ 3184. Process. Where the action is against a foreign corporation, the warrant for attachment stating that the defendant is a foreign corporation need not further state that the cause of action arose within the state or that the plaintiff is a resident thereof.⁷⁹

Notice of garnishment must be in writing and delivered to the garnishee,⁸⁰ and when a garnishment is *ex parte*, without service on or notice to the defendant, the garnishee corporation, in order to protect itself, should notify the defendant and request him to defend.⁸¹

A summons of garnishment or citation addressed to a certain person

⁷⁶ Merchants' Nat. Bank of Boston v. Pennsylvania Steel Co., 57 N. J. L. 336, 30 Atl. 545.

⁷⁷ Life Ass'n of America v. Fasset, 102 Ill. 315; Hunt v. Columbian Ins. Co., 55 Me. 290, 92 Am. Dec. 592; Taylor v. Columbian Ins. Co., 14 Allen (Mass.) 353.

⁷⁸ Cole v. Oil-Well Supply Co., 57 Fed. 534.

⁷⁹ Maury v. American Motor Co., 25 N. Y. Misc. 657, 56 N. Y. Supp. 316, aff'd 38 N. Y. App. Div. 623, 57 N. Y. Supp. 1142, holding that such latter averments are proper for the affidavit.

When the defect in a writ of attachment against a corporation is one that may be cured by amendment, the defendant is not entitled to a dismissal of the writ as against a motion for leave to amend. Kittredge v. Fairbanks Co., — Vt. —, 99 Atl. 1016.

⁸⁰ Mosher v. Banking House of Bartholow, Lewis & Co., 6 Mo. App. 599.

"A notice of garnishment should be directed to the person, firm, or corporation having possession of property of, or owing a debt to the defendant named in the writ of attachment, warning the garnishee that such goods and chattels or choses in action are attached and garnisheed to answer the plaintiff's demands, when evidenced by a judgment. A notice of garnishment to attach a debt due from a corporation should, like a summons or any other process, warn such artificial being that a sum of money due from it, or to mature in favor of a defendant in an action, has been attached and garnisheed." Edwards v. Case, 78 Ore. 220, 152 Pac. 880.

⁸¹ Pierce v. Chicago & N. W. Ry. Co., 36 Wis. 283.

as an officer or agent of a corporation, is not sufficient. Though a citation may be served upon the officer of a corporation designated for that purpose, it must be addressed to the corporation.⁸² And an execution is void which runs against a corporation by the name of the president, directors and company, etc.⁸³

A writ of execution must follow the judgment. The name of the corporation is of its very essence, and a change of name in the fieri facias from that by which it is sued and judgment entered up against it, is a material variance. Though such a variance may be amendable, the levy must fall.⁸⁴

And a writ designating the defendant in attachment as "of the State of Maine," may be amended by striking out those words and inserting a statement that it was organized under the laws of another state.⁸⁵

§ 3185. Attachment bond. On attachment by a corporation, the issuing magistrate must ascertain the authority of the person executing the bond on behalf of the corporation, and, on appeal from the order denying defendant's motion to dissolve, set aside, and dismiss the attachment, it will be presumed that the magistrate did his duty in this regard.⁸⁶

⁸² **United States.** *Lewis v. Smith*, 2 Cranch C. C. 571, Fed. Cas. No. 8,332.

Georgia. *Varnell v. Speer*, 55 Ga. 132.

Iowa. *Moor v. Walker*, 46 Iowa 164.

Louisiana. *Bank of Monroe v. Ouachita Valley Bank*, 124 La. 798, 134 Am. St. Rep. 518, 50 So. 718.

Missouri. *Neuer v. O'Fallon*, 18 Mo. 277, 59 Am. Dec. 313.

Oregon. *Edwards v. Case*, 78 Ore. 220, 152 Pac. 880.

Texas. *Insurance Co. of North America v. Friedman Bros.*, 74 Tex. 56, 11 S. W. 1046; *Sun Mut. Life Ins. Co. v. Seeligson*, 59 Tex. 3.

Under a statute authorizing all suits against a bank to be brought "against the president thereof," and in a garnishment to which an answer was made by one "as president" of the bank, a judgment against him,

"president of" such bank, will be treated as a clerical mistake and as intended to run against him "as president." *Sturgis v. Rogers*, 26 Ind. 1.

⁸³ *Nichols v. Thomas*, 4 Mass. 232.

⁸⁴ *Bradford v. Water Lot Co.*, 58 Ga. 280, holding that when a judgment is against the "Water Lot Company of the City of Columbus," and the execution against the "Water Lot Company," the execution does not follow the judgment.

⁸⁵ *Marston v. F. C. Tibbetts Mercantile Co.*, 110 Me. 533, 87 Atl. 220.

⁸⁶ *J. W. Copeland Co. v. Brown*, 103 S. C. 177, 87 S. E. 1002.

The authority of the secretary and treasurer of a corporation to sign an attachment bond in its name need not have been filed with the bond where it is made to appear by affidavit on the hearing before the issuing magistrate that such officer was duly authorized to sign the bond in the name

Where an affidavit to obtain an attachment on behalf of a corporation was made by its president, and he executed the attachment bond on behalf of his principal and also signed it individually as surety, this created a liability on the attachment.⁸⁷ And where an attachment bond was given to the receiver of a corporation in his official capacity and his successors, in an action brought by the receiver in his official capacity, an action on the bond may be maintained by the real obligee who has succeeded under the forms of law to the position of the receiver, when the corporation has been substituted for the receiver by amendment.⁸⁸

§ 3186. Venue. The general law and statutes with respect to venue apply with respect to attachments and garnishments by and against corporations.⁸⁹ Therefore the practice that, when a judgment has been rendered, process of garnishment can be sent to any county in the state where the garnishee may be found, applies to corporations as well as to natural persons,⁹⁰ and under a statute providing that garnishment proceedings may be brought in a county in which the garnishee resides, a corporation is to all intents and purposes a resident of any county in which it does business and has an agent, and such a proceeding may be brought therein.⁹¹

A foreign corporation transacting business in the state may be garnished for a debt it may owe anywhere in the state where suit for such debt may be brought.⁹²

In some jurisdictions the statutes or charters make special provision as to the place in which such suits may be brought. To illustrate, a special statute has been applied which provides that a writ of attachment may issue against a domestic corporation in the county of its location, that is, other than the home county, in favor of one also a resident of the county, in like cases as in suits between individuals.⁹³ Unless expressly or clearly exclusive, however, they do not abridge the

of the corporation on the day of its date. *J. W. Copeland Co. v. Brown*, supra.

⁸⁷ *Levin v. American Furniture Co.*, 133 Ga. 670, 66 S. E. 888.

⁸⁸ *American Surety Co. of New York v. Campbell & Zell Co.*, 138 Fed. 531, aff'g 129 Fed. 491.

⁸⁹ In *Smith v. Durbridge*, 26 La. Ann. 531, the court said that the fact that a corporation cannot be sued in a certain court on original process

does not prevent its being brought into that court on a writ of garnishment.

⁹⁰ *Toledo, W. & W. R. Co. v. Reynolds*, 72 Ill. 487.

⁹¹ *Alamo Fire Ins. Co. v. Hetherington* (Tex. Civ. App.), 39 S. W. 958.

⁹² *Selma, R. & D. R. Co. v. Tyson*, 48 Ga. 351.

⁹³ *Michigan Dairy Co. v. Runnels*, 96 Mich. 109, 55 N. W. 61.

right to issue attachments or garnishment process in suits brought in the proper jurisdiction under the general law. And so, the right conferred on a bank, of suing out an attachment in the county of its location, is a privilege conferred on it, and does not abridge the power it previously possessed of suing out attachments in the county of the residence of the defendant.⁹⁴

§ 3187. Grounds of attachment—In general. There must, of course, exist the statutory ground upon which an attachment against a corporation may be issued. The one most generally invoked is that which gives the right to attach the property within the state belonging to a nonresident defendant, and, as applied to corporations, this gives the right, in an action against a foreign corporation, to attach the property of such corporation found within the state. And so, in an action against a foreign corporation for the conversion of its own stock, an attachment will lie.⁹⁵ This general ground of attachment is,

⁹⁴ *Pearson v. Gayle*, 11 Ala. 278. But in *Lewis v. Denney*, 4 Cush. (Mass.) 588, it was held that trustee process against a bank must, under the statute, be brought in the county in which it has its usual place of business.

⁹⁵ *Michigan Dairy Co. v. Runnels*, 96 Mich. 109, 55 N. W. 617; *Condouris v. Imperial Turkish Tobacco & Cigarette Co.*, 3 N. Y. Misc. 66, 22 N. Y. Supp. 695.

Where a corporation was organized under the laws of a foreign state, it must be regarded as a nonresident within the meaning of the attachment law. *Title Insurance & Trust Co. v. California Development Co.*, 171 Cal. 173, 152 Pac. 542.

The classification of a corporation as foreign or domestic depends upon the question of the state under the laws of which it was organized, and the statement in a writ of attachment against a corporation that the defendant has its principal office in a named city in a designated foreign state prima facie establishes its status as that of a foreign and nonresident corporation. *Kittredge v. Fairbanks Co.*, — Vt. —, 99 Atl. 1016.

For purposes of attachment, it has been held, under subdivision 18 of section 3343 of the New York Code of Civil Procedure, providing that “a ‘domestic corporation’ is a corporation * * * located in the state, and created by or under the laws of the United States. * * * Every other corporation is a ‘foreign corporation’,” in regard to a railroad corporation, organized under the laws of the United States, chartered or licensed to do business under the laws of different foreign states, and operating a line of road from a point in Texas to a point in California, the federal charter of which corporation “makes no provision for the location of its main office: (1) That its main office is located at the seat of the corporation’s government, i. e., at the regular meeting place of the board of directors; (2) that a corporation is located in the state of New York if its principal office or main office is there located; (3) that, irrespective of what constitutes the main office, a corporation which holds its stockholders’ and directors’ meetings, maintains its executive offices, and keeps its stock certificate books and corporate rec-

of course, discussed more or less throughout this article, but especially in the division on foreign corporations.⁹⁶

§ 3188. — Transfer of property in fraud of creditors. A general ground of attachment prescribed by statute, and which may be applied to a corporation is that it has assigned its property in fraud of creditors.⁹⁷ An attachment on this ground will lie where an insolvent corporation has made a secret bill of sale, delivered in escrow, and a secret mortgage to be recorded under certain conditions,⁹⁸ or when, while holding out deceptive assurances to a creditor, it is distributing its net assets among its stockholders.⁹⁹

Where a corporation cannot make a valid assignment of all its assets for the purpose of securing equitable division of assets among its creditors, or to prevent one creditor by diligence gaining an advantage over another, an attempt by a corporation to make such a transfer is proof of an intent to deprive its creditors of the fruits of their diligence, and is such an intent to defraud the creditors as to authorize the issue of an attachment.¹ But when there is no law prohibiting preferences, and under the rule that to warrant the issue of an attachment on this ground there must be actual or intended fraud, instructions to an attorney to settle first the debts of the corporation, for which the directors were personally liable, were held not to be sufficient on which to base an attachment in the absence of actual fraud.²

The threat of a corporation to give a preference to certain creditors does not indicate such a fraudulent purpose as will sustain a warrant of attachment,³ nor does the fact that a corporation, being insolvent, is trying to have a receiver appointed, and that a suit is pending for that purpose, sustain an allegation of an intent to defraud creditors.⁴ And the fact that a person took charge of the company as manager of the business for some time, does not show him to have been an officer

ords all in the state of New York, is located in the state within the meaning of subdivision 18 of section 3343 of the Code of Civil Procedure.” Gould v. Texas & P. R. Co., 176 N. Y. App. Div. 818, 163 N. Y. Supp. 479.

⁹⁶ See § 3129, supra.

⁹⁷ Louisville Banking Co. v. Etheridge Mfg. Co. (Ky.), 43 S. W. 169.

⁹⁸ McNeil & Higgins Co. v. Plows & Co., 83 Ill. App. 186.

⁹⁹ Wyeth v. Rentz-Bowles Co. (Ky.), 66 S. W. 825.

¹ Bicknell v. Speir, 45 N. Y. St. Rep. 651, 18 N. Y. Supp. 590.

² Wallabout Bank v. Military Club, 36 N. Y. App. Div. 156, 55 N. Y. Supp. 422.

³ McLoughlin v. Consumers' Brewing Co., 20 N. Y. Misc. 144, 45 N. Y. Supp. 716.

⁴ Shuler v. Birdsall, Waite & Perry Mfg. Co., 17 N. Y. App. Div. 288, 45 N. Y. Supp. 725; J. Walter Thompson Co. v. Queen City Cycle Co., 16 N. Y. App. Div. 522, 44 N. Y. Supp. 1049.

of the company, under a statute prohibiting an officer from obtaining by attachment a preferential lien on the corporate assets.⁵

Under the rule that the intent to defraud must exist as a fact, and will not be sustained by the evidence of a constructive fraud, or a fraud in law, the fact that a corporation has mortgaged substantially all its property to its president, though the mortgage is ineffectual and may be set aside, will not support an attachment on the ground that the corporation has disposed of its property with intent to defraud its creditors, the evidence of the corporation that it was executed in good faith, and for money advanced, not being overcome.⁶

And the fact that a corporation, though insolvent, has made a transfer of its property to its officers, who are bona fide creditors, which mortgage is contrary to the provisions of a statute and therefore void, does not show an intent to defraud its creditors so as to authorize the issue of an attachment.⁷

Though on the other hand, on the principle that directors of an insolvent corporation are trustees of its funds for the benefit of creditors, it has been held that a sale of personal property by an insolvent corporation to creditors, one of whom is a director, in satisfaction of an antecedent debt, is invalid as a breach of trust, where all the vendees have knowledge of the facts, and may be set aside at the instance of attaching creditors.⁸ And so, where a corporation, as a going concern, sold some of its property in an attempt to tide over a temporary embarrassment and without interfering with the operations of the plant, this cannot be considered as conferring an unfair preference or as a fraudulent transaction, so as to authorize an attachment.⁹ And if a corporation, as distinguished from its property, is not removing from the state, and is solvent, there is no indication of an intention to hinder, delay, and defraud its creditors in the fact that it changed the location of its factory.¹⁰

Where a corporation transferred its property to a newly-formed corporation for the purpose of hindering, delaying and defeating the creditors of the former company, this forms a sufficient ground of

⁵ *Bicknell v. Speir*, 45 N. Y. St. Rep. 651, 18 N. Y. Supp. 590.

⁶ *Trebilcock v. Big Missouri Min. Co.*, 9 S. D. 206, 68 N. W. 330.

⁷ *Lexow v. St. Lawrence Marble Co.*, 16 N. Y. Misc. 133, 38 N. Y. Supp. 831, aff'd 5 N. Y. App. Div. 624, 39 N. Y. Supp. 412.

⁸ *Schmidt v. Perkins*, 74 N. J. L.

785, 11 L. R. A. (N. S.) 1007, 122 Am. St. Rep. 417, 67 Atl. 77.

⁹ *Poitevent & Favre Lumber Co. v. Standard Planing Mills & Manufacturing Co.*, 49 La. Ann. 72, 21 So. 194.

¹⁰ *Davis v. Reflex Camera Co.*, 97 N. Y. App. Div. 73, 89 N. Y. Supp. 587.

attachment by such creditors of the property transferred, as assets to pay the debts of the former company.¹¹

An attachment cannot be sustained on an affidavit charging an officer of the corporation with fraud in disposing of his individual property.¹² And the fraud, to authorize an attachment, must be an act of fraud on the part of the corporation, and not an act in fraud of the corporation, therefore the fact that an officer of the corporation drew out large sums of money for his own use, does not make the corporation chargeable with fraud.¹³

§ 3189. Affidavits—Attachment by corporation—Who may make.

As an affidavit cannot be made by a corporation, the facts and conditions upon which an attachment is sought to be obtained by the corporate plaintiff may be shown on the oath of an officer or agent of the plaintiff,¹⁴ and such an affidavit may be made by an attorney for the plaintiff, when he acts under the authority of the corporation, and has the requisite information.¹⁵ And in an action by the receiver of a corporation, an affidavit for an attachment may properly be made by an officer of the corporation, who has knowledge

¹¹ *Buckwalter v. Whipple*, 115 Ga. 484, 41 S. E. 1010.

¹² *Central Nat. Bank of Troy v. Ft. Ann Woolen Co.*, 24 N. Y. Supp. 640, aff'd 76 Hun (N. Y.) 610, 27 N. Y. Supp. 1114, 143 N. Y. 624, 37 N. E. 827.

¹³ *Shuler v. Birdsall, Waite & Perry Mfg. Co.*, 17 N. Y. App. Div. 228, 45 N. Y. Supp. 725. But in *Senour Mfg. Co. v. Clarke*, 96 Wis. 469, 71 N. W. 883, it was held that a fraudulent intent was shown when it appeared that the president owned most of the stock and managed the affairs of the corporation; kept no books of account; did not know its financial condition; ran his private and corporate business together and confused its assets; applied corporate funds to his private use while he knew or ought to have known that the corporation was insolvent, and incurred corporate indebtedness and used its assets regardless of the rights of the corporate creditors.

¹⁴ *Central Nat. Bank of Troy v. Ft.*

Ann Woolen Co., 24 N. Y. Supp. 640, aff'd 76 Hun (N. Y.) 610; 27 N. Y. Supp. 1114, 143 N. Y. 624, 37 N. E. 827; *Blyth & Fargo Co. v. Swensen*, 7 Wyo. 303, 51 Pac. 873.

The provision of a statute that a state bank and its branches are severally authorized to take out attachments on the application of any indorser or surety to a bill, note or demand, and on satisfactory showing of such indorser or surety, on oath or otherwise, that either of the grounds specified in the act exists, does not require an officer of the bank to reaffirm or verify again the ground stated by the indorser or surety; but if the showing is satisfactory to the bank, and the oath or affirmation is sufficient in point of form, and made before a proper officer, the bank may take out an attachment thereon, as provided by the first section. *Faver v. Bank of State*, 10 Ala. 616.

¹⁵ *Trenton Banking Co. v. Haverstick*, 11 N. J. L. 171.

of the facts.¹⁶ As, however, an oath is personal, the affidavit must in terms be that of the officer or agent making it.¹⁷

Under a statute requiring an affidavit to be made by the plaintiff, his agent or attorney, and where another statute prescribes the duties of the secretary of a corporation which do not include the making of an attachment affidavit, an attachment cannot be issued on an affidavit made by a secretary, as such an officer is not, by virtue of his office, the agent of the plaintiff for the purpose of making such an affidavit.¹⁸

An affidavit made by an officer that all the material allegations are true, of his personal knowledge, is sufficient though it does not in terms state that he was an officer of the corporation at the time the contract sued on was made,¹⁹ and under a statute providing that a pleading by a corporation must be verified by the chief officer or agent, an affidavit by a vice president has been deemed sufficient, in the absence of an averment by the defendant that he was not at the time the chief officer in the county.²⁰

§ 3190. — Sufficiency. An affidavit must show the legal capacity of the plaintiff to sue,²¹ and an affidavit by the assignee of the cause of action, from a foreign corporation, that the corporation was duly authorized to transact business within the state, and duly assigned the claim to the plaintiff, is sufficient without alleging facts to sustain the averment.²²

It is not enough for the officer or agent to make the statement simply upon information and belief, without showing whence and from whom his information was derived, and why the affidavits of informants were not produced,²³ but an affidavit by an officer stating positively that the plaintiff is entitled to recover the sum mentioned, over and above all counterclaims known to the plaintiff, is sufficient.²⁴

¹⁶ *Lee v. LaCompagnie Universelle Du Canal Interoceanique*, 41 Hun (N. Y.) 641, 2 N. Y. St. Rep. 612.

¹⁷ See *Blyth & Fargo Co. v. Swensen*, 7 Wyo. 303, 51 Pac. 873, holding that an affidavit for attachment, stating that "Plaintiff in the action above named, being duly sworn, deposes and says," etc., and signed "The Blyth & Fargo Co., by Sherman Fargo, Managing Agent," was insufficient, as such a paper was neither the affidavit of the corporation nor of the agent.

¹⁸ *North Penn Iron Co. v. Boyce*,

71 N. J. L. 434, 58 Atl. 1094.

¹⁹ *E. & H. T. Anthony & Co. v. Fox*, 53 N. Y. App. Div. 200, 65 N. Y. Supp. 806, rev'g 64 N. Y. Supp. 273.

²⁰ *Kentucky Jeans Clothing Co. v. Bohn*, 104 Ky. 387, 47 S. W. 250.

²¹ *Citizens' Bank v. Corkings*, 9 S. D. 614, 62 Am. St. Rep. 891, 70 N. W. 1059.

²² *Lumley v. Anatron Chemical Co.*, 56 N. Y. App. Div. 174, 67 N. Y. Supp. 663.

²³ *Marine Nat. Bank v. Ward*, 35 Hun (N. Y.) 395.

²⁴ *National Park Bank v. Whit-*

And an affidavit, as to the cause of action, is sufficient when, as an officer of the corporation, the affiant states that his knowledge is based on the books and papers of the corporation, and on information acquired by him as such officer from such sources and from conversations with employees.²⁵

§ 3191. — Attachment against corporation—In general. Generally, the fact that the defendant is a corporation should be alleged in an affidavit, unless under the method of pleading followed in the particular jurisdiction it is considered unnecessary to allege that a plaintiff or defendant is a corporation.²⁶

When a ground of attachment is set out which would authorize the issue of a writ against a domestic corporation, the affidavit need not state that the corporation is a domestic one.²⁷

And with respect to the ground of the application for an attachment, it must clearly appear from the affidavit to be based upon a corporate act or conduct, and consequently the issue of an attachment against a corporation has been refused on an affidavit which nowhere charged any fraudulent act of the company, but charged the president and largest stockholder with making a fraudulent disposition of his individual property.²⁸

§ 3192. — Foreign corporation. The statutes providing for attachment of the property of a foreign corporation usually require that the facts conferring jurisdiction of the proceedings by attachment shall be set forth in an affidavit. Unless such facts sufficiently appear, the court obtains no jurisdiction, and the proceeding is invalid.²⁹ In order to obtain a warrant of attachment against a foreign

more, 40 Hun (N. Y.) 499, aff'd 104 N. Y. 297, 10 N. E. 524; *Central Nat. Bank of Troy v. Ft. Ann Woolen Co.*, 24 N. Y. Supp. 640, aff'd 76 Hun (N. Y.) 610, 27 N. Y. Supp. 1114, 143 N. Y. 624, 37 N. E. 827.

²⁵ *Lee v. LaCompagnie Universelle Du Canal Interocéanique*, 41 Hun (N. Y.) 641, 2 N. Y. St. Rep. 612; *Yellow Pine Co. v. Atlantic Lumber Co.*, 21 N. Y. Misc. 164, 47 N. Y. Supp. 79.

²⁶ *Mississippi Cent. R. Co. v. Plant*, 58 Ga. 167.

²⁷ *Central Min. & Mfg. Co. v. Stoven*, 45 Ala. 594, in which case the court said that it is only when issued

against a foreign corporation that it is necessary to allege when the corporate capacity was derived, in order that due publication may be made.

²⁸ *Central Nat. Bank of Troy v. Ft. Ann Woolen Co.*, 24 N. Y. Supp. 640, aff'd 76 Hun (N. Y.) 610, 27 N. Y. Supp. 1114, 143 N. Y. 624, 37 N. E. 827.

²⁹ *Crane v. Hibbard*, 66 Ark. 282, 50 S. W. 503; *Coolidge v. American Realty Co.*, 91 N. Y. App. Div. 14, 86 N. Y. Supp. 318; *People v. St. Nicholas Bank*, 44 N. Y. App. Div. 313, 60 N. Y. Supp. 719; *Ladenburg v. Commercial Bank*, 87 Hun (N. Y.)

corporation, it is necessary for plaintiff to show, not merely allege, that the defendant is a foreign corporation. Such fact may be said to be shown if it is positively alleged by some person who may be deemed to have personal knowledge upon the subject, so that his statement can be accepted as evidence of the fact.³⁰ An affidavit against a certain corporation, stating that it is an incorporation not incorporated by the laws of the state, but is transacting business within the state, sufficiently states a ground for attachment against it as a nonresident, without stating that such corporation is a nonresident of the state,³¹ though, on the other hand, it is not necessary

269, 33 N. Y. Supp. 821; *Oliver v. Walker Heywood Chair Mfg. Co.*, 57 Hun (N. Y.) 588, 10 N. Y. Supp. 771; *American Trading Co. v. Bedouin Steam Nav. Co.*, 48 N. Y. Misc. 624, 96 N. Y. Supp. 271; *Cremins v. East Lake Woolen Co.*, 25 N. Y. Civ. Proc. 365, 41 N. Y. Supp. 202; *Seiser Bros. v. Potter Produce Co.*, 23 N. Y. Civ. Proc. 348, 30 N. Y. Supp. 294.

³⁰ *American Trading Co. v. Bedouin Steam Nav. Co.*, 48 N. Y. Misc. 624, 96 N. Y. Supp. 271; *Box Board & Lining Co. v. Vincennes Paper Co.*, 45 N. Y. Misc. 1, 90 N. Y. Supp. 836.

An affidavit from which it appears that the defendant corporation exists in another state, that the transaction out of which the action arose took place in that state, and that a paper purporting to have been signed by the defendant is signed by it as a corporation of that state, is sufficient to raise a presumption that the defendant is a foreign corporation. *Randolph v. Susquehanna Water-Power & Paper Co.*, 12 N. Y. App. Div. 479, 42 N. Y. Supp. 411. And so in an affidavit averring in terms that the defendant is a foreign corporation, that it was organized and existed under the laws of another state, and that deponent obtained information from corporation directories and from the secretary of state. *Steele v. R. M. Gilmour Mfg. Co.*, 77 N. Y. App. Div. 199, 78 N. Y. Supp. 1078. See

also *Stiner v. Tennessee Copper Co.*, 176 N. Y. App. Div. 209, 161 N. Y. Supp. 986.

To the contrary is the case of *George Norris Co. v. S. H. Levin's Sons*, 81 S. C. 36, 61 S. E. 1103, holding that an affiant need not state the source of his information that "defendant is a foreign corporation," and that such an affidavit is not controverted by a denial on information and belief.

In *American Trading Co. v. Bedouin Steam Nav. Co.*, 48 N. Y. Misc. 624, 96 N. Y. Supp. 271, it was said that an averment by the affiant that he was in the employ of the plaintiff and was manager of its hemp department, and that he had personal knowledge of the purchase of hemp and its shipment from Manila, lent no color to his statement that he had personal knowledge of the fact and place of incorporation of the owner of the steamship, and that such a mere statement was improbable.

³¹ *Parramore v. Alexander*, 132 Ga. 642, 131 Am. St. Rep. 207, 64 S. E. 660; *Turner's Chapel African M. E. Church v. Lord Lumber Co.*, 121 Ga. 376, 49 S. E. 272; *Mississippi Cent. R. Co. v. Plant*, 58 Ga. 167.

On a statutory ground for an attachment that it is not a corporation created or recognized as a corporation of the state, an affidavit stating that the defendant is nonresident is

to aver that the defendant was chartered in the state of its alleged residence when it is alleged, in conformity to statute, that the defendant is not a resident of the state, and it is further shown that its residence is that of a designated state.³² Ordinarily, an affidavit is not sufficient which alleges merely that the defendant is a foreign corporation, without stating that the defendant has no agent in the state upon whom service of summons can be had,³³ though when a statute prescribes the form of an affidavit it has been held that it is not necessary that it should aver that an agent has not been appointed, but the burden is upon the corporation to show that it had complied with the statute relative to the appointment of agents upon whom service of process may be made.³⁴ The affidavit in such a case must allege that the plaintiff is a resident of the state, or, if the plaintiff is a nonresident or foreign corporation, that the cause of action accrued within the state or relates to property situated therein.³⁵

§ 3193. — Garnishment. Usually, the fact that a garnishee is a corporation should be stated in the affidavit,³⁶ and an affidavit for a writ of garnishment against two companies, which does not state whether either company is a corporation, joint stock association, or corporation, is not sufficient,³⁷ though, if in this respect conformity to statutory requirements generally is shown, it is not objectionable that the affidavit does not allege that the garnishee was "duly" incorporated.³⁸ And if an affidavit for garnishment process is in the usual form prescribed by statute and is against a certain named company, it has been held *prima facie* sufficient to show that the party garnished is a corporation, that fact being implied in the name.³⁹

An affidavit which describes the garnishee as a corporation, without stating that it is a foreign corporation, has been held not to be fatally defective,⁴⁰ and it is not necessary, in an affidavit to subject a foreign

insufficient. *Brand v. Auto Service Co.*, 75 N. J. L. 230, 67 Atl. 19.

³² *Iroquois Furnace Co. v. Wilkin Mfg. Co.*, 181 Ill. 582, 54 N. E. 987, rev'g 77 Ill. App. 59.

³³ *Crane v. Hibbard*, 66 Ark. 282, 50 S. W. 503.

³⁴ *Bradley v. Interstate Land & Canal Co.*, 12 S. D. 28, 80 N. W. 141.

³⁵ *People v. St. Nicholas Bank*, 44 N. Y. App. Div. 313, 60 N. Y. Supp. 719; *Maury v. American Motor Co.*, 25 N. Y. Misc. 657, 56 N. Y. Supp. 316, aff'd 38 N. Y. App. Div. 623, 57

N. Y. Supp. 1142; *Cremins v. East Lake Woolen Co.*, 41 N. Y. Supp. 202.

³⁶ *Underwood v. First Nat. Bank of Honey Grove* (Tex. Civ. App.), 62 S. W. 943.

³⁷ *Insurance Co. of North America v. Friedman Bros.*, 74 Tex. 56, 11 S. W. 1046.

³⁸ *First Nat. Bank of Morgan v. Brown*, 42 Tex. Civ. App. 584, 92 S. W. 1052.

³⁹ *Brauser v. New England Fire Ins. Co.*, 21 Wis. 506.

⁴⁰ *Grinnell v. Niagara Fire Ins. Co.*,

corporation to garnishment, to state that it owns property in the state, nor that the cause of action, in respect to it, arose therein, it being sufficient if it is in the usual form prescribed by statute.⁴¹ To allege in an application for garnishment that the garnisheed corporation has a local agent at a certain place is sufficient compliance with a statute requiring such an application to state the residence of the garnishee, a local agent being deemed to reside in the territory over which his agency extends and the residence of such an agent being the residence of the corporation for purposes of venue and service of writs under the statute.⁴²

In a garnishment proceeding against a stockholder in a suit against the corporation, under a statute making each stockholder liable for the debts to the amount unpaid upon his stock, some statutes make a difference between such a garnishment sought at the time of commencing the suit against the corporation, and one applied for after judgment and execution, an affidavit not being required in the former case.⁴³

An allegation that an officer or agent of the company is indebted to the defendant is not sufficient to hold the company as a garnishee.⁴⁴

§ 3194. Service or levy—In general. The service of process on attachment or garnishment must be made in accordance with the direction of the statutes.⁴⁵ When there is a statute designating the particular officers of a corporation upon whom such process may be served, there must be service according to the direction of the statute, as the method provided for the general service of ordinary legal process

127 Mich. 19, 86 N. W. 435, in which case the writ was served on an agent of the company, an agent appeared in answer to the summons of garnishment and made disclosure, and on a later day the defendant was represented by counsel.

⁴¹ Brauser v. New England Fire Ins. Co., 21 Wis. 506.

⁴² C. E. Harris & Co. v. C. B. Cozart Grain Co., — Tex. Civ. App. —, 178 S. W. 733. See also Dickerson v. Central Texas Grocery Co., — Tex. Civ. App. —, 147 S. W. 695; Lash v. Morris County Bank, —Tex. Civ. App. —, 54 S. W. 806.

⁴³ World's Fair Excursion & Trans-

portation Boat Co. v. Gasch, 162 Ill. 402, 44 N. E. 724, rev'g 59 Ill. App. 391.

⁴⁴ Bowers v. Continental Ins. Co., 65 Tex. 51, holding further that an appearance by the company and filing answer might waive an imperfect writ, but it would not cure a vital defect in the affidavit.

⁴⁵ Service of the writ of attachment on a corporation sought to be garnisheed cannot be predicated on the reading of the writ to an officer of the corporation over the telephone. Sharpless Separator Co. v. Brillhart, 129 Md. 82, 98 Atl. 484.

on corporations is not then sufficient.⁴⁶ It is not like the service of ordinary process.⁴⁷ A statute providing a mode of serving attachment process on corporations in certain cases is to be understood, however, as not superseding service of such process in the mode otherwise provided in a general attachment statute, but as furnishing an additional mode of service.⁴⁸ The fact that the officers of a corporation may have known of the issuance of a writ of garnishment does not dispense with the regular service as provided by statute.⁴⁹

⁴⁶ *Fowler v. Dickson*, 1 *Boyce* (Del.) 113, 74 Atl. 601.

Under Georgia Civil Code 1910, § 5270, providing that "service of a summons of garnishment upon the agent in charge of the office or business of the corporation in the county or district at the time of service shall be sufficient," personal service upon the ticket agent of the railroad company garnisheed will be sufficient, notwithstanding the fact that such ticket agent is also employed by the three other railroad companies using the union station in which such agent has his office, and that the freight which was the subject of the garnishment was more directly under the charge of another agent of the garnishee at another office in the same city. *Seaboard Air-Line Ry. v. Browder*, 144 Ga. 322, 87 S. E. 6.

⁴⁷ *Clark v. Chapman*, 45 Ga. 486.

⁴⁸ *Gokey v. Boston & M. R. Co.*, 130 Fed. 994. See also §§ 3195, 3197, *infra*.

⁴⁹ *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863.

"To acquire jurisdiction, upon a suggestion, to direct payment of money or appropriation of the property in the hands or under the control of one other than the judgment debtor, in satisfaction of the lien of an execution, the process must be served on the person having such money or property in his custody, or, if it be a foreign or nonresident domestic corporation, upon the auditor. Acceptance of service by either will not suffice." *First Nat. Bank of New*

Cumberland v. Smith, — W. Va. —, 93 S. E. 755 (headnote by the court). Reference to *Atkins v. Evans*, 76 W. Va. 17, 84 S. E. 901, which the court held to be controlling, clarifies the meaning not only of the above statement, but also of the opinion in *First Nat. Bank of New Cumberland v. Smith*, *supra*, which is equally obscure. In *Atkins v. Evans*, *supra*, the court held that "though the garnishee appears, his mere appearance does not bring in the thing sought to be affected in his hands. It can only be brought under the power of the court by being attached by the law, just as is prescribed in the statute. With us, what is it that attaches the property or debt in the hands of the garnishee and brings the same under the power of the court? It is the swearing out of a valid writ of attachment, the designation thereon of a person as being indebted to the defendant, or as having in his hands effects of the defendant, and the serving of the writ of attachment, endorsed with such designation, on the party so designated. Code 1913, ch. 106, sec. 5. Only in this way is the debt or property in the hands of the garnishee reached so that the court may make any order affecting it. Actual service of such writ on the garnishee is primarily essential to the court's jurisdiction to act in relation to the debt or property sought to be affected."

Irregularities in the service of the writ of attachment on the corporation sought to be garnisheed are not waived

Where the law authorizes the service of a garnishee summons upon an officer of a corporation who has not in his actual possession the property or money sought to be reached by such process, but such property or money with which to pay the debt is in the possession of some other officer or employee of the company, and such other officer or employee delivers such property or money to a person authorized to receive the same, before he can, with reasonable diligence on the part of the officer served, be notified to retain the possession thereof, such service is not sufficient to charge the corporation as garnishee; the officer served with process is bound to use reasonable, but not extraordinary, diligence.⁵⁰

Service may be made upon a de facto officer, and this includes a person who has been illegally elected an officer of the corporation,⁵¹ but service of a writ of garnishment upon one not an officer, but who was elected to the office after the service, is not valid service upon the corporation.⁵² Under a statute requiring service to be made on the president, director, manager, or other officer of the corporation, an attorney of the company is not one of the officers within the meaning of the statute,⁵³ and an attorney appointed under a statute on whom process may be served for the purpose of commencing actions upon any liability or indebtedness incurred or contracted, is not one upon whom garnishment notice may be served, as garnishment process is not an action commenced upon any such liability or indebtedness.⁵⁴

by the appearance of an attorney for the individuals, connected with the corporation, upon whom service was claimed to have been made. *Sharpless Separator Co. v. Brillhart*, 129 Md. 82, 98 Atl. 484.

⁵⁰ *Lyon v. Russell*, 72 Me. 519; *Williams v. Kenney*, 98 Mass. 142; *Spooner v. Rowland*, 4 Allen (Mass.) 485; *Bates v. Chicago, M. & St. P. Ry. Co.*, 60 Wis. 296, 50 Am. Rep. 369, 19 N. W. 72.

When a writ of garnishment has been duly served upon an agent of a corporation, payment by the treasurer of the garnishee to the defendant in ignorance of the fact that the writ has been served upon an agent, does not affect the liability of the garnishee. *McFaddin v. Texas & N. O. R. Co.* (Tex. Civ. App.), 129 S. W. 634.

⁵¹ *Barthell v. Hencke*, 99 Wis. 660, 75 N. W. 952.

Service of a summons of garnishment upon the chief clerk of the agent of a railroad company is good service upon the company under sections 2260 and 5270 of the Georgia Civil Code of 1910, when at the time of the service the agent is absent from the office and the chief clerk is in entire charge and control thereof and of the business of the company there transacted. *Central of Georgia Ry. Co. v. Ellis*, 17 Ga. App. 536, 87 S. E. 815.

⁵² *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863.

⁵³ *Northern Cent. R. Co. v. Rider*, 45 Md. 24.

⁵⁴ *Moore v. Wayne Circuit Judge*, 55 Mich. 84, 20 N. W. 801.

A statute requiring an instrument for the payment of money to be taken possession of by an attaching officer does not apply to a policy of fire insurance, and in such a case levy may be made by serving a copy of the warrant of attachment on the proper officer of the garnishee.⁵⁵ A common carrier cannot surrender property to an officer on a telegram from another officer instructing him to stop the property and stating that he holds an attachment; and the subsequent appearance by the second officer with the attachment will not validate the first illegal surrender.⁵⁶ Negotiable mortgage coupon bonds cannot be attached or garnished by service of process on the issuing corporation; title to such bonds passes by delivery and they can be reached only by service of the process on the holder.⁵⁷

The levy of an execution must follow the method prescribed by statute.⁵⁸ With respect to executions, the property of a corporation must be sold under the statutory provisions applicable to corporations, if there are such, and not under the provisions of the general law.⁵⁹ And on a motion to revive a judgment and for leave to issue execution against a corporation, the "personal service" required by the statute is in contradistinction to that given by publication, and under the statute with respect to service of process generally may be served upon one of certain designated officers.⁶⁰

Acceptance of service must show the qualification of the person to accept,⁶¹ and admission of service by an attorney, upon whom valid service cannot be made, can have no greater effect than actual service upon him.⁶²

§ 3195. — On domestic corporation. In the case of an attachment or garnishment against a domestic corporation, the process must

⁵⁵ *Trepagnier & Bres v. Rose*, 155 N. Y. 637, 49 N. E. 1105, aff'g 18 N. Y. App. Div. 393, 46 N. Y. Supp. 397.

⁵⁶ *Nickey v. St. Louis, I. M. & S. Ry. Co.*, 35 Mo. App. 79.

⁵⁷ *Husband v. Linehan*, 168 Ky. 304, Ann. Cas. 1917 D 954, 181 S. W. 1089.

⁵⁸ *Iron City Nat. Bank of Pittsburgh v. Siemens-Anderson Steel Co.*, 14 Fed. 150; *Fox v. Hempfield R. Co.*, 2 Abb. 151, Fed. Cas. No. 5,011; *Loring v. Maysville Creamery Ass'n*, 70 Mo. App. 54; *In re Bayard*, 72 Pa. St. 453.

The provision of the charter of a mutual fire insurance company, that no execution shall issue upon any

judgment against it until three months after the rendition thereof, will be enforced by the court, although the judgment be founded upon a foreign judgment rendered more than three months before. *Judkins v. Union Mut. Fire Ins. Co.*, 39 N. H. 172.

⁵⁹ *Vermeule v. York Water Co.*, 112 Me. 437, 92 Atl. 513.

⁶⁰ *Rush v. Haleyon Steamboat Co.*, 84 N. C. 702.

⁶¹ *Hebel v. Amazon Ins. Co.*, 33 Mich. 400.

⁶² *Northern Cent. R. Co. v. Rider*, 45 Md. 24.

be served upon an officer who is designated for service in the statute.⁶³

When there is no special statute prescribing the mode of levying or serving an attachment writ or garnishment summons, a general statute relating to the service of process may be followed, as the term "process" may be understood to include attachment and garnishment.⁶⁴

When a general statute prescribing the mode of attaching on mesne process and selling on execution provides that a sale made in the manner prescribed only shall be good, this repeals a previous charter provision prescribing a different mode.⁶⁵

The term "general or special agent," in a statute permitting garnishment summons to be served on "the president, cashier, secretary, treasurer, general or special agent, superintendent, or other principal officer," is very indefinite, but employed as it is in association with other terms designating the principal officers of the corporation, it evidently refers to agents who either generally or in respect to some particular department of the corporate business have a controlling authority, general or special, and does not mean every man who is intrusted with a commission or an employment.⁶⁶

When a statute requires service upon a "managing agent," in the absence of the president and cashier of a bank, service may be made upon the bookkeeper as the only person in the bank upon whom service could be made.⁶⁷

Under a statute providing that service may be made upon the agent in charge of the office or business of a corporation, it cannot lawfully be made upon any other agent of the company,⁶⁸ and the president of a bank, as its chief executive officer, in the absence of a showing to the contrary, will be presumed to be the agent in charge of its affairs, and service on him is *prima facie* sufficient.⁶⁹ Service of summons of garnishment upon the agent of a railroad company, under such a statute, is sufficient.⁷⁰

⁶³ *Rosenberg v. First Nat. Bank* (Tex. Civ. App.), 27 S. W. 897 (cashier of a bank).

⁶⁴ *Boyd v. Chesapeake & O. Canal Co.*, 17 Md. 195, 79 Am. Dec. 646.

⁶⁵ *Howe v. Starkweather*, 17 Mass. 240.

⁶⁶ *Lake Shore & M. S. Ry. Co. v. Hunt*, 39 Mich. 469.

⁶⁷ *First Nat. Bank of Blue Hill v. Turner*, 30 Neb. 80, 46 N. W. 290.

⁶⁸ *Hargis v. East Tennessee, V. & G. Ry. Co.*, 90 Ga. 42, 15 S. E. 631.

⁶⁹ *Third Nat. Bank of Atlanta v. McCullough*, 108 Ga. 249, 33 S. E. 848.

⁷⁰ *Central of Georgia R. Co. v. Dickerson*, 15 Ga. App. 293, 82 S. E. 942.

Service of notice of garnishment on a depot agent of a railroad company in a county other than that in which the company has its chief office for business, is not notice to the company, it not appearing that it grew out of the business of the agency, and no reason being assigned for failing to serve it on the president, sec-

Under a statute authorizing all suits against a bank to be brought against the president thereof, the president is the only proper person to answer to a process of garnishment,⁷¹ and when a statute requires a garnishment summons to be served upon the president, his temporary absence will not warrant service upon a subordinate officer or agent.⁷²

Under a statute requiring service to be made on either the president, secretary, treasurer, or local agent of a corporation, service on the "manager" is not sufficient.⁷³

And when service is to be had at the principal office of the company, a service made at the teller's desk in a bank is not service on a company transacting business in an adjoining room.⁷⁴

A statute requiring a copy of the warrant and a notice showing the property attached to be delivered and left with the person holding property incapable of manual delivery, applies to a deposit in a bank.⁷⁵ And a compliance with the statutory condition of leaving a copy of the writ at the place of last and usual abode of such designated officer, is sufficient.⁷⁶

Service must be made upon the individual as an officer or agent of the corporation, and a notice to a person as "manager," without specifying of what he was manager, and served on that person individually, as shown by the officer's return, stating that property in his hands had been attached, was not notice to a company of which such person was manager.⁷⁷

§ 3196. — On foreign corporation—In general. Jurisdiction in garnishment proceedings is wholly statutory, and for every step taken until jurisdiction is acquired authority must be found in the law providing for the proceeding.⁷⁸ And in serving attachment or

retary, treasurer or director. *Lambreth & Co. v. Clarke & Brown*, 57 Tenn. 32.

⁷¹ *Sturgis v. Rogers*, 26 Ind. 1.

⁷² *Brigham v. Port Royal & A. Ry.*, 74 Ga. 365; *Steiner, Smith Bros. & Knecht v. Central R. R.*, 60 Ga. 552; *Clark v. Chapman*, 45 Ga. 486.

⁷³ *Tompkins Machine & Implement Co. v. Schmidt (Tex. App.)*, 16 S. W. 174.

⁷⁴ *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863.

⁷⁵ *Courtney v. Eighth Ward Bank*,

154 N. Y. 688, 49 N. E. 54; *People v. St. Nicholas Bank*, 44 N. Y. App. Div. 313, 60 N. Y. Supp. 719.

⁷⁶ *Harris v. Somerset & K. R. Co.*, 47 Me. 298.

⁷⁷ *Cole v. Utah Sugar Co.*, 35 Utah 148, 99 Pac. 681.

⁷⁸ *German American Ins. Co. v. Chippewa Circuit Judge*, 105 Mich. 566, 63 N. W. 531; *Milwaukee Bridge & Iron Works v. Wayne County Circuit Judge*, 73 Mich. 155, 41 N. W. 215; *Moore v. Wayne Circuit Judge*, 55 Mich. 84, 20 N. W. 801; *Iron Cliffs*

garnishment process upon foreign corporations, the rule must be particularly observed, that the method prescribed by statute must be strictly followed.⁷⁹

Co. v. Lahais, 52 Mich. 394, 18 N. W. 121; Ford v. Detroit Dry Dock Co., 50 Mich. 358, 15 N. W. 509; Hebel v. Amazon Ins. Co., 33 Mich. 400.

In *National Bank v. Furtick*, 2 Marv. (Del.) 35, 44 L. R. A. 115, 69 Am. St. Rep. 99, 42 Atl. 479, the court said: "It is true as contended by the counsel for the plaintiff, that the attachment statute is a remedial statute, and that, as a general rule, when the object of a statute is remedial it is to be construed liberally. But it is equally true that when the remedy is sought to be obtained by summary proceeding, and under a statute which is in derogation of the common law, a statute is to be strictly construed, and must be exactly followed by those who act under or in pursuance of it. 'A proceeding in attachment, as authorized by the statutes of the several states, is always viewed as a violent proceeding, wherein the plaintiff, at the inception of his suit, seizes the property of the defendant without waiting to establish his claim before the judicial tribunals of the land, and the statute authorizing it has invariably received a strict construction.' Black, *Interp. Law*, 315. This rule of construction has become so general in this country that in some of the states statutes have been enacted directing that the attachment laws shall be literally construed. As before stated, the attachment statutes of this state expressly provide upon whom service must be made to give the court power to appropriate, to the satisfaction of the plaintiff's demand, the effects or credits of the debtor in the hands of the garnishee; for it is by the service of the writ that the court gets control of the property. To acquire jurisdiction and secure

such control the terms of the statute must be strictly followed. The power originates with the statute, and exists only to the extent plainly granted. This has been recognized to be the law of this state. In *Pennsylvania Steel Co. v. New Jersey Southern R. Co.*, 4 *Houst. (Del.)* 572, and in *Frankel v. Satterfield*, 9 *Houst. (Del.)* 201, 19 Atl. 898, the court (per Grubb, J.) said: 'In this state the institution of a suit by foreign attachment process is a statutory proceeding, which must be pursued conformably with the provisions authorizing it.' We are therefore of the opinion that service of process upon corporations, when such corporations are to be summoned as garnishees, must be made upon one of the officers designated in the statute relating to attachments. Ferdinand L. Gilpin, under the facts of this case, was not such an officer, being neither the president, treasurer, cashier, nor paying clerk, and the attempt to serve the writ upon the Liverpool & London & Globe Insurance Company through him was ineffectual to bind the corporation, and it should be discharged. If the garnishee should be discharged, no other property being attached, there was nothing to give the court jurisdiction, and the attachment should be vacated."

⁷⁹ *Hinman v. Andrews Opera Co.*, 49 Ill. App. 135; *German American Ins. Co. v. Chippewa Circuit Judge*, 105 Mich. 566, 63 N. W. 531.

For cases involving service of writ of garnishment, see generally *National Bank v. Furtick*, 2 Marv. (Del.) 35, 44 L. R. A. 115, 69 Am. St. Rep. 99, 42 Atl. 479; *Franklyn v. Taylor Hydraulic Air Compressing Co.*, 68 N. J. L. 113, 52 Atl. 714; *Elizabeth Town*

The mode of service of garnishment process upon such corporations is absolutely within the discretion of the legislature, and their right to do business may be made dependent upon a compliance with a statute which authorizes such service to be made upon any officer or agent of the corporation found within the state, whether upon corporate business or not.⁸⁰ And it has been held that when the statute fails to make provision for the method of service of a writ of garnishment upon foreign corporations, such process cannot be served, though the statute in terms provides that foreign as well as domestic corporations may be garnished.⁸¹

In attachment or garnishment against foreign corporations, as in the case of such process against domestic corporations, a statute relating to service of process in ordinary suits has no application,⁸² though a special statute providing for service of a writ of attachment out of a justice's court upon a foreign corporation is not exclusive, but service may be made under the general attachment statute.⁸³

It has been said that a statute under which a foreign corporation appoints an agent for the purpose of receiving service of process on it for all causes of action arising within the state, does not contemplate that an agent should be appointed for service in a garnishment proceeding, as such is an auxiliary proceeding and service is not for a cause of action.⁸⁴ But upon the idea that service of such process may be made upon a statutory agent, it has nevertheless been held that such method of service is not exclusive, and that service may be made upon an agent of the foreign corporation within the state as in

Sav. Inst. v. Gerber, 35 N. J. Eq. 153; *Wright v. Douglass*, 7 N. Y. 564; *Wright v. Douglass*, 3 Barb. (N. Y.) 554; *Conley Mfg. Co. v. Mzik*, 23 Ohio Cir. Ct. 164; *Holt v. Ladd*, 71 Vt. 204, 44 Atl. 69; *Tatum v. Niagara Fire Ins. Co.*, 43 Wash. 373, 86 Pac. 660.

⁸⁰ *First Nat. Bank of Detroit v. Burch*, 80 Mich. 242, 45 N. W. 93.

⁸¹ *German American Ins. Co. v. Chippewa Circuit Judge*, 105 Mich. 566, 63 N. W. 531; *Milwaukee Bridge & Iron Works v. Wayne County Circuit Judge*, 73 Mich. 155, 41 N. W. 215. See also *Ettelsohn v. Fireman's Fund Ins. Co.*, 64 Mich. 331, 31 N. W. 201.

⁸² *O'Connor v. Jones*, 129 La. 411, 56 So. 350; *Milwaukee Bridge & Iron*

Works v. Wayne County Circuit Judge, 73 Mich. 155, 41 N. W. 215; *Moore v. Wayne Circuit Judge*, 55 Mich. 84, 20 N. W. 801; *Iron Cliffs Co. v. Lahais*, 52 Mich. 394, 18 N. W. 121.

A writ of summons and attachment is not a judicial writ, and a statute relating to the service of judicial writs upon nonresidents has no application to the service of a writ of attachment upon a foreign corporation. *Kittredge v. Fairbanks Co.*, — Vt. —, 99 Atl. 1016.

⁸³ *Davidson v. Fox*, 120 Mich. 385, 79 N. W. 1106.

⁸⁴ *Brisco v. Minah Consol. Min. Co.*, 82 Fed. 952.

the service of like process on an agent within the state of a nonresident defendant.⁸⁵ And when garnishment process is served upon a resident corporation designated by a foreign corporation to be its agent upon which process may be served, it has been held that the service may be made in the usual way that writs are served upon corporations.⁸⁶ Under a statute authorizing service upon an agent in charge of the office or business of the corporation, garnishment can lawfully be served upon a foreign corporation by making personal service upon any agent of the company in the state.⁸⁷ And the fact that the agent served was himself defendant in the judgment upon which the garnishment was sued out against his principal does not render the service invalid.⁸⁸ An authorized agent of a foreign insurance company is a "managing officer" thereof within the meaning of an attachment statute,⁸⁹ and in a statute authorizing service by delivery of summons to any agent, cashier or secretary of a foreign corporation, it has been held that the word "agent" is not limited to agents of the class of "cashier or secretary," but service may be made on any agent having representative authority.⁹⁰ But service on a "general or special agent" of a foreign corporation requires service on an agent who is more than the mere custodian of property.⁹¹

Under a statute which provides that no foreign insurance company shall transact any business in the state, until it shall have first appointed the insurance commissioner of the state to be the attorney of such company in the state upon whom "all lawful process in any action or proceeding" against the company may be served, with the same effect as if the company existed in the state, and that the power of attorney shall stipulate on the part of the company that any lawful process against it served on said attorney shall have the same legal power and effect as if served on the company, it is held that service of process of garnishment may be made on the commissioner in a proceeding against a foreign corporation as garnishee.⁹²

⁸⁵ *Somerville Lumber Co. v. Mackres*, 86 Vt. 466, 85 Atl. 977; *Tatum v. Niagara Fire Ins. Co.*, 43 Wash. 373, 86 Pac. 660.

⁸⁶ *Franklyn v. Taylor Hydraulic Air Compressing Co.*, 68 N. J. L. 113, 52 Atl. 714.

⁸⁷ *Catheart v. Cincinnati, H. & D. Ry. Co.*, 108 Ga. 253, 33 S. E. 875; *Harvey v. Thompson*, 2 Ga. App. 569, 60 S. E. 11.

⁸⁸ *Catheart v. Cincinnati, H. & D. Ry. Co.*, 108 Ga. 253, 33 S. E. 875.

⁸⁹ *McAllister v. Pennsylvania Ins. Co.*, 28 Mo. 214.

⁹⁰ *Frieze v. Powell*, 79 Wash. 483, 140 Pac. 690; *Barrett Mfg. Co. v. Kennedy*, 73 Wash. 503, 131 Pac. 1161.

⁹¹ *Kirby Carpenter Co. v. Trombley*, 101 Mich. 447, 59 N. W. 809.

⁹² *Moshassuck Felt Mill v. Blanding*, 17 R. I. 297, 21 Atl. 538.

§ 3197. — Effect of appearance. If a foreign corporation appears before final judgment, and accepts a declaration in the attachment suit, the effect thereof is to convert the suit into a personal action sub modo. Such appearance supersedes the attachment so far as to enable the defendant to have the claim of the defendant and applying creditors litigated, as if the suit had been commenced by summons, but it does not destroy or impair in any way the lien created by the attachment.⁹³ Except with respect to the property attached, the attachment against the property of a foreign corporation has no effect. If the foreign corporation defendant does not appear, the proceeding is in rem, and the court acts upon its property.⁹⁴ As said by the Supreme Court of the United States: "If the defendant appears, the cause becomes mainly a suit in personam, with the added incident that the property attached remains liable, under the control of the court, to answer to any demand which may be established against the defendant by the final judgment of the court. But, if there is no appearance of the defendant, and no service of process on him, the case becomes, in its essential nature, a proceeding in rem, the only effect of which is to subject the property attached to the payment of the demand which the court may find to be due to the plaintiff." ⁹⁵

§ 3198. Return of service. There must be a proper return of service of attachment and garnishment process and of the levy of an execution as in the case of the service of other process, and the return or the record must show affirmatively upon what person or persons the writ was served, and his official connection with the corporation, so that the court can determine whether the service was duly made upon the company.⁹⁶ A return of service of a writ of garnishment must show service to have been made on the person named as an

⁹³ Goldmark v. Magnolia Metal Co., 65 N. J. L. 341, 47 Atl. 720.

⁹⁴ Cooper v. Reynolds, 10 Wall. (U. S.) 308, 309, 19 L. Ed. 931; Goldmark v. Magnolia Metal Co., 65 N. J. L. 341, 47 Atl. 720.

⁹⁵ Cooper v. Reynolds, 10 Wall. (U. S.) 308, 309, 19 L. Ed. 931, cited with approval in Goldmark v. Magnolia Metal Co., 65 N. J. L. 341, 47 Atl. 720.

⁹⁶ Montgomery & E. R. Co. v. Hartwell, 43 Ala. 508; Hargis v. East Tennessee, V. & G. Ry. Co., 90 Ga. 42, 15 S. E. 631; Northern Cent. R. Co. v. Rider, 45 Md. 24.

Under statute, where an officer having an execution against a corporation demands of an officer of the corporation that he point out corporate property on which to levy, and the officer refuses, these facts are properly shown by the return on the execution; and where the execution was lost, it was competent to prove by parol what the return showed, but not to contradict the return, by showing that no demand had been made. Singer v. Given, 61 Iowa 93, 15 N. W. 858.

officer or agent of the corporate garnishee and not individually,⁹⁷ and that notice of garnishment was given in writing, if required by statute,⁹⁸ and, on an attachment against a foreign corporation, a return that the officer had given notice of the attachment to the cashier of a bank, without stating that he had attached anything, or that the bank held any property of, or was in any way indebted to such foreign corporation, has been held not sufficient to reach notes of such foreign corporation held by the bank for collection.⁹⁹

In a suit against two corporations, a return of service of an attachment on real estate as against one corporation only, without designating which, is not sufficient.¹

When a statute authorizes service upon a "general or special agent" of a corporation garnishee, it refers to agents who either generally or in respect to some particular department of the corporate business have a controlling authority, either general or special, and a return that the summons had been served on a certain person, "agent of the within named defendant," has been held to be insufficient, as it did not appear what his agency was.²

Under the general rule that a return of process may be amended to make it speak the truth, the omission to state, in the return of service of a summons of garnishment, that the agent of the corporation served was the agent in charge of the office or business of the corporation in the county can be cured by amendment made by the officer who made the service and return.³ And where a summons of

⁹⁷ *Sun Mut. Life Ins. Co. v. Seeligson*, 59 Tex. 3.

In *Brauser v. New England Fire Ins. Co.*, 21 Wis. 506, it was held that an officer's return that he served a notice directed to A. B., agent for a named corporation, upon A. B., the agent of the same, at, etc., was *prima facie* sufficient.

⁹⁸ *Mosher v. Banking House of Bartholow, Lewis & Co.*, 6 Mo. App. 599.

⁹⁹ *Thomas v. Merchants' Bank*, 9 Paige (N. Y.) 216.

¹ *Johnson v. Bennington & N. A. St. R. Co.*, 87 Vt. 519, 90 Atl. 507.

² *Lake Shore & M. S. Ry. Co. v. Hunt*, 39 Mich. 469. But in *Grinnell v. Niagara Fire Ins. Co.*, 127 Mich. 19. 86 N. W. 435, it was held, under

such a statute, that a return showing service on a person described as "agent" of the garnishee insurance company was sufficient to confer jurisdiction, when the adjuster of the company appeared in answer to the summons and made disclosure, and on an adjourned day the company was represented by counsel.

³ *Southern Expos. Co. v. National Bank of Tifton*, 4 Ga. App. 399, 61 S. E. 857.

Where a writ of attachment against property of a foreign corporation is returned served, *inter alia*, by delivering a copy of the writ for the defendant to a named person "a resident agent of said defendant," and the defendant appears specially by its attorney and moves to dismiss the

garnishment was issued against a corporation, and the officer made two returns of service and these returns showed service upon a different corporation, and the officer was allowed to amend one of the returns so as to make it show service upon the corporation intended to be served, and the return, as amended, was traversed, the original returns were held to be admissible in evidence.⁴

§ 3199. Disclosure or answer in garnishment—In general. A corporation summoned by a writ of garnishment or trustee process must make disclosure or answer, but must necessarily do so by an individual representative. This must be by an officer or duly recognized agent of the corporation, and not by one who is merely an employee.⁵ When the answers to interrogatories contained in a writ of garnishment are signed by the secretary and treasurer of the garnishee, it will be presumed that he is acting within the scope of his authority.⁶ A bookkeeper is not such an officer or agent,⁷ though a disclosure by an assistant treasurer has been received, it appearing that he had knowledge of the facts therein stated.⁸ An attorney at law of a corporate garnishee, it has been held, cannot, in that capacity, make answer to a summons of garnishment in behalf of the corporation,⁹ but dis-

cause on the ground that the court has no jurisdiction for the reason that the service was not in the manner prescribed by statute, the court, after overruling the motion pro forma, may properly permit the officer to amend his return according to the fact by entering therein, after the words "a resident agent of said defendant," the words "for want of a designated service of process, agent of said defendant within this state." *Kittredge v. Fairbanks Co.*, — Vt. —, 99 Atl. 1016.

⁴ *News Printing Co. v. Brunswick Pub. Co.*, 113 Ga. 233, 38 S. E. 853.

⁵ *Central of Georgia R. Co. v. Dickerson*, 15 Ga. App. 293, 82 S. E. 942; *First Nat. Bank of Detroit v. Burch*, 80 Mich. 242, 45 N. W. 93.

A corporation, as garnishee, has answered when it has given to the attaching officer a certificate made by the proper officer, as provided for by law. *Mann v. Peer*, 4 Pennw. (Del.) 279, 55 Atl. 335.

Where there is nothing in the record to show that a director and agent of a corporation sought to be garnisheed had any authority to make a return to the writ of attachment served on him so as to bind the corporation, the latter will not be precluded by the return actually made by him from moving to quash the sheriff's return. *Sharpless Separator Co. v. Brillhart*, 129 Md. 82, 98 Atl. 484.

⁶ *International Seal Co. v. Beyer*, 33 App. Cas. (D. C.) 172.

⁷ *Pettit v. Muskegon Booming Co.*, 74 Mich. 214, 41 N. W. 900. But in *Woodward Lumber Co. v. Watson, Vansant & Co.*, 8 Ga. App. 114, 68 S. E. 622, it was held that an answer by a bookkeeper who answers positively to the facts therein stated is sufficient.

⁸ *Whitworth v. Pelton*, 81 Mich. 98, 45 N. W. 500; *Duke v. Rhode Island Locomotive Works*, 11 R. I. 599.

⁹ Certificates of the attorney in fact

closure by an attorney has been considered good, though he derived his information wholly from the books of the company and the statements of its officers.¹⁰ It is not necessary that the affidavit should be made by the same officer on whom the writ was served. It is sufficient if made by any duly authorized officer.¹¹

On behalf of a foreign corporation, disclosure may be made by the general agent in the state, who is authorized to receive service of process on its behalf,¹² and it has been held that a foreign corporation is not to be considered in default for want of an answer after disclosure has been filed by its authorized agent.¹³

Some statutes provide for the transmission of disclosures in certain cases by mail.¹⁴ The company is not concluded by entries upon its books, and although a balance appears to be in favor of the principal defendant, the officer making disclosure may show that it arose from mistake or fraud.¹⁵ In the case of goods in possession of a common carrier, it is a frequent occurrence that bills of lading and consignments are transferred to third persons, and also goods are frequently consigned to factors and agents, and consequently, under a rule that disclosure in a justice's court must not be ambiguous, a disclosure by an agent of a common carrier that it had in possession goods consigned to the principal defendant, but that the agent did not know whether they belonged to the consignee, and had no personal knowledge of consignee's business, and none of other consignments was held to be insufficient to make the company liable.¹⁶

The adoption by a corporation at a subsequent term of an invalid answer filed for it at a former term, does not take effect by relation as of the time of filing, but becomes effectual as an answer only from the date of its adoption, and hence, where an invalid answer is filed by a corporation, the garnishee is not discharged by the failure of the plaintiff to contest such answer, until its adoption by the garnishee at a subsequent term of the court.¹⁷ The signing of the

and the general adjuster of an insurance company are insufficient to confer jurisdiction of the subject-matter of a debt, owing by the company, which is sought to be garnisheed. *Central of Georgia R. Co. v. Dickerson*, 15 Ga. App. 293, 82 S. E. 942; *Edwards v. Case*, 78 Ore. 220, 152 Pac. 880.

¹⁰ *Head v. Merrill*, 34 Me. 586.

¹¹ *Duke v. Rhode Island Locomotive Works*, 11 R. I. 599.

¹² *Lorman v. Phoenix Ins. Co.*, 33 Mich. 65.

¹³ *Lorman v. Phoenix Ins. Co.*, 33 Mich. 65.

¹⁴ *Whitworth v. Pelton*, 81 Mich. 98, 45 N. W. 500.

¹⁵ *Bigelow v. York & C. R. Co.*, 37 Me. 320.

¹⁶ *Walker v. Detroit, G. H. & M. R. Co.*, 49 Mich. 446, 13 N. W. 812.

¹⁷ *Steiner v. First Nat. Bank*, 115 Ala. 379, 22 So. 30.

verification is a sufficient signing of the answer.¹⁸ And when a disclosure has been made in writing, the court has the power, under the statute, to require the officer or agent of the corporation to submit to an oral examination,¹⁹ and such a statute contemplates that the officer or agent shall be one cognizant of the facts; it does not mean that the corporation, at its mere pleasure, may appoint any agent to attend and make oral answer for it, as one might be selected with intentional reference to his want of knowledge of the facts about which he is to be interrogated.²⁰ Where the circumstances were such as were reasonably calculated to procure the answer that was made and the omission in such answer as to the debtor's ownership of corporate stock was not wilful but was due to an oversight on the part of the corporation garnisheed, the court, on timely motion, should set aside the default judgment, entered, under the statute, for failure to make full answer.²¹

When a foreign corporation has a local agent in a certain county, it is a resident of such county within the meaning of the Texas

¹⁸ Frieze v. Powell, 79 Wash. 483, 140 Pac. 690.

¹⁹ Grinnell v. Niagara Fire Ins. Co., 127 Mich. 19, 86 N. W. 435; Baltimore & O. R. Co. v. Gallahue's Adm'rs, 12 Gratt. (Va.) 655, 65 Am. Dec. 254.

²⁰ Ex parte Cincinnati, S. & M. Ry. Co., 78 Ala. 258.

A statute requiring a garnishee to appear in court and answer interrogatories, cannot, in the nature of things, apply to a corporation; it is competent for such corporation to answer in writing through some officer or agent, and if issue be taken upon the answer so filed, then the plaintiff may summon any officer or agent of the company, and examine him as a witness. Bailey v. Union Pac. Ry. Co., 62 Iowa 354, 17 N. W. 567.

²¹ Jones Hardware & Furniture Co. v. Gunter, — Tex. Civ. App. —, 184 S. W. 342.

Where at the time garnishment notice was served upon a bank, the property in its possession did not belong to the judgment defendant but, after due notice of and opportunity to

be heard on the motion for judgment of garnishment against it, it failed to set up such fact, allowed judgment to go against it on the assumption that the property did in fact belong to the judgment defendant and subsequently acquiesced in the judgment entered against it, neither appealing therefrom nor seeking to have such judgment set aside, it could not afterwards, there having been no fraud practiced upon it and no new fact discovered, resist the payment thereof, and, this being the case, where the property garnisheed was the share of the judgment debtor in a deceased's estate which was under the control of the bank, the other heirs to, and the administrator of the estate who were not parties to the garnishment proceedings and whose rights in the fund in the hands of the bank were not in the least affected by such proceedings, could not come in and have the judgment of garnishment set aside. Commercial State Bank v. Pierce, 176 Iowa 722, 158 N. W. 481.

statute permitting a default judgment against a resident garnishee failing to answer the writ of garnishment.²²

§ 3200. — Necessity for seal. In some of the older cases it was said that the answer must be made under the corporate seal,²³ but the absence of the seal has been held to be of no significance, for modern convenience has almost wholly abrogated the ancient doctrine that a corporation can act only through its seal, and it is now generally recognized that the acts and contracts of a corporate officer, within the scope of his authority, although not under the seal of the corporation, are binding upon the corporation.²⁴

§ 3201. — Verification. The answer or disclosure of a corporation which has been garnisheed, made by a duly authorized officer or agent, should be verified when, and in the manner required by statute,²⁵ and when a general statute requires an answer to be verified but does not prescribe how it shall be made by a corporation, its answer may be verified as in chancery.²⁶ It may be verified by an officer or agent who can and will depose positively to the facts stated therein,²⁷ or by an officer of the corporation to whom such knowledge will be imputed by law.²⁸ And an answer by such an officer on information and belief has been held to be sufficient.²⁹

A mere letter signed by an agent of the corporation cannot be taken as an answer, as such a paper is not duly verified.³⁰

G. Wrongful Attachment

§ 3202. Liability of corporation. A corporation is liable for wrongful attachment the same as an individual,³¹ and it has been held

²² *Queen Ins. Co. v. Keller*, — Tex. Civ. App. —, 186 S. W. 359.

²³ *Planters' & Merchants' Bank v. Leavens*, 4 Ala. 753; *Branch Bank v. Poe*, 1 Ala. 396; *Chicago, R. I. & P. R. Co. v. Mason*, 11 Ill. App. 525; *Baltimore & O. R. Co. v. Gallahue's Adm'rs*, 12 Gratt. (Va.) 655, 65 Am. Dec. 254.

²⁴ *International Seal Co. v. Beyer*, 33 App. Cas. (D. C.) 172.

²⁵ *Friedman v. Cullman Building & Loan Ass'n*, 124 Ala. 344, 27 So. 332; *Steiner v. First Nat. Bank*, 115 Ala. 379, 22 So. 30; *Chicago, R. I. & P. Ry. Co. v. Mason*, 11 Ill. App. 525.

²⁶ *St. Louis Perpetual Ins. Co. v. Maguire*, 10 Mo. 141; *St. Louis Perpetual Ins. Co. v. Cohen*, 9 Mo. 421.

²⁷ *Walker v. Swift Fertilizer Works*, 3 Ga. App. 283, 59 S. E. 850; *Bump v. Augustine*, 163 Iowa 307, 143 N. W. 1104.

²⁸ *Central of Georgia R. Co. v. Dickerson*, 15 Ga. App. 293, 82 S. E. 942.

²⁹ *Paschall v. Whitsett*, 11 Ala. 472; *Frieze v. Powell*, 79 Wash. 483, 140 Pac. 690.

³⁰ *Hutson v. Illinois Cent. R. Co.*, 186 Ala. 436, 65 So. 62.

³¹ *Western News' Co. v. Wilmarth*,

to be liable for exemplary damages in suing out an attachment wrongfully and maliciously, although it acted only by an agent.³²

H. Redemption of Property

§ 3203. Right of stockholder. Where property has been sold under execution and no steps are taken by the corporate authorities to redeem the property within the period limited by law, a stockholder may interpose and redeem the property for the benefit of the corporation, and hold it liable for the money advanced for that purpose, and by so doing he becomes the equitable assignee of the certificate of sale, and is subrogated to all the rights of the original purchaser at the sheriff's sale.³³

II. CREDITORS' BILLS AND BILLS IN AID OF EXECUTION

§ 3204. Definition and distinction. A creditor's bill, as that term is used in designating the subject here under consideration, is essentially a proceeding in equity by which the creditor seeks to satisfy his debt out of some equitable estate of the debtor which is not subject to levy and sale under execution at law, or out of some property which the debtor has put beyond the reach of ordinary process.³⁴ One office of such a bill is to uncover property which the debtor has sought by fraud or concealment to place beyond the reach of his creditors, and another is to subject to the payment of the creditor's judgment equitable assets of, or choses in action belonging to, the debtor which cannot be reached by general execution.³⁵

³³ Kan. 510, 6 Pac. 786; Carey v. D. Wolff & Co., 72 N. J. L. 510, 63 Atl. 270; Wheless v. Second Nat. Bank, 1 Baxt. (Tenn.) 469, 25 Am. Rep. 783.

³² Jefferson County Sav. Bank v. Eborn, 84 Ala. 529, 4 So. 386.

³³ Wright v. Oroville Gold & Silver Min. Co., 40 Cal. 20.

³⁴ Coleman v. Hagey, 252 Mo. 102, 158 S. W. 829.

"The words 'creditors' bills,'" says the Supreme Court of Massachusetts, "are commonly used in the English chancery to describe bills brought by the creditors of the estate of a deceased person for the administration of the estate, or by creditors and claimants of a trust fund for the distribution of the fund. Such bills

may be brought by many several creditors jointly, or, if brought by one creditor, must be brought for the benefit of himself and all other creditors interested in the estate or the fund. But the words are also used to describe bills brought by creditors who have obtained judgments at law, and who have in vain attempted at law to obtain satisfaction of the judgments, and who sue in equity for the purpose of reaching property which could not be taken on execution at law. Such bills could be maintained by a single creditor without joining others." Pettibone v. Toledo, C. & St. L. R. Co., 148 Mass. 411, 1 L. R. A. 787, 19 N. E. 337.

³⁵ Kalona Sav. Bank v. Eash, 133 Iowa 190, 109 N. W. 887.

Of a bill in aid of execution, it has been said that the relief afforded thereby "is of a different character from that afforded by a creditor's bill. Under the former the only relief granted is to set aside the incumbrances or conveyances therein specified as fraudulent, while under the latter any equitable estate of the debtor may be reached."³⁶

§ 3205. Right of creditor to maintain bill. Independently of any statutory provision,³⁷ a creditor of a corporation may maintain a creditor's bill in equity against it and other necessary or proper parties to obtain satisfaction of his debt, when he has exhausted his legal remedies, or when the circumstances are such that he has no legal remedy, except in so far as such remedy by creditor's bill has been superseded by the statutory remedy of supplementary proceedings,³⁸ and the broad principles governing such a suit are, as a general proposition, the same as in a case where the debtor is a natural person.³⁹ In accordance with those principles, when a creditor of a corporation has recovered a judgment against it, and an execution has been returned unsatisfied, or, under some circumstances, before the recovery of judgment, or without the issue and return of an execution,⁴⁰ he may maintain a creditor's bill to reach equitable assets of the corporation, and have them applied to the satisfaction of his claim.⁴¹ Such a bill may be maintained by a creditor, for example,

³⁶ *James H. Rice Co. v. McJohn*, 244 Ill. 264, 91 N. E. 448. See also *Newcomb v. Montague*, — Mich. —, 160 N. W. 405.

³⁷ *Shalek v. Jetter Brewing Co.*, 155 N. Y. Supp. 972.

An action to remove an obstacle fraudulently placed in way of an execution may be maintained independently of statute, under established rules of equity. *Koechl v. Leibinger & Oehm Brewing Co.*, 26 N. Y. App. Div. 573, 50 N. Y. Supp. 568; *Easton Nat. Bank v. Buffalo Chemical Works*, 48 Hun (N. Y.) 557, 1 N. Y. Supp. 250.

³⁸ See § 3208, *infra*.

³⁹ For notes on the subject of creditors' bills, in which the subject is discussed and a vast number of earlier cases collected, see 90 Am. Dec. 285-301, 66 Am. St. Rep. 271-290.

⁴⁰ See *infra*, this section.

⁴¹ *United States. Hatch v. Dana*,

101 U. S. 205, 25 L. Ed. 885; *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. Ed. 849; *Citizens' Bank & Trust Co. v. Union Mining & Gold Co.*, 106 Fed. 97.

Alabama. *The Coliseum v. Interstate Lumber Co.*, 123 Ala. 512, 26 So. 122.

California. *Baines v. Babcock*, 95 Cal. 581, 29 Am. St. Rep. 158, 30 Pac. 776, 27 Pac. 674.

Georgia. *Albany & R. Iron & Steel Co. v. Southern Agr. Works*, 76 Ga. 135, 2 Am. St. Rep. 26.

Illinois. *Singer v. Hutchinson*, 83 Ill. App. 675, *aff'd* 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388; *Siegel v. A. H. Andrews & Co.*, 78 Ill. App. 611, *aff'd* 181 Ill. 350, 54 N. E. 1008.

Missouri. *Washington Sav. Bank v. Butchers' & Drovers' Bank*, 107 Mo. 133, 28 Am. St. Rep. 406, 17 S. W. 644.

to set aside a fraudulent conveyance, transfer or mortgage by the corporation, and to subject the property to the payment of its debts, or to hold the grantees or transferees liable for the value of the property;⁴² or to enforce claims in favor of the corporation against the directors or other officers for diversion of assets, mismanagement or negligence;⁴³ or to reach or hold stockholders liable for assets withdrawn by them, or distributed among them, in fraud of the rights of creditors;⁴⁴ or to enforce a liability of stockholders for a balance due on their stock;⁴⁵ or, under some statutes, to enforce the statutory liability of stockholders to creditors.⁴⁶ After a corporation has been dissolved, creditors may maintain a bill in equity to subject its assets to the payment of their claims.⁴⁷ In general, a judgment creditor may reach any property right or interest not exempt from execution which the judgment debtor might itself reach with the aid of

Rhode Island. *Olney v. Conanicut Land Co.*, 16 R. I. 579, 5 L. R. A. 361, 27 Am. St. Rep. 767, 18 Atl. 181.

South Carolina. *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 69 Am. St. Rep. 888, 31 S. E. 673.

Tennessee. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

Wisconsin. *Ballin v. Loeb*, 78 Wis. 404, 10 L. R. A. 742, 47 N. W. 516.

A corporation which is largely indebted on claims long past due, whose only property consists of a mine and a plant for operating the same, which are not available for payment of its debts in the ordinary course of business, and whose officers admit its inability to meet its obligations, is insolvent in such a sense as to entitle its creditors to have its property sold, and the proceeds applied to the payment of their claims. *Citizens' Bank & Trust Co. v. Union Mining & Gold Co.*, 106 Fed. 97.

⁴² See generally the chapter on Insolvency, *infra*, and also §§ 1191, 1205, *supra*.

⁴³ See generally §§ 2569-2669.

⁴⁴ See Chap. 56.

Where a corporation, with a view

to going out of business and with the result that nothing is left to pay its debts, transfers all of its assets to one of its stockholders, the transferee, by the very circumstances of the transaction, is charged with notice and takes the property cum onere, and a judgment creditor whose execution has been returned nulla bona may reach such property by a creditor's bill. *Williams v. Commercial Nat. Bank*, 49 Ore. 492, 11 L. R. A. (N. S.) 857, 91 Pac. 443, 90 Pac. 1012, 1015.

⁴⁵ See Chap. 56.

⁴⁶ See Chap. 56.

⁴⁷ See chapter on Forfeiture, Dissolution and Winding Up, *infra*.

Where a suit is in the nature of a creditors' suit for the administration of assets owned by and remaining with an insolvent corporation and is brought in behalf of creditors generally who may choose to avail of the suit, the creditor actually bringing the suit does not thereby acquire any prior right as against other creditors who come into the case in response to the invitation extended by the bill whether formally made parties or not. *Moore v. Parker Drug Co.*, 135 Ala. 287, 33 So. 439.

equity.⁴⁸ Conversely, "a creditor's bill will not lie to reach assets of the debtor which the debtor cannot recover in an action in his own name."⁴⁹

Creditors of a corporation will have the same right as the corporation itself to pursue funds belonging to the latter which one of its officers has appropriated to his own use in the purchase of land.⁵⁰

Upon a creditor's bill a court of equity has ample power to reach assets in the hands of any person who is holding them without legal right, and to apply them in satisfaction of the claims of judgment creditors.⁵¹ Thus, where a corporate creditor of an insolvent corporation has converted to its own use, as it was enabled to do through a community of stockholders, etc., all of the property of the latter to which a judgment creditor of the insolvent corporation could have resorted for satisfaction of his debt, such judgment creditor may reach the property by a suit in the nature of a creditor's bill.⁵² Unissued mortgage bonds of a manufacturing company which are held by a trust company subject to the manufacturing company's order and without any advance having been made upon them do not, however, constitute a part of the property or assets of the manufacturing company and cannot be reached on a bill by one of its creditors.⁵³ Nor can money, derived from the sale, to stockholders in a corporation for which a receiver has been appointed, at less than par, of stock in a new corporation organized by bondholders of the old corporation for the purpose of taking over the old corporation's property which had been bought in by such bondholders at mortgage sale, be reached in an action by judgment creditors of the old corporation.⁵⁴ But where one corporation sells all of its property to another and assigns to the purchaser its rights in a fund held by a third corporation, a

⁴⁸ *Weckerly v. Taylor*, 74 Neb. 84, 103 N. W. 1065. See also *German Nat. Bank of Hastings v. First Nat. Bank*, 55 Neb. 86, 75 N. W. 531.

While equitable interests cannot be levied upon under an execution at law, they may be subjected to payment of the judgment in equity. *Robinson v. Tischler*, 69 Fla. 77, 67 So. 565.

A creditor's bill will not lie when the property sought to be reached is in custodia legis. *Anheuser-Busch Brewing Ass'n v. Hier*, 52 Neb. 424, 72 N. W. 588. See also *Williams v. Smith*, 117 Wis. 142, 93 N. W. 464.

⁴⁹ *Noonan v. Stein*, 56 Colo. 64, 136

Pac. 1181, 1185. See also *Bonte v. Cooper*, 90 Ill. 440, 444.

⁵⁰ *Arbuckle Bros. v. Columbia Grocery Co.*, 150 Ala. 271, 43 So. 781.

⁵¹ *Adams v. Cross Wood-Printing Co.*, 27 Ill. App. 313.

⁵² *German Nat. Bank of Hastings v. First Nat. Bank*, 55 Neb. 86, 75 N. W. 531.

⁵³ *Eastern Elec. Cable Co. v. Great Western Mfg. Co.*, 164 Mass. 274, 41 N. E. 295.

⁵⁴ *Ferguson v. Ann Arbor R. Co.*, 17 N. Y. App. Div. 336, 45 N. Y. Supp. 172.

judgment creditor of the seller may proceed against such fund by a bill in equity.⁵⁵

Where the authority of the general manager of a corporation to execute conveyances of corporate property, alleged to have been made in fraud of a judgment creditor, is a matter of proof aliunde the conveyances, which conveyances, therefore, cannot be said to be void on their face and hence no obstacle in the way of execution, a bill seeking to have them set aside may be maintained.⁵⁶ Again, a creditor of a corporation will be required to account, on a creditor's bill, for the proceeds of corporate property sold under an execution on a pro confesso judgment in his favor which was authorized by corporate officers lacking power to act for the corporation in the matter.⁵⁷ Where the purchase by a corporation of shares of its own stock is regarded as a fraud upon the corporation's creditors, the money paid therefor is property fraudulently transferred which may be reached and subjected by a corporate creditor on a bill in chancery.⁵⁸

§ 3206. Conditions precedent. Courts of equity entertain creditors' bills against a natural person or a corporation, on the ground that the creditor has no adequate remedy at law,⁵⁹ and, as a general rule, therefore, a mere general creditor, who has not obtained a judgment at law or acquired a lien on the property sought to be reached, has no standing in equity to maintain a creditor's bill.⁶⁰

⁵⁵ *Jennings, Neff & Co. v. Crystal Ice Co.*, 128 Tenn. 231, 47 L. R. A. (N. S.) 1058, 159 S. W. 1088.

A valid sale of corporate property and the distribution of its proceeds which were less than the total indebtedness of the corporation among certain creditors cannot be attacked by a judgment creditor because of the fact that he was not among the creditors paid. *O. W. Shipman Co. v. Detroit, L. S. & M. C. Ry.*, 140 Mich. 589, 104 N. W. 24.

⁵⁶ *Dothan Lumber Co. v. Bell-Lumber Co.*, 193 Ala. 399, 69 So. 419.

⁵⁷ *Adams v. Cross Wood-Printing Co.*, 27 Ill. App. 313.

⁵⁸ *Hall & Farley v. Alabama Terminal & Improvement Co.*, 143 Ala. 464, 2 L. R. A. (N. S.) 130, 5 Ann. Cas. 363, 39 So. 285.

⁵⁹ *Richardson Drug Co. v. Meyer*, 54 Neb. 319, 74 N. W. 575.

"Courts of equity and courts of law have concurrent jurisdiction when property has been fraudulently conveyed or incumbered in order to defeat the claims of creditors; but jurisdiction in equity will not be entertained where the remedy at law is full, complete, and adequate." *Kemmler v. McGovern*, 238 Pa. 460, 86 Atl. 304.

⁶⁰ *First Nat. Bank v. Manassa*, 80 Ore. 53, 150 Pac. 258.

The reason for requiring a judgment at law as a condition precedent to the maintenance of a creditor's bill or a bill in aid of execution is frequently said to be, according to the Supreme Court of Illinois, "that to allow a complainant to establish his claim in the first instance in a court of chancery would be to deprive the defendant of the right of trial by jury."

Ladd v. Judson, 174 Ill. 344, 66 Am. St. Rep. 267, 51 N. E. 838. See also

While the appointment of a receiver is not a condition precedent to the bringing of such a bill,⁶¹ the creditor must have exhausted his legal remedies by recovering a judgment against the corporation, and issuing execution thereon, or else he must show that for some reason he could not do so, or if he could, that it would have been useless, or that, for some reason, the immediate action of a court of equity is necessary to protect him.⁶² This principle, subject to statutory modifications,⁶³ is elementary,⁶⁴ although the courts have not always

In re Abbott, 187 Mich. 229, 153 N. W. 795.

"It may be remarked," says the Supreme Court of Montana, "that a creditor cannot, solely on the ground that he is a creditor, and that his debtor has no property other than an existing cause of action at law, bring suit upon such cause of action and obtain a judgment thereon as if he were the owner of it, and justify the action on the theory that he is proceeding by a creditor's bill. To hold the contrary would be equivalent to laying down the doctrine that, because an insolvent debtor does not bring action to rectify a wrong done him, his creditor may do so, and not only so, but may, in his own right, bring the wrongdoer to book by going into a forum and adopting a form of action wherein and whereby the wrongdoer is deprived of a trial according to the fundamental law requiring his case to be submitted to a jury according to the forms of law." Raymond v. Blanegrass, 36 Mont. 449, 15 L. R. A. (N. S.) 976, 93 Pac. 648.

⁶¹ Lehr v. Murphy, 136 Wis. 92, 116 N. W. 893.

⁶² "For the purpose of maintaining a creditor's bill, proof of a judgment at law, of the issuance of an execution, and of a sheriff's return nulla bona, is sufficient, in the absence of fraud or collusion, to show that plaintiff's remedies at law have been exhausted." Parsons v. Cathers, 92 Neb. 525, 138 N. W. 747 (headnote by

the court). See also Corn v. Greenberg, 181 Ill. App. 669.

⁶³ See Fidelity Mortgage Bond Co. v. Morris, 191 Ala. 318, Ann. Cas. 1917 C 952, 68 So. 153 (existence of statute does not appear in this case but does appear in Freeman v. Pullen, 119 Ala. 235, 24 So. 57, cited by the court); Wilson v. Martin-Wilson Automatic Fire-Alarm Co., 151 Mass. 515, 8 L. R. A. 309, 24 N. E. 784.

The enlarging, by statute, of the right of a creditor without judgment does not destroy the pre-existing right of the debtor with judgment. Maynard v. Armour Fertilizer Works, 138 Ga. 549, 75 S. E. 582.

⁶⁴ **United States.** Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 37 L. Ed. 1113; Scott v. Neely, 140 U. S. 106, 35 L. Ed. 358; D. A. Tompkins Co. v. Catawba Mills, 82 Fed. 780; Kittel v. Augusta, T. & G. R. Co., 65 Fed. 859.

Alabama. Drennen v. Jenkins, 180 Ala. 261, 60 So. 856.

Georgia. McGough & Crews v. Insurance Bank of Columbus, 2 Ga. 151, 46 Am. Dec. 382.

Illinois. Corn v. Greenberg, 181 Ill. App. 669.

Massachusetts. Thornton v. Marginal Freight Ry. Co., 123 Mass. 32.

Michigan. Tawas & B. County R. Co. v. Iosco Circuit Judge, 44 Mich. 479, 7 N. W. 65.

Missouri. Coleman v. Hagey, 252 Mo. 102, 158 S. W. 829, 838; Atlas Nat. Bank v. John Moran Packing Co., 138 Mo. 59, 39 S. W. 71.

agreed in the matter of its application. This rule is well settled in the federal courts, and its application is not affected by the fact that a statute authorizes a general creditor to maintain such a suit in the state courts, for "the line of demarcation between equitable and legal remedies in the federal courts cannot be obliterated by state legislation."⁶⁵ A simple contract creditor of a corporation, not having reduced his claim to judgment, and not having any lien by mortgage, trust deed or otherwise, cannot sue in equity to reach and subject to his claim property alleged to have been fraudulently conveyed by the corporation, on the theory that the assets of the corporation are a trust fund for the benefit of creditors, for they are not a trust fund in any such sense.⁶⁶

Most of the courts hold that this rule applies where a creditor sues to set aside a fraudulent conveyance, to such an extent, at least, that he must have first recovered a judgment.⁶⁷ It is a general rule

Nebraska. Merchants' Nat. Bank of Omaha v. McDonald, 63 Neb. 363, 89 N. W. 770, 88 N. W. 492; Wehn v. Fall, 55 Neb. 547, 70 Am. St. Rep. 397, 76 N. W. 13.

Oregon. Williams v. Commercial Nat. Bank, 49 Ore. 492, 11 L. R. A. (N. S.) 857, 91 Pac. 443, 90 Pac. 1012.

Contra, see Hancock v. Wooten, 107 N. C. 9, 11 L. R. A. 466, 12 S. E. 199, which finds its authority in Dawson Bank v. Harris, 84 N. C. 206.

"Before a creditor can maintain a creditor's bill, he must show that he has exhausted his remedy at law or that he has no adequate remedy at law." Gabbert v. Union Gas & Traction Co., 140 Mo. App. 6, 123 S. W. 1024.

Before a creditor can "proceed under a creditor's bill proper, he must exhaust his remedy at law by obtaining judgment, execution, and the return of the execution nulla bona or unsatisfied in whole or in part." James H. Rice Co. v. McJohn, 244 Ill. 264, 91 N. E. 448. See also Lakin v. Chartered Co. of Lower California, 111 Me. 556, 90 Atl. 427.

A creditor must allege and prove that he has no adequate remedy at

law; otherwise, the aid of a court of equity is unnecessary and will be denied. Coleman v. Hagey, 252 Mo. 102, 158 S. W. 829.

In addition to the exhaustion of legal remedies "there must be present some element of jurisdiction clearly set forth in the pleading peculiar to courts of equity for which equitable relief is applicable." Coleman v. Hagey, 252 Mo. 102, 158 S. W. 829.

See the notes, treating this matter at length, and collecting the cases, in 90 Am. Dec. 288-301, and 66 Am. St. Rep. 271-290.

⁶⁵ Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 37 L. Ed. 1113. And see D. A. Tompkins Co. v. Catawba Mills, 82 Fed. 780.

⁶⁶ Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 37 L. Ed. 1113. And see chapter on Insolvency, infra.

Unliquidated claims for damages arising out of tort cannot, standing alone, form any basis for a creditors' bill against the guilty corporation. Slover v. Coal Creek Coal Co., 113 Tenn. 421, 68 L. R. A. 852, 106 Am. St. Rep. 851, 82 S. W. 1131.

⁶⁷ Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 37 L. Ed. 1113. See

that a creditor who has not reduced his debt to judgment has no such lien or claim upon his debtor's property as will authorize him to complain of the disposition thereof, and the fact that the debtor is a corporation does not affect the application of such rule.⁶⁸ While a void judgment will not support a creditor's bill,⁶⁹ where a judgment is merely irregular and not absolutely void it will sustain a bill in aid of execution.⁷⁰ Moreover the judgment debtor against whom a creditor's bill is brought cannot set up as a defense the fact that the contract on which the judgment was based was tainted with illegality, even though such fact was not discovered until after the judgment was rendered, such a collateral attack on the judgment not being permissible,⁷¹ and, since stockholders in a corporation are in

notes, 90 Am. Dec. 288, and 66 Am. St. Rep. 271, 286.

A valid and enforceable judgment against the principal defendant is essential to a creditor's suit to set aside a fraudulent conveyance, and in the absence of such a judgment the action must fail. *Holmes v. Webster*, 98 Neb. 105, 152 N. W. 312.

"Lands conveyed in fraud of the rights of creditors cannot be subjected to the payment of their claims until the claims have been reduced to judgment, or, if the debtor is a nonresident of this state, until the lands have been attached and held subject to the payment of such judgment as may be rendered in the action." *Knox v. Farguson*, 97 Kan. 487, 155 Pac. 929 (headnote by the court).

⁶⁸ *Coleman v. Hagey*, 252 Mo. 102, 158 S. W. 829, 836.

"Property in the hands of one person cannot be subjected to a general debt against another, unless such debt has been first reduced to judgment, or unless there is a proceeding coincidentally to reduce it to judgment." *Hardy v. Hardy*, 143 Ga. 703, 86 S. E. 780 (from a headnote by the court).

⁶⁹ *Wilhelm v. Locklar*, 46 Fla. 575, 110 Am. St. Rep. 111, 35 So. 6.

⁷⁰ *Griffin v. McGavin*, 117 Mich. 372, 72 Am. St. Rep. 564, 75 N. W. 1061.

⁷¹ *Bank of Wooster v. Stevens*, 1

Ohio St. 233, 59 Am. Dec. 619. In this case, the bill was defended by the judgment debtors on the ground that the basic contract was usurious, and by two of their number, who were sureties for the third, on the further ground that they had no knowledge of the usury until after the rendition of the judgment, thus raising the question whether if "a judgment creditor brings a creditor's bill to enforce satisfaction of his judgment by charging equities, can the judgment debtor be permitted to show in defense that the contract upon which the judgment was rendered was infected with usury or other illegality?" Addressing itself to this question, the court said: "The defendants place themselves upon this ground alone, and excuse themselves from further answering upon the assumption that this is a perfect answer to the equity of the bill, when coupled with the fact that they were not advised of the usury until after the rendition of the judgment at law. In support of this position, they insist that, while it is true that a party invoking the aid of a court of equity to be relieved from usury can only do so upon paying what is equitably due, yet as a defendant, he may insist upon it as a perfect defense in equity as well as at law; that the illegality of the contract will constitute a sufficient

privity with the corporation and concluded by a judgment against it, there need be no allegation in a creditor's bill, based on a judgment against the corporation, to compel certain stockholders to pay the unpaid portions of their subscriptions, that the judgment was founded upon a valid and subsisting debt.⁷²

On the other hand, satisfaction or discharge of the revived judgment on which such a bill is based may be shown as a defense thereto.⁷³ It has been said that, as a general rule, a dormant judgment will not sustain a creditor's bill,⁷⁴ but, while there is authority to the contrary,⁷⁵ it has been held that a creditor's suit is in the nature of an equitable execution and as such tolls the statute, at least as far as the particular property sought to be reached is concerned.⁷⁶

reason why a court of equity will not lend its aid to enforce it. This is undoubtedly generally correct; and it is equally true that if the obligation upon which this judgment is founded was tainted with usury, it was absolutely void for the want of corporate power in the plaintiff to make it * * * But all this does not come to the point in hand. The question here is, Can the party be permitted to go back of the judgment in a proceeding brought to enforce it, and aver and prove such illegality? It certainly cannot be necessary at this day to cite authorities to show that the judgment of a court of competent jurisdiction cannot be impeached collaterally. It is a record of the highest character, importing absolute verity, and works a conclusive estoppel upon parties and privies to aver or prove anything against it. It speaks for itself, and when it has spoken, the parties to it at least are bound to be silent. Without overturning the very foundations of the law, we are bound to hold that it can only be impeached upon a direct proceeding brought to reverse or annul it. The difficulty here is not that a court of chancery cannot refuse to enforce a usurious obligation when that is proved, but it arises from the fact that the defendants are conclusively estopped from proving it

against the judgment. While that stands unreversed and in force, no evidence can be received to impair the absolute verity which it imports. If instead of this proceeding to obtain satisfaction of the judgment an action at law had been brought upon it, I do not suppose it would be contended that a plea setting up usury in the obligation upon which it was founded could be sustained; and yet it would not differ from the present attempt. The power of a court of equity to allow such a defense is not more comprehensive than that of a court of law; and certainly a judgment when thus used is not less sacred in the one tribunal than in the other."

⁷² *Tatum v. Rosenthal*, 95 Cal. 129, 29 Am. St. Rep. 97, 30 Pac. 136.

⁷³ *Bickerdike v. Allen*, 157 Ill. 95, 29 L. R. A. 782, 41 N. E. 740.

⁷⁴ *Bank of Miller v. Moore*, 98 Neb. 843, 154 N. W. 731.

⁷⁵ An action in the nature of a creditor's bill does not operate to keep alive the judgment on which the action is based, and if pending the action the judgment expires, the action will fail. *Newell v. Dart*, 28 Minn. 248, 9 N. W. 732; *Miller v. Melone*, 11 Okla. 241, 56 L. R. A. 620, 67 Pac. 479.

⁷⁶ *Flint v. Chaloupka*, 72 Neb. 34, 117 Am. St. Rep. 771, 99 N. W. 825, in which the Supreme Court of Ne-

On the same ground and to the same extent, it has been held that a creditor's suit prevents the attaching of the statutory presumption of payment from the lapse of the specified time without the issuance of an execution.⁷⁷ Some courts hold that an execution must have been issued and returned unsatisfied.⁷⁸ Others hold that an issue of execution in such a case is not necessary.⁷⁹

Where the only purpose of a bill is to remove a fraudulent conveyance out of the way of an execution, such bill, it is said, is one in aid of execution and not a creditor's bill within the strict meaning of that term, and execution need not have issued and been returned nulla bona or unsatisfied as a condition precedent to the bringing of the bill.⁸⁰

braska affirmed per curiam the opinion of the commissioners wherein it was said: "The beginning of a creditors' action gives a specific lien upon the property which it is sought to reach. The judgment is not a legal lien, but the creditors' action is in the nature of an equitable execution, and when begun creates a specific lien. This lien continues while the cause is pending and until final determination. Since it is of the nature of an execution, it tolls the statute of dormancy so far as the particular property sought to be reached is concerned, and hence the issuance of a general execution upon the judgment during the pendency of the creditors' action is not necessary to keep the judgment alive so far as the specific property equitably levied upon by this suit is concerned. * * * We are cognizant that this doctrine is at variance with the position taken by the Supreme Court of Minnesota in *Newell v. Dart* [cited supra, note 75], * * * and later cases, and also with the holdings of the courts of North Dakota and South Dakota, but the provisions of the statutes of these states upon which the rule is based by their courts are not the same as those of our statute. The holdings of these cases is that at the end of 10 years the judgment is void of vital force. In this state we

have taken a different view as to dormant judgments. Our statutes are not so broad and emphatic as to the inability to enforce a judgment after the time limited expires. * * * A writ issued upon a dormant judgment is not void, but voidable. Unless the bar of the statute is raised by motion or pleading, it is waived. For these reasons we conclude that the decisions mentioned are not applicable in this state, and we decline to follow them." See also *Cincinnati v. Hafer*, 49 Ohio St. 60, 30 N. E. 197.

A creditors' bill constitutes an equitable levy. *Bragg v. Gaynor*, 85 Wis. 468, 21 L. R. A. 161, 55 N. W. 919.

⁷⁷ *Alexander v. Munroe*, 54 Ore. 500, 135 Am. St. Rep. 840, 103 Pac. 514, 101 Pac. 903.

⁷⁸ See *Adsit v. Butler*, 87 N. Y. 585; *Bassett v. St. Albans Hotel Co.*, 47 Vt. 313; *Gilbert v. Stockman*, 81 Wis. 602, 29 Am. St. Rep. 922, 52 N. W. 1045, 51 N. W. 1076.

⁷⁹ *Wisconsin Granite Co. v. Gerrity*, 144 Ill. 77, 33 N. E. 31; *Miller v. Davidson*, 8 Ill. 518, 44 Am. Dec. 715; *Brown v. J. Wayland Kimball Co.*, 84 Me. 492, 24 Atl. 1007. See note, 90 Am. Dec. 289.

⁸⁰ *James H. Rice Co. v. McJohn*, 244 Ill. 264, 91 N. E. 448. But see to the contrary *Allen v. Kane*, 79

By express statutory provision in some states, a general creditor is permitted to maintain a suit in equity to wind up an insolvent corporation and distribute its assets, or to set aside fraudulent conveyances and transfers, etc., and recovery of a judgment against the corporation, before bringing the suit, is not necessary.⁸¹ And even in the absence of such a statute, the general rule is subject to exceptions. "A prior judgment at law and unavailing process are not conditions on which equitable jurisdiction is founded. They do not constitute the basis on which the right to equitable relief rests. They

Wash. 248, 140 Pac. 534, holding that before property conveyed in fraud of the rights of creditors can be reached in equity, the claims must have been reduced to judgment and execution must have issued. See also *Brown v. McKown*, 265 Mo. 320, 176 S. W. 1043.

In *Newcomb v. Montague*, — Mich. —, 160 N. W. 405, the court held that the bill originating the suit, in which it was sought to have an alleged fraudulent conveyance set aside, could not be sustained on the theory that it was a bill in aid of execution "because before such remedy can be invoked the execution must have been issued and a levy made upon the property alleged to have been fraudulently conveyed, and the execution must still be in force," and it appeared from the bill that no execution had been levied.

In Montana, "it has been repeatedly held * * * that a creditor cannot invoke the aid of a court of equity to reach assets of his debtor which have been fraudulently conveyed, without having acquired a lien upon them by appropriate proceedings at law, or unless a trust exists in his favor; and that, in case of personal property and interests not capable of manual delivery, a lien must be fixed upon them by levy of process in the manner pointed out by the statute. * * * In many, if not most, of the states, recovery of judgment and return of

an execution *nulla bona* is sufficient to entitle the creditor to invoke the aid of equity to reach property fraudulently conveyed by his debtor. In view of the * * * decisions [cited], however, and the further fact that all interests of the judgment debtor in real estate, whether recorded in his name or not, are subject to attachment and execution (Rev. Codes, §§ 6662, 6821), the question arises [but is pretermitted by the court] whether or not, in this state, in order for a creditor to obtain relief in this class of cases, he must not allege and prove that he has secured a lien by causing attachment or execution to be levied." *Koopman v. Mansolf*, 51 Mont. 48, 149 Pac. 491.

The established rules of equity do not permit a judgment creditor to maintain an action to secure the removal of an obstacle e. g., a judgment, fraudulently placed in the way of his execution unless such execution has been actually issued and is outstanding or has been returned unsatisfied. *Easton Nat. Bank v. Buffalo Chemical Works*, 48 Hun (N. Y.) 557, 1 N. Y. Supp. 250.

⁸¹ *Cook v. New York Condensed Milk Co.*, 100 Ala. 580, 13 So. 685; *J. V. Northam & Co. v. Atherton*, 67 Ill. App. 230; *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

are rather an element in procedure and not an equitable right. The facts which they are taken to establish, by the general rule, may be made to otherwise appear, and thus exceptions to the general rule are recognized and have become as well established as the rule itself."⁸²

A judgment is not necessary where it is impossible to obtain it, as in a case where the corporation has been dissolved,⁸³ or where the immediate action of the court is necessary, and delay to procure a judgment at law would result in irreparable injury, or where the complainant has a lien which he seeks to enforce, etc.⁸⁴ It has been held that the rule requiring a judgment does not apply where the corporation is insolvent and is disposing of its assets so that prompt action by a court of equity is necessary to prevent the fraud and preserve the assets for creditors. In such a case, a general creditor may sue in equity for an injunction and the appointment of a receiver, without having first reduced his claim to judgment.⁸⁵

By the weight of authority, in order to maintain a creditor's bill, it is not necessary to show the issue of execution and its return unsatisfied, where it is otherwise shown that the corporation is insolvent, and that the issue of an execution would have been useless;⁸⁶ and in some states, although not in others, it has been held that recovery of a judgment is not necessary in such a case.⁸⁷ So the general rule has been held not to apply in the case of an insolvent foreign corporation which has ceased to do business in the state and has withdrawn therefrom all of its assets excepting the fund sought to be reached.⁸⁸ "Nonresidence of the debtor and also his insolvency have each been held sufficient to dispense with prior judgment and execution at law; the first, because of the great impracticability, if not impossibility, of proceeding against the debtor in that way, and the second, because

⁸² *Williams v. Adler-Goldman Commission Co.*, 227 Fed. 374.

⁸³ See chapter on Forfeiture, Dissolution and Winding Up, *infra*; *Pullman v. Stebbins*, 51 Fed. 10; *Atlantic Dredging Co. v. Beard*, 145 N. Y. App. Div. 342, 130 N. Y. Supp. 4. See also *Drennen v. Jenkins*, 180 Ala. 261, 60 So. 856.

⁸⁴ See notes in 90 Am. Dec. 288, and 66 Am. St. Rep. 271.

Statutory right of attachment creditor in Missouri to sue to set aside fraudulent conveyance, see *Brown v. McKown*, 265 Mo. 320, 176 S. W. 1043.

⁸⁵ *Albany & R. Iron & Steel Co. v. Southern Agr. Works*, 76 Ga. 135, 2 Am. St. Rep. 26.

⁸⁶ *O'Brien v. Stambach*, 101 Iowa 40, 63 Am. St. Rep. 368, 69 N. W. 1133; *Parker v. Carolina Sav. Bank*, 53 S. C. 583, 590, 69 Am. St. Rep. 888, 891, 31 S. E. 673. *Contra*, *Dickinson v. Traphagan*, 147 Ala. 442, 41 So. 272; *Wilson v. Salisbury*, 167 Mo. App. 191, 151 S. W. 194. See also *Fluke v. Sharum*, 118 Ark. 229, 176 S. W. 684.

⁸⁷ See note, 66 Am. St. Rep. 285.

⁸⁸ *The Field v. Harding Dredge Co.*, 180 Mo. App. 563, 167 S. W. 593.

it stands for what the judgment and execution would conclusively prove." ⁸⁹

A bill in aid of an execution may be brought before execution has issued and as soon as the creditor obtains judgment,⁹⁰ and an allegation of the issuance of an execution and a return of "no property found" will be superfluous.⁹¹

The objection that the complainant in a creditor's suit has not recovered a judgment at law may be waived, and it will be held to have been waived if not made in limine.⁹² Where the plaintiff's right to go into equity depends entirely upon the fact that the bill is brought to reach and apply to payment of its debt property of its debtor which cannot be reached by attachment or taken on execution in an action at law, the averments of the existence of such property are jurisdictional and must be proved as laid. Should the averments of the bill not sufficiently show the existence of such property, the bill may be dismissed on demurrer, and must be dismissed on hearing if it does not appear that there is such property, unless the objection has been waived either by filing a bond to pay the amount of any indebtedness that may be established, and thus dissolving the equitable attachment, or in some other way in which a defendant in equity may waive the objection that the plaintiff has a plain, adequate and complete remedy at law.⁹³

§ 3207. Parties. A creditor's bill being a bill in equity, the question of parties thereto—in its broad aspects, at least—will be determined by the same rules which govern the question of parties to a suit in equity of any other character, and it was long ago laid down as a general rule of equity practice, which rule is, of course, subject to various exceptions,⁹⁴ that "however numerous the persons interested in the subject of a suit, they must all be made parties plaintiffs or

⁸⁹ *Williams v. Adler-Goldman Commission Co.*, 227 Fed. 374, 375, citing many cases.

⁹⁰ *James H. Rice Co. v. McJohn*, 244 Ill. 264, 91 N. E. 448.

⁹¹ *Dawson v. First Nat. Bank of Paris*, 228 Ill. 577, 81 N. E. 1128.

⁹² *Hollins v. Brierfield Coal & Iron Co.*, 150 U. S. 371, 37 L. Ed. 1113; *Brown v. Lake Superior Iron Co.*, 134 U. S. 530, 33 L. Ed. 1021; *Reynes v. Dumont*, 130 U. S. 354, 32 L. Ed. 934; *Citizens' Bank & Trust Co. v. Union*

Mining & Gold Co., 106 Fed. 97; *State v. Circuit Court for Green Lake County*, 98 Wis. 143, 73 N. W. 788. See also *American Brake Shoe & Foundry Co. v. Pere Marquette R. Co.*, 205 Fed. 14, 18; *Union Trust Co. v. Southern Sawmills & Lumber Co.*, 166 Fed. 193.

⁹³ *Hosher-Platt Co. v. Miller*, 190 Mass. 285, 76 N. E. 650.

⁹⁴ *Ribon v. Chicago, R. I. & P. R. Co.*, 16 Wall. (U. S.) 446, 21 L. Ed. 367; *Story v. Livingston*, 13 Pet. (U. S.) 359, 10 L. Ed. 200.

defendants, in order that a complete decree may be made; it being the constant aim of a court of equity to do complete justice by embracing the whole subject, deciding upon and settling the rights of all persons interested in the subject of a suit to make the performance of the order perfectly safe to those who have to obey it, and to prevent future litigation."⁹⁵ Accordingly, it has been said that the right of several judgment creditors to join as co-plaintiffs and enforce their rights by creditor's bill in a single action is well established and should be regarded with favor as preventing a multiplicity of suits.⁹⁶

But a creditor's bill may be brought by a single judgment creditor in his own right and for his sole benefit.⁹⁷ Of the correctness of this

⁹⁵ *Caldwell v. Taggart*, 4 Pet. (U. S.) 190, 7 L. Ed. 828. After quoting the statement of the rule above set out, the court, in this case, continuing, stated that the general rule was also laid down in the following language: "All persons are to be made parties, who are legally or beneficially interested in the subject-matter and result of the suit." Mr. Whitehouse, however, in his work on equity practice (1 Whitehouse, Equity Practice, § 50), after recognizing that a common statement of the rule is that "all persons materially interested either legally or beneficially in the subject-matter of a suit should be made parties to it, and if they will not join as plaintiffs, then they should be made defendants," declares that such statement thereof "is not wholly satisfactory and requires explanation and analysis." This explanation and analysis he makes in succeeding sections (§§ 51-53) and, in conclusion, says (§ 53): "Bearing in mind then the discussion of terms and classes above, the general rule governing the joinder of parties readily frames itself in three parts as follows: 1. All persons having any interest, whether formal or material, in the subject-matter of the suit, may properly be made parties if desired. 2. All persons having a material interest in the

subject-matter of the suit, should be made parties if practicable. 3. All persons having a material interest in the subject-matter of the suit of such a nature that an effective decree cannot be rendered in their absence without prejudice to that interest, must be made parties. Any person thus interested who will not join as plaintiff may be joined as defendant." See also *Barney v. Baltimore City*, 6 Wall. (U. S.) 280; 18 L. Ed. 825, quoted in 1 Whitehouse, Equity Practice, § 54, note 58, as sustaining the division of parties made by Mr. Whitehouse.

A subsequent purchaser should be made a party to a suit to set aside a fraudulent conveyance. *Aman v. Walker*, 165 N. C. 224, 81 S. E. 162. But the co-debtors of one of two or more joint debtors, making a fraudulent conveyance, are not necessary parties to a suit to avoid such conveyance. *Graham Grocery Co. v. Chase*, 75 W. Va. 775, 84 S. E. 785.

⁹⁶ *Enright v. Grant*, 5 Utah 334, 15 Pac. 268. See also *Maynard v. Armour Fertilizer Works*, 138 Ga. 549, 75 S. E. 582; *Morehouse v. Kissam*, 58 N. J. Eq. 364, 43 Atl. 891, aff'd 60 N. J. Eq. 443, 45 Atl. 966; *Hancock v. Wooten*, 107 N. C. 9, 11 L. R. A. 466, 12 S. E. 199.

⁹⁷ *Bartlett v. Drew*, 57 N. Y. 587. See also *Pettibone v. Toledo, C. & St. L. R. Co.*, 148 Mass. 411, 1 L. R. A.

proposition, not only when the governing statute provides in accordance therewith,⁹⁸ but even in the absence of a statute dealing with the subject and when it is the general equity jurisdiction that is invoked, there can be no doubt although it has, perhaps, been more often accepted without question than adjudicated. In an early New York case, however, the chancellor, addressing himself to the question "as to the right of the other judgment-creditors of the defendants, and whether they are necessary parties," said: "It might be sufficient, in this case, to say they do not stand in the same right with the complainants, as it does not appear by the answer that executions in those causes have been actually returned unsatisfied, which was necessary to give them any right to come into this court for relief.

* * * But it may be useful to inquire whether they would be necessary parties, even if that fact was distinctly alleged in the answer. I have once had occasion to examine this question elsewhere, and the conclusion at which I arrived was, that the creditor whose execution at law was returned unsatisfied, might file a bill to reach the equitable estate of the defendants, either in his own name and for his own benefit, or might join with others standing in the same situation in a joint suit for their joint benefit, in proportion to the amount due to each, * * * or that he might file a bill in the usual way, in behalf of himself and all others standing in the same situation, as judgment-creditors whose executions had been returned unsatisfied, and who might choose to come in under the decree, and contribute to the expenses of the suit. I can see no reasonable objection to either mode of proceeding. The latter, at the first blush, may appear the most equitable, but the two first are much more likely to insure a vigilant prosecution of the suit. And, on further examination, it may seem unjust that the creditor who has sustained all the risk and expense of bringing his suit to a successful termination, should in the end be obliged to divide the avails thereof with those who have slept upon their rights, or who have intentionally kept back that they might profit by his exertions, when there could no longer be any risk in becoming parties to the suit."⁹⁹ Again, but at a much later day, the Supreme Court of California declared that "a judgment creditor, by filing a bill in equity to subject equitable assets to the payment of his judgment, acquires an equitable lien on such assets and a priority over any other creditor who has not already filed such a bill. Other

787, 19 N. E. 337; *Pierce v. Milwaukee Const. Co.*, 38 Wis. 253.

⁹⁸ *Rioux v. Cronin*, 222 Mass. 131, 109 N. E. 898.

⁹⁹ *Edmeston v. Lyde*, 1 Paige Ch. (N. Y.) 637, 19 Am. Dec. 454.

judgment creditors who have not filed such a bill are therefore not necessary parties to the action, and their presence is not necessary for the protection of the defendants."¹ Especially will a single creditor be permitted to sue without making his suit one for the joint benefit of himself and other creditors when such other creditors are not of his rank as far as judgment, unsatisfied execution, etc., is concerned,² and it is obviously true that he may sue alone when it is so expressly provided by statute.³

It has been said that the general rule is that the judgment debtor is a necessary party to a creditor's action⁴ to reach property claimed to have been transferred in fraud of the creditor's rights, and then this rule applies to an action to set aside a fraudulent transfer of property by a corporation to its stockholders.⁵

Where, by his creditor's bill, a judgment creditor of a corporation does not seek to obtain the satisfaction of his judgment from the stockholders in the corporation but, rather from third persons, the stockholders are not necessary parties defendant; "the corporation being in court, it results that so far as they (the stockholders) are affected, if at all, it is vicariously only."⁶

Even when it is the unpaid subscriptions of stockholders⁷ or other corporate assets in the latter's hands which are sought to be reached, all of the stockholders are not required to be made parties defendant,⁸ in the absence of some statute requiring it.⁹ The judgment creditor in such case has nothing to do with the equities existing among the stockholders¹⁰ and when a part only of the stockholders

¹Seymour v. McAvoy, 121 Cal. 438, 41 L. R. A. 544, 53 Pac. 946.

²Way v. Bragaw, 16 N. J. Eq. 213, 84 Am. Dec. 147.

³Hall v. Henderson, 114 Ala. 601, 62 Am. St. Rep. 141, 21 So. 1020.

⁴Where the judgment debtor is not a party to, nor in any way represented in a judgment creditors' action, such action cannot be maintained. Ferguson v. Ann Arbor R. Co., 17 N. Y. App. Div. 336, 45 N. Y. Supp. 172.

⁵Lathrop, Shea & Henwood Co. v. Byrne, 115 N. Y. App. Div. 846, 100 N. Y. Supp. 1041.

⁶Johnson v. United Rys. Co., 247 Mo. 326, 152 S. W. 362.

⁷Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; Ogilvie v. Knox Ins. Co.,

22 How. (U. S.) 380, 16 L. Ed. 349; Pierce v. Milwaukee Const. Co., 38 Wis. 253.

⁸Singer v. Hutchinson, 83 Ill. App. 675, aff'd 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388; Bartlett v. Drew, 57 N. Y. 587; Pierce v. Milwaukee Const. Co., 38 Wis. 253.

⁹See Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885, which holds that Terry v. Tubman, 92 U. S. 156, 23 L. Ed. 537, and Pollard v. Bailey, 20 Wall. (U. S.) 520, 22 L. Ed. 376, are not in conflict with Ogilvie v. Knox Ins. Co., supra, for the reason, inter alia, that the contrary holdings in those cases have a statutory basis.

¹⁰Hatch v. Dana, 101 U. S. 205, 25 L. Ed. 885; Ogilvie v. Knox Ins. Co.,

are made parties defendant, the remedy of such defendants, if they desire an equitable distribution of the burden is to move for a receiver,¹¹ or file a cross-bill.¹²

III. SUPPLEMENTARY PROCEEDINGS

§ 3208. Statutory provisions. In some of the states, statutes have been enacted expressly providing a remedy in favor of creditors who are unable to collect their judgment claims by the ordinary legal processes.¹³ This remedy is the one that is commonly known as supplementary proceedings or proceedings supplementary to execution. Such proceedings are generally held to be intended to be a substitute for the creditor's bill, which would otherwise have been the creditor's recourse,¹⁴ except in cases where they are not adequate to accomplish

22 How. (U. S.) 380, 16 L. Ed. 349; *Singer v. Hutchinson*, 83 Ill. App. 675, aff'd 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388; *Bartlett v. Drew*, 57 N. Y. 587.

¹¹ *Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885.

¹² *Hatch v. Dana*, 101 U. S. 205, 25 L. Ed. 885; *Singer v. Hutchinson*, 83 Ill. App. 675, aff'd 183 Ill. 606, 75 Am. St. Rep. 133, 56 N. E. 388.

¹³ The federal statute (4 Fed. St. Ann. p. 580, § 916), providing that "the party recovering a judgment in any common-law cause in any circuit or district court, shall be entitled to similar remedies upon the same; by execution or otherwise, to reach the property of the judgment debtor, as are now provided in like causes by the laws of the state in which such court is held, or by any such laws hereafter enacted which may be adopted by general rules of such circuit or district court, and such courts may, from time to time; by general rules, adopt such state laws as may hereafter be in force in such state in relation to remedies upon judgments, as aforesaid, by execution or otherwise," applies to supplementary proceedings to examine the debtor under a judgment rendered in a common-law

cause. *Ex parte Boyd*, 105 U. S. 647, 26 L. Ed. 1200. See also *Canal & C. Sts. R. Co. v. Hart*, 114 U. S. 654, 29 L. Ed. 226; *Meyer v. Consolidated Ice Co.*, 163 Fed. 400, 402.

¹⁴ *McKenzie v. Hill*, 9 Cal. App. 78, 98 Pac. 55; *Importers' & Traders' Nat. Bank of New York v. Quackenbush*, 144 N. Y. 651, 39 N. E. 77, 143 N. Y. 567, 38 N. E. 728; *Smith v. Cutter*, 64 N. Y. App. Div. 412, 72 N. Y. Supp. 99; *Bronson v. Wilmington North Carolina Life Ins. Co.*, 85 N. C. 411. See also *Mason v. Weston*, 29 Ind. 561.

In *Newell v. Dart*, 28 Minn. 248; 9 N. W. 732, the court referred to supplementary proceedings as "a satisfactory substitute" for a creditor's bill.

The statute supplies a legal statutory remedy in place of the existing equitable one. *Regina Music Box Co. v. F. G. Otto & Son*, 124 Fed. 747. But see *In re Albright*, 55 N. Y. Misc. 324, 105 N. Y. Supp. 486. In this case it appeared that, pending supplementary proceedings, an action in the nature of a creditors' bill to set aside a conveyance made by the judgment debtor to the third person sought to be examined in the supplementary proceedings was commenced in a foreign

the purpose of such a bill,¹⁵ and especially will such an intention be

court, and it was claimed that by instituting such action "the judgment debtor has elected his remedy, and ought not to be permitted to continue this proceeding in order to enable him to obtain evidence in aid of his creditors' action." The court, however, citing different New York cases, the latest one of which was *In re Bachiller De Ponce De Leon*, 69 N. Y. Supp. 242, stated that "it is held that the remedies provided by supplementary proceedings and by judgment creditors' actions are concurrent, and that the judgment creditor may prosecute either or both until satisfaction of the judgment, and that the judgment creditor does not waive his right to examine in supplementary proceedings by bringing a creditors' action."

¹⁵ *Rapp v. Whittier*, 113 Cal. 429, 45 Pac. 703; *Gordon v. Lemp*, 7 Idaho 677, 65 Pac. 444; *Ryan v. Maxey*, 14 Mont. 81, 35 Pac. 515; *Monroe v. Reid*, 46 Neb. 316, 64 N. W. 983, citing *Feldenheimer v. Tressel*, quoted *infra*, this note. See also *Ludes v. Hood, Bombright & Co.*, 29 Kan. 49.

In *Feldenheimer v. Tressel*, 6 Dak. 265, 43 N. W. 94, the court, after stating that the bill filed by plaintiff as a judgment creditor to set aside an alleged fraudulent conveyance of the judgment debtor's lands, etc., might "be maintained unless some other remedy equally effectual has been provided by law," said: "It is claimed that such remedy has been provided by the Code of Civil Procedure in its provisions in regard to proceedings supplementary to execution, and that this remedy is exclusive. We are unable to assent to this proposition, for several reasons. The remedy afforded by proceedings supplementary to execution is not as effective as that furnished by creditors' bills as ad-

ministered by courts of equity. They are merely proceedings in the original action for the purpose of enforcing the judgment already recovered. *Dresser v. Van Pelt*, 15 How. Pr. 19; *Gould v. Torrance*, 19 How. Pr. 560. In the latter case the court, in defining these proceedings, says that they are in the nature of additional or equitable executions. It is not in any sense a new suit. By these proceedings a summary mode is instituted for ascertaining what, if any, property a judgment creditor [debtor] may have under his control or in his possession subject to execution, and if any persons are owing him, and to what extent. Third persons cannot be made parties to the original suit, though they may be compelled to appear and be examined as to any property under their control or in their custody belonging to the defendant, as to whether they owe him. But this is the extent to which the inquiry can go in such proceedings. If property belonging to the defendant is found upon such an examination in the hands of these persons it may be ordered turned over to apply on the judgment debt; but if the right of the person having it under apparent title comes in question, if he claims to be the owner of the property, the question of title cannot be summarily disposed of by the court or judge before whom the proceedings may be pending. Such questions must be adjudicated and determined by an action brought for that purpose. It is thus made apparent that the remedy by proceedings supplementary to execution are much less efficacious, and in many cases would not afford relief to the same extent as a bill in equity, and this even though the proceeding should be prosecuted to a re-

recognized when there has been express repeal of the statute specially

ceivership and carried to its utmost extent under the statute. * * * It is doubtless true that in many jurisdictions adequate remedies have been provided by law to accomplish some of the purposes of creditors' suits—discovery of assets, debts owing by third persons, and the like—and for these purposes proceedings supplementary to execution may be considered a substitute. But for the purpose of reaching equitable assets of the judgment debtor, or to set aside fraudulent transfers of property, supplemental proceedings provide an inadequate remedy; and, though in many respects they may serve as a substitute for a creditor's bill, they are by no means the exclusive remedy to which the creditor may resort. He may still have his creditor's suit." After citing certain New York cases, decided prior to *Importers' & Traders' Nat. Bank of New York and Smith v. Cutter*, cited *supra* note 14 (*Feldenheimer v. Tressel* itself antedates these two cases), an Indiana case, decided prior to *Mason v. Weston*, also cited *supra*, note 14, and an early Kentucky case, the court continued: "We cannot assume that the legislature intended to take from creditors any of the remedies that they enjoyed under the court of chancery for the enforcement of their judgment, after having exhausted their remedy at law, and turn them over to the often inadequate and imperfect remedy provided by the statute in regard to proceedings supplementary to execution. Upon reason and authority the remedy by creditor's suit exists now as it formerly did under the court of chancery. Under the Codes of Procedure a suit in the nature of a creditor's bill may be maintained under the same rules which formerly prevailed in courts of

chancery. The Code has changed the form of the suit, but has not affected the rights of the parties or impaired the powers of courts having equity jurisdiction from administering proper relief in a case showing a state of facts which formerly were sufficient to authorize a court of chancery to act." See also *Matlock v. Babb*, 31 Ore. 516, 49 Pac. 873. And compare *Merchants' Nat. Bank of Bismarck v. Braithwaite*, 7 N. D. 358, 66 Am. St. Rep. 653, 75 N. W. 244, in which it is said that supplementary proceedings "are a statutory substitute for the old mode of reaching equitable assets by a creditors' bill."

In *Enright v. Grant*, 5 Utah 334, 15 Pac. 268, the court said: "If the statute in relation to supplementary proceedings on execution is to be regarded as a statute merely prescribing the practice or mode of procedure upon bills in the nature of creditors' bills, then it should be followed, and it would prohibit any other mode. I think it is plain that it is not to be so construed. It is a statutory proceeding providing for a summary process, but its efficiency and utility depend much upon statutory construction. Its power to reach creditors or their property which may be outside the limits of the judicial district in which the proceedings are had, may be doubted. There is no provision for a receiver, and it may be said that it does not purport to be a direction as to how an independent equitable jurisdiction shall be exercised, but only to provide a speedy and summary proceeding to which the creditor may resort if he sees fit to do so. *Reed v. Baker*, 42 Mich. 272, 3 N. W. Rep. 959. Original suits brought by creditors in the nature of creditors' bills are well-recognized subjects of equitable jurisdiction, both in England and

authorizing the employment of the remedy by creditor's bill.¹⁶

As the proceeding supplementary to execution is wholly statutory,¹⁷ and whether corporations are within the purview of the statute, and, provided they are, to what extent and in what cases they may avail of, and are amenable to its provisions depends, of course, upon the language used therein.¹⁸ The language used in the statutes of the

in this country, wherein the courts will proceed, according to the established principles and course of equity, to sequester and administer the estate of a debtor, and apply it to the liquidation of the indebtedness. Where a remedy exists at common law, and a new remedy is given by statute, and there are no negative words in the statute indicating that the new remedy is to be exclusive, the presumption is that it was meant to be cumulative, and a party may at his option pursue either the statutory or common-law remedy. Cooley, Torts, 651, and cases cited in note 1. In my opinion the statute under consideration is not a substitute for creditors' suits."

Under the express provisions of the New York Code of Civil Procedure (section 2463), article 1 of the title "Proceedings supplementary to an execution against property" in c. 17 of such Code (of which article section 2463 forms a part) "does not authorize the seizure of, or other interference with, any property, which is expressly exempt by law from levy and sale by virtue of an execution; or any money, thing in action, or other property, held in trust for a judgment debtor, where the trust has been created by, or the fund so held in trust has proceeded from a person, other than the judgment debtor; or the earnings of the judgment debtor for his personal services, rendered within sixty days, next before the institution of the special proceeding; when it is made to appear, by his oath

or otherwise, that those earnings are necessary for the use of a family, wholly or partly supported by his labor."

¹⁶ *Graham v. La Crosse & M. R. Co.*, 10 Wis. 459. See also *Seymour v. Briggs*, 11 Wis. 196. Immediately after the decision in *Graham v. La Crosse & M. R. Co.*, supra, was announced, the remedy by creditor's bill was restored by statute. *Winslow v. Dousman*, 18 Wis. 456. See also *Williams v. Sexton*, 19 Wis. 42; *Gates v. Boomer*, 17 Wis. 455.

Since the adoption of the Colorado Code, which expressly repealed the statute specially authorizing a creditor's bill, the remedies provided in such Code "for subjecting the property, and choses in action of a judgment debtor to execution, must be pursued whenever adequate for the purpose, and * * * a bill in the nature of a creditor's bill, cannot be maintained in such cases." *Hexter v. Clifford*, 5 Colo. 168, 171.

¹⁷ *Bryant v. Bank of California* (Cal.), 7 Pac. 128; *Heyl v. Taylor*, 64 N. Y. Misc. 31, 117 N. Y. Supp. 916; *Mede v. Meyer*, 55 N. Y. Misc. 621, 105 N. Y. Supp. 957.

¹⁸ Under the earlier New York Code, the provisions thereof relating to supplementary proceedings applied to natural persons only. *Boucker Contracting Co. v. W. H. Callahan Contracting Co.*, 218 N. Y. 321, 113 N. E. 257; *Logan v. McCall Pub. Co.*, 140 N. Y. 447, 35 N. E. 655; *Meyer v. Consolidated Ice Co.*, 132 N. Y. App. Div. 265, 116 N. Y. Supp. 906;

several states is, as might be expected, variant, and, within the brief limits of this section, only a few outstanding propositions relating to the law of supplementary proceedings can be laid down.¹⁹

§ 3209. Proceedings as collateral or independent. Even when it is held that such proceedings are collateral to the original action,²⁰ as well as, obviously, when they are deemed to constitute an independent action,²¹ they are regarded as embracing many of the ele-

Stevens v. Page, 4 N. Y. Misc. 517, 24 N. Y. Supp. 698.

The Missouri statute is a highly penal one, and must be strictly construed. In *re Koehler*, 174 Mo. App. 297, 156 S. W. 982.

In an early Indiana case, it was said that "justice requires that a remedy so extraordinary and summary should be confined to the cases clearly within the provisions of the statute." *Burt v. Hoettinger*, 28 Ind. 214, 217.

¹⁹ As a general rule whatever procedure would have been available to the judgment creditor to aid in collecting his judgment may be taken advantage of by the assignee of the judgment. *American Fidelity Co. v. White*, 122 N. Y. App. Div. 93, 106 N. Y. Supp. 738.

²⁰ *McKenzie v. Hill*, 9 Cal. App. 78, 98 Pac. 55.

²¹ Describing the proceedings under the Indiana statute, the Appellate Court of Indiana, in *Harper v. Behagg*, 14 Ind. App. 427, 42 N. E. 1115, said: "The proceeding [involved] is one known as 'supplementary to execution' * * * The judgment rendered is a final judgment, absolute and unconditional, ascertaining and determining the rights of the parties as to the matters in issue, and adjudging that [a third person indebted to the judgment debtor] * * * must pay a fixed sum at a specified date. The numerous cases of appeals in proceedings of this character settle, beyond question, that appeals will

properly lie from such judgments. The case of *Pursell v. Papenheimer*, 11 Ind. 327, might be authority for holding the judgment below to be erroneous by reason of the nonmaturity of the debt but it certainly does not sustain appellee's position that it is not final nor appealable, since an appeal was there taken and the cause reversed. The proceeding cannot be regarded as a continuation of the original action, or a mere incident to it. While it is true that it is in aid of the original judgment, and its purpose is to compel the payment of that judgment, the adjudications in this state have definitely determined that it is an independent action, and not a part of the original case. *Pounds v. Chatham*, 96 Ind. 342; *Railway Co. v. Summers*, 113 Ind. 10, 14 N. E. 733. Although, under the Code, since 1881, the mode of procedure is summary, and without formal issues, other than the complaint or affidavit, and demurrer or motion to dismiss or strike out, to test its sufficiency * * * yet it is a civil action. *Burkett v. Holman*, 104 Ind. 6, 3 N. E. 406; *Baker v. State*, 109 Ind. 47, 9 N. E. 711; *Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412; *Balz v. Benninghof*, 5 Ind. App. 522, 32 N. E. 595. In various respects these proceedings have been held to possess the attributes of the ordinary civil action, so far as in harmony with the special provisions of the Code governing them. Thus, they may be commenced in a county other than that in which

ments which are characteristics of such an independent action.²²

§ 3210. Purposes for, and conditions under which, proceedings allowed. As a general rule, supplementary proceedings contemplate an examination, on proper application,²³ of the judgment debtor or some third person or persons, under oath, touching the former's property and any disposition or concealment thereof,²⁴ and, upon the dis-

the judgment was rendered. *Cooke v. garnishee's* creditor. They are a Ross, 22 Ind. 157. Changes of venue substitute for a creditors' bill." are permitted in them. *Burkett v. McKenzie v. Hill*, 9 Cal. App. 78, 98 Holman, supra; *Burkett v. Bowen*, Pac. 55. 118 Ind. 379, 21 N. E. 38; *Kissell v. 23* The California Code of Civil Procedure provides "that supplementary proceedings shall be commenced by affidavits, which must contain the requirements of the section of the Code under which they are made. Such an affidavit takes the place of a creditors' bill in chancery, * * * and, as the legal substitute for that procedure, it must not only contain the necessary averments to give the court jurisdiction over it, but it must also be filed in the court, or delivered to the clerk for that purpose. Until the proceeding is thus commenced, it has no legal existence to set in motion the jurisdiction of the court to make the necessary orders for the examination of the judgment debtor or garnishee in aid of the judgment; there is nothing upon which the judge of the court can judicially act." *Bryant v. Bank of California* (Cal.), 7 Pac. 128.

Anderson, 73 Ind. 485. Third persons may be brought in, and, under proper averments, their rights determined as to the property or money in controversy. *Harris v. Howe*, 22 Ind. App. 419, 28 N. E. 711; *Bronze Co. v. Clark*, 123 Ind. 230, 23 N. E. 855; *Burkett v. Bowen*, supra; *McMahan v. Works*, 72 Ind. 19. A jury trial may be demanded. *Bronze Co. v. Clark*, supra; *McMahan v. Works*, supra. The affidavit may be amended. *Burkett v. Bowen*, supra; *Hutchinson v. Trauerman*, 112 Ind. 21, 13 N. E. 412. But, by the case last cited, and *Balz v. Benninghof*, supra, it is decided that special findings and conclusions of law thereon are not appropriate."

²² Thus the California Court of Appeals has said that "proceedings supplementary to execution, while collateral to an original action, are still quite independent of it. Indeed, they embrace all the elements of an independent civil action. It has its own record, and only parties thereto need be served with notice of appeal. In *Wells v. Torrance*, 119 Cal. 437, 441, 51 Pac. 626, these proceedings are called, so far as a garnishee is concerned, original proceedings. In *Coffey v. Haynes*, 124 Cal. 561, 71 Am. St. Rep. 99, 57 Pac. 482, they are said to be proceedings not against the judgment debtor, but against his [the judgment debtor in the hands of

covery of property which should be devoted to the satisfaction of the judgment debt, the making of all orders and judgments necessary to compel its application thereto.²⁵

One of the conditions precedent to supplementary proceedings, as to a creditor's bill,²⁶ is, it has been held, the exhaustion by the judgment creditor of his remedies at law. "Proceedings supplementary to execution," says the New York Court of Appeals, "are remedies in equity for the collection of the creditor's judgment, and were intended as a substitute for the creditor's bill, as formerly used in chancery. * * * In such cases it was the settled rule that unless the creditor had exhausted all his remedies at law, or in case he was not in a position to avail himself of all the ordinary remedies which courts of law gave for the enforcement of judgments, the bill in equity could not be maintained, and would be dismissed. The creditor must pursue his remedy at law to every available extent before he can resort to equity for relief. * * * The same rule applies to proceedings supplementary to execution, and it is not enough that forms are observed by the return of an execution which is not effective to reach all of the debtor's property."²⁷

the defendant, the court may, by any of the methods known to ordinary chancery practice, apply such assets to the payment of the judgment, but where the answer not only fails to discover, but also denies, the possession of assets, such answer cannot be traversed and the court proceed to try such traverse and grant relief in case the defendant is proved actually to be in possession of assets. *Philadelphia Fire Ins. Co. v. Central Nat. Bank of Chicago*, 1 Ill. App. 344. *Contra, Schroetter v. Brown*, 59 Ill. App. 24, holding that bills under such statute "are not pure bills of discovery, and are not dependent, alone, upon a discovery, although discovery may be had under them."

²⁵ See *Smith's Equitable Remedies of Creditors*, § 201, p. 224.

Supplementary proceedings cannot reach property in custodia legis. *Williams v. Smith*, 117 Wis. 142, 93 N. W. 464.

²⁶ See § 3206, supra.

²⁷ *Importers' & Traders' Nat. Bank*

of *New York v. Quackenbush*, 143 N. Y. 567, 38 N. E. 728, motion for re-argument denied, 144 N. Y. 651, 39 N. E. 77.

In *Dilling, Baker & Co. v. Foster*, 21 S. C. 334, 339, wherein it was contended "that the examination of the debtor disclosed sufficient property, subject to levy and sale, to pay the plaintiff's judgment, and therefore no receiver should have been appointed," the court said: "It is true that there are authorities cited by appellant which would seem to support this view, but these cases are based upon the analogy of proceedings in a creditor's bill, but they are not subject to all the rules governing the chancery practice under a creditor's bill. Hence, while under that practice, where property was found subject to levy and sale under execution, the court of chancery would, at one time, have granted an order suspending the proceedings until the creditor could proceed to sell under his execution, this was because of the fact that

Moreover, supplementary proceedings cannot be maintained when their primary object is not to discover property with which to satisfy the judgment upon which they are based, but rather to obtain evidence for use upon the trial of a subsequent action, and when such obtaining of evidence is the end sought, a restraining order will lie against the proposed examination.²⁸ Nor can a judgment creditor resort to such proceedings when his object, while ostensibly the examination of one of his judgment debtors, is in reality the examination of third persons for the purpose of discovering whether he has a cause of action against them.²⁹

The right of a judgment creditor of a foreign corporation to institute supplementary proceedings for the examination of a third person is unaffected by the fact that the court, acting under its general equitable jurisdiction, has, in a stockholders' action, appointed a common-law receiver *pendente lite* to prevent the unlawful disposition and any waste of the debtor's property, since the receiver does not take title to such property, does not possess any authority to institute proceedings to ascertain what property he is entitled to claim from third persons, and does not have the right to recover any debts owing to the corporation.³⁰

Jurisdiction is dependent upon the statute, and, to authorize the institution of the supplementary proceedings provided for, the judgment must be for a sum not less than the jurisdictional amount.³¹

§ 3211. Necessity of valid judgment. Supplementary proceedings fall with the invalidity of the judgment on which they are based,³² and when the judgment expires pending the proceedings, which of themselves do not operate to keep it alive, a motion will lie to set them aside.³³

equity and law were administered by different tribunals, and as the powers of the court of equity were only invoked, in aid of the law court, such powers would not be exercised where such aid was not necessary. But since the same court now possesses the powers of both of the former courts, the former practice is inapplicable, and there is now no reason why property subject to levy and sale may not be reached under supplementary proceedings."

²⁸ *Jones v. Ramsdell*, 174 N. Y. App. Div. 13, 159 N. Y. Supp. 209.

²⁹ *Jones v. Standard Plunger-Elevator Co.*, 167 N. Y. App. Div. 178, 152 N. Y. Supp. 910.

³⁰ *Howell v. German Theatre*, 64 N. Y. Misc. 110, 117 N. Y. Supp. 1124, distinguishing *Bueki v. Bueki*, 26 N. Y. Misc. 69, 56 N. Y. Supp. 439.

³¹ *Mede v. Meyer*, 55 N. Y. Misc. 621, 105 N. Y. Supp. 957.

³² *In re Korpilinski*, 84 N. Y. Misc. 96, 146 N. Y. Supp. 859.

³³ *Merchants' Nat. Bank of Bismarek v. Braithwaite*, 7 N. D. 358, 66 Am. St. Rep. 653, 75 N. W. 244.

An irregular judgment will not sustain an order for the examination of the judgment debtor in such proceedings.³⁴ But the judgment on which supplementary proceedings are based cannot be attacked by the judgment debtor on an order to show cause why he should not be punished for contempt in failing to appear for examination.³⁵ Nor can a third person sought to be examined by a receiver duly appointed in supplementary proceedings raise an issue as to the validity of the judgment which forms the basis of the proceedings instituted.³⁶

§ 3212. Procedure. The statute which provides the remedy prescribes the mode of procedure and that mode must be followed. Unless there is a compliance with the statutory requirements, the proceedings cannot be sustained.³⁷ Under the Iowa statute, the proceedings, the principal purpose of which is to discover property, are summary and contemplate neither pleadings nor formal issue.³⁸

When the statute expressly describes the person upon whom the service of process must be made, the proceedings can only be maintained when the process is served in accordance therewith.³⁹ Warrant for any action taken in supplementary proceedings must be found in the statute.⁴⁰

Under the New York Code, orders made in supplementary proceedings are proceedings of a civil character. The failure of the judgment debtor to appear for examination, pursuant to order, either upon the day originally set or upon an adjourned day is a civil, and not a criminal, contempt, and the order adjudging contempt in such

³⁴ *Simon v. Underwood*, 61 N. Y. Misc. 369, 115 N. Y. Supp. 65.

Where a judgment becomes null and void by reason of a bankruptcy proceeding (Bankruptcy Law, § 67f), no valid proceeding supplementary to execution can be instituted or prosecuted for the obvious reason that there is no judgment to enforce. *Roscoe Lumber Co. v. Payne*, 149 N. Y. Supp. 331.

³⁵ *Feinberg v. Kuteosky*, 147 N. Y. App. Div. 393, 132 N. Y. Supp. 9.

³⁶ *Rabbe v. Astor Trust Co.*, 61 N. Y. Misc. 650, 114 N. Y. Supp. 131.

³⁷ *Bryant v. Bank of California* (Cal.), 7 Pac. 128.

³⁸ *Bennett v. Valley Min. Co.*, 142 Iowa 53, 120 N. W. 654.

As to the summary character, etc., of proceedings under the Indiana statute, see *Harper v. Behagg*, 14 Ind. App. 427, 42 N. E. 1115.

³⁹ *Meyer v. Consolidated Ice Co.*, 196 N. Y. 471, 90 N. E. 54.

A supplementary proceeding is a special proceeding within the meaning of a statute providing the mode of service of process in a special proceeding except where special provision relating thereto is otherwise made. *Meyer v. Consolidated Ice Co.*, 196 N. Y. 471, 90 N. E. 54.

⁴⁰ *Heyl v. Taylor*, 64 N. Y. Misc. 31, 117 N. Y. Supp. 916.

a case should recite that the court has found that the conduct of the judgment debtor has been such as to defeat, impair, impede, or prejudice the right or remedy of the judgment creditor.⁴¹

Supplementary proceedings should be terminated within a reasonable time, and, even though an adjournment may be permitted in a proper case, it should not be sanctioned when its purpose is merely to harass the judgment debtor.⁴²

§ 3213. Receivers. In the course of supplementary proceedings the court may generally, under the statute, appoint a receiver.⁴³ In New York, if a receiver is thus appointed, the title to the judgment debtor's property vests in him ⁴⁴ and the judgment debtor is not a

⁴¹ *Feinberg v. Kutcosky*, 147 N. Y. App. Div. 393, 132 N. Y. Supp. 9.

⁴² *Feinberg v. Kutcosky*, 147 N. Y. App. Div. 393, 132 N. Y. Supp. 9. In this case it was said that "while a judgment creditor has the right to fully examine his judgment debtor and ascertain all that he can with respect to his property or lack of it, the practice is altogether too common of adjourning the proceeding from time to time and prolonging the examination merely for the purpose of annoying the judgment debtor. While the attention of the learned county judge was not called to the adjournment taken in the present case, this court takes this occasion to condemn such practice. Judges granting orders in supplementary proceedings have supervisory power over such examinations had before referees, and on application of the judgment debtor can compel their termination within a reasonable time and after a fair examination, and should be alert so to do."

⁴³ As to receivers, see generally the chapter on Receivers, *infra*.

In New York, it is held that it is not a condition precedent to the appointment of a receiver that it be made to appear that the judgment debtor has property which may be

applied to the satisfaction of the judgment. *Ryan v. Wagner*, 143 N. Y. App. Div. 176, 127 N. Y. Supp. 973; *Dease v. Reese*, 39 N. Y. Misc. 657, 80 N. Y. Supp. 590.

⁴⁴ The New York Code of Civil Procedure, § 2468, provides that "the property of the judgment debtor is vested in a receiver, who has duly qualified, from the time of filing the order appointing him, or extending his receivership, as the case may be; subject to the following exceptions: 1. Real property is vested in the receiver, only from the time when the order, or a certified copy thereof, as the case may be, is filed with the clerk of the county where it is situated. 2. Where the judgment debtor, at the time when the order is filed, resides in another county of the State, his personal property is vested in the receiver, only from the time when a copy of the order, certified by the clerk in whose office it is recorded, is filed with the clerk of the county where he resides."

The federal court of appeals for the second circuit, which includes New York, has said, however, that there is authority for the proposition that a receiver, such as one in supplementary proceedings, does not, by virtue of his appointment, acquire

necessary party defendant in a proceeding by the receiver to examine a third person claimed to be in possession of property belonging to such debtor.⁴⁵ A receiver appointed in supplementary proceedings is for the benefit of,⁴⁶ and represents only the judgment creditor who procured his appointment,⁴⁷ and such others as may have succeeded in having the receivership extended to their claims, each becoming entitled to payment in full in the order of his diligence.⁴⁸ Under the New York statute, the appointment of a receiver in supplementary proceedings does not terminate the right of the judgment creditor to apply for an order for the examination of a third person.⁴⁹

§ 3214. Transfer of property by debtor. The Washington statute expressly grants the court the power in appointing a receiver to enjoin the judgment debtor and all persons with notice of the supplementary proceedings from conveying or interfering with the property involved, but when such property is a certain number of shares of stock in a corporation, the injunction cannot be made to extend to all of the stock, property and holdings of such corporation, notwithstanding the latter was organized as a holding company for the judgment debtor's family.⁵⁰

In a New York case it was held that a corporation, forbidden, by the order requiring it to appear for examination in supplementary proceedings, "to transfer or make or suffer any other disposition of any property belonging to such judgment debtor * * * or in any manner to interfere therewith, until further order in the premises," was not guilty of contempt, as having violated such order, by reason of the fact that it subsequently transferred to a third person for the amount owing it by the judgment debtor a bond and mortgage owned by such debtor and assigned to it by him, prior to the institution of the proceedings, to secure the payment of his indebtedness to

title to patent rights. *Inventions Corporation v. Hobbs*, 244 Fed. 430, 444.

⁴⁵ *Rabbe v. Astor Trust Co.*, 61 N. Y. Misc. 650, 114 N. Y. Supp. 131.

⁴⁶ *Price v. Price*, 21 N. Y. App. Div. 597, 47 N. Y. Supp. 772.

⁴⁷ *Howell v. German Theatre*, 64 N. Y. Misc. 110, 117 N. Y. Supp. 1124.

⁴⁸ *Boucker Contracting Co. v. W. H. Callahan Contracting Co.*, 218 N. Y. 321, 113 N. E. 257.

⁴⁹ *Smith v. Cutter*, 64 N. Y. App.

Div. 412, 72 N. Y. Supp. 99. See also *Denison v. Jackson Bros. Realty Co.*, 158 N. Y. App. Div. 475, 143 N. Y. Supp. 586, holding that *Sorrentino v. Langlois*, 144 N. Y. App. Div. 271, 128 N. Y. Supp. 1003, was not intended to overrule *Smith v. Cutter*, *supra*, and that the statement in *Sorrentino v. Langlois*, *supra*, conflicting with *Smith v. Cutter*, *supra*, must be regarded as obiter.

⁵⁰ *Smith v. Weed*, 75 Wash. 452, 134 Pac. 1070.

it, especially in view of the fact that after the making of the order but before the transfer was made a receiver had been appointed and the prohibitive order had thus been superseded,⁵¹ the order appointing the receiver being a "further order" within the meaning of the prohibition.⁵² Considering the question of the inherent validity of the transfer of the bond and mortgage, the court said: "The [prohibitive] order * * * did not restrain the [corporation] * * * from transferring or disposing of its own property. The [corporation] * * * had the legal title to the bond and mortgage as security for its debt. That title and only that could it assign. It could not transfer the interest of the judgment debtor, and its assignee would take only such interest as it had. The transfer of its interest, therefore, was not a transfer or other disposition of any property of the judgment debtor."⁵³

§ 3215. Vacating or abatement of order. Under the New York Code, orders made in supplementary proceedings are those of the judge and not those of the court,⁵⁴ and one judge cannot, when basing his action upon the original papers, vacate an order for the examination of the judgment debtor which has been made by another judge.⁵⁵

Moreover, such proceedings are not abated by want of prosecution, at least, not when the statute provides that they can be discontinued or dismissed only by an order of the judge, made upon the application of the judgment creditor, upon such terms as justice requires.⁵⁶

⁵¹ *Sullivan v. United States Gas Fixture Co.*, 134 N. Y. App. Div. 658, 119 N. Y. Supp. 532.

⁵² *People v. Randall*, 73 N. Y. 416.

⁵³ *Sullivan v. United States Gas Fixture Co.*, 134 N. Y. App. Div. 658, 119 N. Y. Supp. 532.

⁵⁴ *Feinberg v. Kutcosky*, 147 N. Y. App. Div. 393, 132 N. Y. Supp. 9.

⁵⁵ *Bamberger-Stern Co. v. Paris*, 159 N. Y. Supp. 647, 648.

In *Belfer v. Ludlow*, 144 N. Y. App. Div. 746, 129 N. Y. Supp. 626, an appeal from an order vacating an ex parte order for the examination of a judgment debtor, the court held that the objection that the vacating order "was in effect an attempt by one justice to review the order of

another justice, and hence without jurisdiction," was "untenable, as the order appealed from was not made by a justice, but by the court, on the return of the ex parte order. When the judgment debtor was brought into court, he had a right to object to the sufficiency of the ex parte papers which brought him in, and it then became the duty of the court, either to vacate the ex parte order, or to deny the motion to vacate. There is no other way of reviewing the ex parte order, except by an appeal from an order vacating it, or from one denying a motion to vacate."

⁵⁶ *Roscoe Lumber Co. v. Payne*, 149 N. Y. Supp. 331.

CHAPTER 49

QUO WARRANTO

I. ORIGIN AND NATURE OF REMEDY

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I. ORIGIN AND NATURE OF REMEDY

§ 3216. Introductory statement. A clear, comprehensive and accurate statement of the principles governing the applicability of the remedy of quo warranto to private corporations, and the procedure when such remedy is invoked, of necessity involves an examination into the history of the remedy, and a discussion of the ancient common-law remedies by the issuance of writs of quo warranto and by informations in the nature of quo warranto. In addition some reference must be had to the English statutes on the subject.

This results not only because of the existence of the common law in various states, and the consequent existence of the ancient remedies, but because most of the American statutes on the subject are modeled either directly or indirectly after the English statute of 9 Anne, c. 20, an enactment of great importance and of far-reaching effect with reference to this particular remedy. In addition the principles ap-

plied in the English decisions, not only under the statute of Anne, but also prior to that time, are applied at the present time. Thus the rules as to what parties may bring the proceeding are founded on the common law and the English statutes, and the same may be said with reference to the pleadings and the method of pleading the facts involved.¹

The American statutes and the procedure thereunder differ widely from the ancient remedies, and in some states even the ancient name of the proceeding has been abolished, or at least is not mentioned in the statute. So radically different are the proceedings that it has been said that the cases decided under the ancient practice are of but "slight if any value."² Nevertheless, a close examination of all the cases will disclose the continual repetition of common-law principles and rules, and the application of the decisions under the English statutes. And while legislatures may be reluctant to use the name "quo warranto," the statutory substitutes of the remedy are usually designated quo warranto proceedings by the courts, jurists and text-writers.

Another reason for referring to the common law and the English statutes, is the fact that equitable procedure is involved in some of the American decisions. Referees have been appointed, and litigants have sought to have receivers appointed when quo warranto proceedings were instituted. The remedies in equity and by quo warranto are distinct, and, in general, equitable principles or procedure have no application. The exception to this rule is in Tennessee, where the statute provides a remedy which may be described as a remedy by quo warranto plus the equitable remedies of injunction and otherwise. The Tennessee decisions expressly state that the ancient remedies of writs of quo warranto and by information are abolished and do not exist in that state.

Emphasis must be placed on the growing importance of the remedy by quo warranto. It is available for a number of purposes and has been found particularly efficacious to punish corporations guilty of the violation of criminal laws, such as the statutes against combinations and monopolies. The cases on the subject are numerous in Missouri, while in other states a few cases are also found. It is in-

¹ See §§ 3237-3260, *infra*.

² Such was the view of the Iowa court, which further said that the statutes though enacted for the same general purpose, "are so dissimilar in detail, that cases involving similar

states of fact do not necessarily afford authoritative precedents except for courts of the jurisdiction in which they have been determined." *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

teresting to note that in Delaware the common-law remedies were adopted in 1736 and existed as a part of the law of the state as an English colony. Nevertheless, the remedy was first invoked in 1881, and was involved in an appealed case for the first time in 1911.

In this analysis reference is had first to the ancient remedies and the English statutes in general. In taking up the American practice and procedure subsequently, the common-law practice and procedure is also referred to, in connection with the particular branch of the remedy involved.³

§ 3217. The writ of quo warranto at common law. Little is known of the origin of the common-law writ of quo warranto, as its history is obscured by antiquity.⁴ According to some authorities the proceeding was originally classed as a criminal proceeding. It has been so described by Chancellor Kent and other learned judges,⁵ while other authorities speak of the remedy as a civil writ at the suit of the crown, which is, perhaps, the more generally accepted view.⁶ By the fiction of the feudal law the king was the fountain whence all franchises were derived, the exercise of any of which without regal grant was considered a usurpation of the royal prerogative. Hence the writ of quo warranto became a prerogative writ that issued of right, wherein the king being the sole party in interest, instituted the action in his own name, in his own right, by his attorney general.⁷ The remedy was also available in case of nonuser or long neglect of a franchise, or misuser or abuse of it, being a writ commanding the

³ Although long in existence, the remedy by an information in the nature of quo warranto was first invoked in Delaware in the case of *State v. Stewart* (6 *Houst.* 359) in 1881, and was subject to judicial construction by an Appellate Court for the first time in 1911. *Brooks v. State*, 3 *Boyce* (Del.) 1, 51 *L. R. A.* (N. S.) 1126, *Ann. Cas.* 1915 A 1133, 79 *Atl.* 790.

⁴ *Brooks v. State*, 3 *Boyce* (Del.) 1, 51 *L. R. A.* (N. S.) 1126, *Ann. Cas.* 1915 A 1133, 79 *Atl.* 790. See *State v. Standard Oil Co. of Kentucky*, 120 *Tenn.* 86, 110 *S. W.* 565.

⁵ *Attorney General v. Utica Ins. Co.*, 2 *Johns.* (N. Y.) 371. See also *State v. Des Moines City R. Co.*, 135 *Iowa* 694, 109 *N. W.* 867.

⁶ *Ames v. Kansas*, 111 *U. S.* 449, 28 *L. Ed.* 482; *Rex v. Marsden*, 3 *Burr.* 1817. See *State v. Standard Oil Co. of Kentucky*, 120 *Tenn.* 86, 110 *S. W.* 565.

⁷ 3 *Bl. Com.* 262; *Brooks v. State*, 3 *Boyce* (Del.) 1, 51 *L. R. A.* (N. S.) 1126, *Ann. Cas.* 1915 A 1133, 79 *Atl.* 790. See also *People v. Union Consol. El. R. Co.*, 263 *Ill.* 32, *Ann. Cas.* 1915 C 388, 105 *N. E.* 12; *People v. Healy*, 230 *Ill.* 280, 15 *L. R. A.* (N. S.) 603, 82 *N. E.* 599; *State v. Des Moines City R. Co.*, 135 *Iowa* 694, 109 *N. W.* 867; *State v. Standard Oil Co. of Kentucky*, 120 *Tenn.* 86, 110 *S. W.* 565.

defendant to show by what warrant he exercised such a franchise, having never had any grant of it, nor having forfeited it by neglect or abuse.⁸

§ 3218. Information in the nature of quo warranto at common law—As compared with remedy by quo warranto. There is a distinction between a writ of quo warranto and an information in the nature of quo warranto,⁹ in origin, form and procedure;¹⁰ and although it has been said that the ancient writ was the foundation of the more modern proceeding by information,¹¹ it appears that the latter remedy grew up in England gradually and finally displaced the remedy by writ of quo warranto.¹² This had occurred, even in Blackstone's time, and while the objects of the two proceedings were substantially the same, the proceeding by information was favored for various reasons. Not only was the proceeding by writ of quo warranto of cumbersome length, but the judgment rendered in such proceeding was final and conclusive, even against the crown, whereas the remedy by information filed in the court of the king's bench by the attorney general was speedier, and the judgment not quite so conclusive.¹³ There is no historical certainty as to the origin of this remedy by information in the nature of quo warranto, although it existed long before the time of the enactment of the statute of Anne.¹⁴

⁸ 3 Bl. Com. 262. See *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

⁹ *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

¹⁰ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

¹¹ *Territory v. Virginia Road Co.*, 2 Mont. 96.

¹² *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790; *People v. Union Consol. El. R. Co.*, 263 Ill. 32, Ann. Cas. 1915 C 388, 105 N. E. 12; *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599; *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867. See *State v. Standard Oil Co. of Kentucky*, 120 Tenn. 86, 110 S. W. 565.

¹³ 3 Bl. Com. 263; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902. See *State v. Standard Oil Co. of Kentucky*, 120 Tenn. 86, 110 S. W. 565.

¹⁴ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790. See *State v. Standard Oil Co. of Kentucky*, 120 Tenn. 86, 110 S. W. 565.

The statute of 9 Anne, c. 20, was not the origin of proceedings by information, as such proceedings existed prior to that time in England, and the fourth section of the statute expressly recognizes the existence of the remedy. *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790; *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867; *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

§ 3219. — Nature and purpose. The proceeding by information in the nature of quo warranto was a criminal proceeding in nature,¹⁵ and was a prerogative remedy,¹⁶ in the sense that it was allowed only within the exercise of judicial discretion,¹⁷ being instituted in the name of the crown upon the information of the attorney general.¹⁸ It was like the ancient writ of quo warranto, in that it was a proceeding to try the right or title to an office, franchise or liberty,¹⁹ and it seems to have been long settled in England that the remedy might not be invoked for the redress of mere private grievances, but only when a wrong had been done to the public.²⁰

The relief granted included not only the ouster from the usurped office or franchise, but the usurper was punished by the imposition of a fine.²¹

§ 3220. Statute of Anne and other English statutes. The statutes upon the subject of quo warranto, enacted in England, made a great stride towards English liberty and the limitation of the royal prerogative.²² There are a number of these statutes, but by far the most important is the statute of 9 Anne, c. 20, which was enacted in 1711.

¹⁵ 3 Bl. Com. 263; *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599; *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867. See also *State v. Standard Oil Co. of Kentucky*, 120 Tenn. 86, 110 S. W. 565.

The conveniences attending the information, as a mode of trying the mere question of right to an office or franchise were such that, although it never entirely lost its form as a criminal proceeding, it was so modeled as to become substantially a civil action. See *State v. Standard Oil Co. of Kentucky*, 120 Tenn. 86, 110 S. W. 565.

¹⁶ *People v. Union Consol. El. R. Co.*, 263 Ill. 32, Ann. Cas. 1915 C 388, 105 N. E. 12; *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599.

¹⁷ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790. See § 3243, *infra*.

¹⁸ See § 3237 *et seq.*, *infra*.

¹⁹ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790; *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599. See *State v. Standard Oil Co. of Kentucky*, 120 Tenn. 86, 110 S. W. 565.

²⁰ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790; *State v. Home Brewing Co. of Indianapolis*, 182 Ind. 75, 105 N. E. 909.

²¹ See § 3269, *infra*.

²² See *State v. Standard Oil Co. of Kentucky*, 120 Tenn. 86, 110 S. W. 565.

Quo warranto proceedings were first regulated by statute as early as 1278, by the statute of 6 Edw. I, c. 1, passed in consequence of the commission of quo warranto issued by the king. A distinction was drawn in the report between libertates, jurisdiction exercised by the lord as lord, and regalia, jurisdiction exercised by crown grant. *Encyc. Britannica* (11th Ed.), vol. 22, p. 764.

While, as a general rule, the statute does not exist in the United States as a part of the common law,²³ although it has been held a part of the common law in force in the state of New Mexico,²⁴ the words of the statute are preserved in substance in the majority of the states of the Union,²⁵ and in fact, this statute is the basis of the remedy in England and in the United States at the present time, except where the proceedings are established or changed by statute.²⁶

As noted previously, the statute did not originate the proceeding by information,²⁷ and was, in the main, a mere regulation of procedure,²⁸ but it covered the practice of filing informations on private relation,²⁹ and it can be said the quo warranto proceedings, as a means of investigating and determining civil rights between parties, originated with the statute of Anne.³⁰ As a result, the proceeding by information might be applied to the decision of corporation disputes between party and party, without any intervention of the preroga-

²³ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

The statute of 9 Anne, c. 20, was never in force in the American colonies. *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790; *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599.

As a result, the construction given to the statute of Anne by the English courts does not apply. *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

²⁴ *State v. Tularosa Community Ditch*, 19 N. M. 352, 143 Pac. 207.

²⁵ See *State v. Home Brewing Co. of Indianapolis*, 182 Ind. 75, 105 N. E. 909; *State v. Standard Oil Co. of Kentucky*, 120 Tenn. 86, 110 S. W. 565.

In most of the American jurisdictions that provide statutory remedies by quo warranto, the statutes are modeled after the statute of Anne. *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

The words of the New York statute (2 Rev. St. 581, § 28) were taken

from 9 Anne, c. 20, § 4. *People v. Thompson*, 16 Wend. (N. Y.) 655.

The Illinois Quo Warranto Act (J. & A. Ann. St. ¶ 8687 et seq.) is a substantial copy of the statute of 9 Anne, c. 20. *People v. Waite*, 70 Ill. 25; *People v. Ridgley*, 21 Ill. 65.

The language used in the Wisconsin statute came indirectly from the English statute, being copied from the New York statute. *State v. Norcross*, 132 Wis. 534, 122 Am. St. Rep. 998, 112 N. W. 40; *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

In some of the older states the practice instituted upon the adoption of the statute of Anne still prevails. *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

²⁶ *Territory v. Virginia Road Co.*, 2 Mont. 96.

²⁷ See § 3216, supra.

²⁸ *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

²⁹ *State v. Home Brewing Co. of Indianapolis*, 182 Ind. 75, 105 N. E. 909.

³⁰ *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599.

tive,³¹ and the province of informations was very greatly enlarged.³²

The statute authorized and required the proper officer to file an information, by leave of court, upon the relation of any person desiring to prosecute the same, against persons usurping or unlawfully holding certain offices or franchises, and provided for the speedy determination of the suit. If the defendant was convicted, a fine might be imposed as well as the judgment of ouster, and the relator might pay or receive costs, according to the event of the suit.³³ The remedy was still prerogative in its nature, in that it could not be employed without leave, and was entitled in the name of the king upon the relation of the private individual.³⁴ Also the statute was limited in its territorial scope, and referred to offices and franchises of a public and political character, originally derived from the king, which were enumerated in the preamble.³⁵ Among the other English statutes, which may be referred to, are the statute of 3 Geo. II, c. 25, which provided for a trial by jury in quo warranto proceedings,³⁶ and the statute of 4 and 5 William and Mary, c. 18, as to proceedings by private relators and requiring a recognizance.³⁷

§ 3221. Remedy by writ or by information in United States—In general. The remedy by information in the nature of quo warranto was a part of that vast mass of remedies for wrongs which were brought over to this country by the early English settlers,³⁸ and the same statement applies to the remedy by writ of quo warranto, which had fallen into general disuse. By the adoption of the common law, these remedies were made a part of the civil judicature of various states, and still exist in a large number of such states together with the practice and procedure incident to such remedies. But the remedies adopted are the common-law remedies and not the statutory

³¹ 3 Bl. Com. 264.

³² The statute of 9 Anne, c. 20, gave to private individuals the power of proceeding against any one who unlawfully usurped or intruded into any office or franchise. See *State v. Standard Oil Co. of Kentucky*, 120 Tenn. 86, 110 S. W. 565.

It authorized the filing of informations by leave of court, at the relation of a private person, as a means for determining civil rights between parties. *People v. Union Consol. El. R. Co.*, 263 Ill. 32, Ann. Cas. 1915 C 388, 105 N. E. 12.

³³ 3 Bl. Com. 264; *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599; *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867; *State v. Tularosa Community Ditch*, 19 N. M. 352, 143 Pac. 207.

³⁴ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

³⁵ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

³⁶ See § 3263.

³⁷ See § 3240.

³⁸ *Brooks v. State*, 3 Boyce (Del.)

remedies.³⁹ In some states, the writ and information as original proceedings are abolished by statute, and exist only as an aid to the jurisdiction of appellate courts,⁴⁰ and in other states these ancient common-law remedies have no existence.⁴¹ It may also be mentioned that at the common law both scire facias and the information in the nature of quo warranto were the appropriate remedies to enforce the dissolution of a corporation for cause of forfeiture,⁴² and in one state it has been held that the remedy by writ of scire facias is the exclusive method for obtaining such relief.⁴³

§ 3222. — Statutory substitutes. The statutory provisions as to quo warranto proceedings, in a large number of states, are modeled after the statute of Anne, as has already been noted,⁴⁴ but in other

1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

³⁹ The remedy by an information in the nature of quo warranto, was by the general adoption of the powers of the King's Bench, by statutory and constitutional enactments, beginning in 1736 (Laws of Del. vol. 1, pp. 121, 122) and concluding with the existing constitution, made a part of the civil judicature of the state of Delaware. *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

The common law of Indiana, existing by legislative adoption is the common law of England and the English statutes of general nature as it was prior to 1607, and in regard to quo warranto, the law amounted to this and no more. The writ having fallen into disuse, the information would lie in the name of the attorney general to secure a forfeiture, ouster and fine, in the case of a misuser of corporate franchises. *State v. Home Brewing Co. of Indianapolis*, 182 Ind. 75, 105 N. E. 909.

An information in the nature of quo warranto by the attorney general in behalf of the state to forfeit the charter of a corporation for misuser or nonuser, or for failure to perform a condition subsequent which is ex-

pressly declared a cause for forfeiture, is a remedy at common law, and it may be brought whenever a cause for forfeiture arises. It is not necessary that there shall be any general or special statute authorizing the proceeding to be brought. *State v. Southern Pac. R. Co.*, 24 Tex. 80.

⁴⁰ *Louisiana & N. W. R. Co. v. State*, 75 Ark. 435, 5 Ann. Cas. 637, 88 S. W. 559. See *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

The constitution has vested in the supreme court original jurisdiction for hearing and determining proceedings by quo warranto or "informations in the nature of quo warranto." *State v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S. W. 145.

⁴¹ Neither the old writ of quo warranto nor the information in the nature of quo warranto has ever been adopted in Tennessee. *State v. Standard Oil Co. of Kentucky*, 120 Tenn. 86, 110 S. W. 565.

⁴² *Green v. St. Albans Trust Co.*, 57 Vt. 340.

⁴³ Under the Act of October 23, 1797 (now found in R. L. c. 72) the mode of forfeiting the charter of a corporation is by writ of scire facias and such method is exclusive. *Green v. St. Albans Trust Co.*, 57 Vt. 340.

⁴⁴ See § 3220.

states special statutes have been enacted providing a remedy in lieu of quo warranto or proceedings in the nature of quo warranto and abolishing the latter remedies. These statutory substitutes generally provide a somewhat enlarged remedy, similar to the common-law proceeding by information, but with statutory regulation of the practice and procedure.⁴⁵ It has been held that such statutes are remedial and to be liberally construed.⁴⁶

In some states, the use of the words "quo warranto" or "proceedings in the nature of quo warranto" is avoided. Nevertheless, an

45 Alabama. *State v. Birmingham Water Works Co.*, 185 Ala. 388, Ann. Cas. 1916 C 166, 64 So. 23. The statutes (Code Ala. 1907, §§ 5450-5472) first found in the Code of 1852 are intended to furnish a remedy co-extensive in scope with the common-law information in the nature of quo warranto. *State v. Birmingham Water Works Co.*, 185 Ala. 388, Ann. Cas. 1916 C 166, 64 So. 23. See also *Louisville & N. R. Co. v. State*, 154 Ala. 156, 45 So. 296.

Colorado. *State Railroad Commission v. People*, 44 Colo. 345, 22 L. R. A. (N. S.) 810, 98 Pac. 7. Under chapter 27 of the Code, the action for trying title to a public office or franchise is a substitute for the original common-law quo warranto remedy. *State Railroad Commission v. People*, 44 Colo. 345, 22 L. R. A. (N. S.) 810, 98 Pac. 7.

Indiana. *State v. Home Brewing Co. of Indianapolis*, 182 Ind. 75, 105 N. E. 909. The Indiana statute (Burns' Ann. St. 1914, §§ 1188-1203) provides a definite, comprehensive and sufficient method of enforcing these remedies, and especially of the remedy which the sovereign may seek to exercise against a corporation to secure a forfeiture of its franchise. This statute is exclusive in all of the particulars of remedy and procedure which it covers. *State v. Home Brewing Co. of Indianapolis*, 182 Ind. 75, 105 N. E. 909.

Iowa. Code, tit. 21, c. 9, § 4313 et seq. *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

New York. The legislature in abolishing the writ of quo warranto, did not intend to deprive the court of jurisdiction to forfeit the franchises of corporations, but merely intended to change the form of procedure so that the relief formerly obtainable by quo warranto, informations in the nature of quo warranto, and by scire facias, should be had in actions or by motions as prescribed by the Code of Civil Procedure. *People v. Bleecker St. & F. F. R. Co.*, 140 App. Div. 611, 125 N. Y. Supp. 1045. The early New York statute was a substantial copy of the statute of Anne, and some of the provisions of the statute of Anne still are found in the statutes of this state. See § 3220, supra.

Washington. *State v. Seattle Gas & Electric Co.*, 28 Wash. 488, 70 Pac. 114, 68 Pac. 946.

Wisconsin. Stats. 1898, § 3466, is a literal copy of a New York statute. (2 Rev. St. 1829, pt. III, c. IX, tit. 2, § 28), and has many of the features of the statute of Anne. *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

⁴⁶*State v. Seattle Gas & Electric Co.*, 28 Wash. 488, 70 Pac. 114, 68 Pac. 946.

examination of the statutes in question will disclose that the object is to secure the essential purposes formerly effected by these remedies, and it has accordingly been held that it was not improper to speak of the statutory remedy as a quo warranto proceeding, although in the strict sense of the term such an appellation might be erroneous.⁴⁷ In one state an equity proceeding may be brought to secure the relief formerly obtained by quo warranto proceedings, and the object seems to have been to enact a quo warranto statute with the procedure to be governed by equitable rules. Accordingly a proceeding in this state carries with it the vast remedial incidents of a court of equity, by injunction and otherwise.⁴⁸ In another state, the statute on the subject is but a re-enactment of the common law, and there is no attempt to abolish the common-law remedy;⁴⁹ and in some states it seems that the statutes supplant the common law by regulating practice.⁵⁰

§ 3223. — Nature of proceeding. The discussion as to the nature of quo warranto proceedings in the United States has been prolonged by the retention of the words "information," "prosecute," "guilty," "fine," "punish," and the like, words which are survivals of the period when the proceeding was criminal in every respect. But in England before the time of the Revolution, and since that date in most of the American states, quo warranto has been resorted to for the purpose of trying the civil right and determining whether a defendant had usurped or forfeited an office or franchise. And after quo warranto proceedings began to be used as a method of trying title, it was inevitable that the civil feature would tend to dominate in fixing the character of the proceeding for all purposes.⁵¹ At the present time the tendency of all courts is to regard quo warranto as a

⁴⁷ *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

⁴⁸ Shannon's Tennessee Code, §§ 5165-5187. *State v. Standard Oil Co. of Kentucky*, 120 Tenn. 86, 110 S. W. 565.

⁴⁹ Mont. Civil Practice Act, approved January 12, 1872, § 310 et seq. *Territory v. Virginia Road Co.*, 2 Mont. 96.

To a certain extent the common-law remedy exists in Indiana, as has been noted. See § 3221, *supra*.

⁵⁰ The statute defining the practice

in quo warranto and the conditions to which the same apply has existed as early as January 14, 1825, and still exists practically unchanged (*Rev. St. 1909*, § 2631 et seq.). *State v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S. W. 145.

In Missouri, the Supreme and Appellate courts have jurisdiction of quo warranto proceedings by virtue of the constitution. See § 3236, *infra*.

⁵¹ *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936.

summary remedy invoked for the settlement of civil rights,⁵² and while the proceeding is criminal in form, and is spoken of as a prosecution, it is a civil action.⁵³ In one state it was pointed out that the only difference between a quo warranto proceeding and an ordinary civil action was the formal requirement that the proceeding be instituted on the relation of some one.⁵⁴ This is the general rule, although there are states where the proceeding is treated as criminal both in procedure and in the relief afforded.⁵⁵

II. WHEN REMEDY AVAILABLE

§ 3224. Purpose and propriety of remedy generally—Redress of public or private grievances. The paramount purpose of the remedy of quo warranto, and the statutes providing for proceedings of that nature, is the protection of public interests, either to redress public wrongs or to enforce public rights.⁵⁶ The remedy is not available for the enforcement of private rights or for the redress of private or local grievances.⁵⁷ This is true whether the remedy is invoked by

⁵² *People v. Heidelberg Garden Co.*, 233 Ill. 290, 84 N. E. 230, aff'g 124 Ill. App. 331.

⁵³ *Arkansas. Louisiana & N. W. R. Co. v. State*, 75 Ark. 435, 5 Ann. Cas. 637, 88 S. W. 559.

Illinois. People v. Heidelberg Garden Co., 233 Ill. 290, 84 N. E. 230, aff'g 124 Ill. App. 331. Under the Illinois statute as to quo warranto (*J. & A. Ann. St. ¶ 8687 et seq.*), the proceeding is a civil remedy when used for the protection of private rights. *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599.

Iowa. State v. Des Moines City R. Co., 135 Iowa 694, 109 N. W. 867.

Maine. State v. York Light & Heat Co., 113 Me. 144, 93 Atl. 61.

Missouri. State v. Arkansas Lumber Co., 260 Mo. 212, 169 S. W. 145; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902; *State v. Business Men's Athletic Club*, 178 Mo. App. 548, 163 S. W. 901.

Tennessee. An equity proceeding under Shannon's Code, §§ 5165-5187 is purely civil in nature. *State v. Standard Oil Co. of Kentucky*, 120

Tenn. 86, 110 S. W. 565.

Washington. State v. Seattle Gas & Electric Co., 28 Wash. 488, 70 Pac. 114, 68 Pac. 946.

Wisconsin. State v. Norcross, 132 Wis. 534, 122 Am. St. Rep. 998, 112 N. W. 40.

⁵⁴ *State v. Seattle Gas & Electric Co.*, 28 Wash. 488, 70 Pac. 114, 68 Pac. 946 (referring to the statutory remedy).

⁵⁵ See *State v. Kearns*, 17 R. I. 391, 22 Atl. 322, 1018.

⁵⁶ *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599; *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867; *Territory v. Virginia Road Co.*, 2 Mont. 96; *State v. Norcross*, 132 Wis. 534, 122 Am. St. Rep. 998, 112 N. W. 40.

⁵⁷ *State v. Business Men's Athletic Club*, 178 Mo. App. 548, 163 S. W. 901; *Territory v. Virginia Road Co.*, 2 Mont. 96; *State v. Seattle Gas & Electric Co.*, 28 Wash. 488, 70 Pac. 114, 68 Pac. 946.

Quo warranto is not a remedy to determine disputes between a private person and a corporation. *State v.*

the public prosecutor or by a private citizen. To the effectuation of the public purpose, the protection of private interests which may be involved is only incidental.⁵⁸

In accordance with this rule, it has been held that a proceeding to exclude a corporation from the privilege of acting as a trustee is not maintainable, as the public interest is not involved.⁵⁹ And a proceeding at the relation of a railroad company to oust railroad commissioners from their offices, which are claimed to be illegally held, and to declare void the statute under which they are appointed cannot be maintained, as it is for the relator's private interest.⁶⁰ Nor will quo warranto lie to prevent a railroad company from making a "reconsignment charge" on grain for services rendered after such grain has been delivered on certain tracks, as the public has no interest in such charges and mere private rights are involved.⁶¹ It has even been held that where a corporation violated its charter duty as to keeping its principal office in a certain city for a time after it was incorporated, such violation was not prejudicial to the citizens of the state.⁶²

§ 3225. — Forfeiture of franchises and offices. The general objects and purposes of writs of quo warranto and of proceedings by information in the nature of quo warranto at the common law and of the similar proceeding under the statute of Anne, were substantially the same. The remedies were available in the case of the usurpation of offices, franchises and liberties, in the case of misuser and abuse of such privileges or where there was nonuser or long neglect of a franchise.⁶³ And the general objects and purposes of the similar proceedings in the various states of the Union at the present time are also the same. But in speaking of franchises, it must be remembered that the term is a general one of somewhat extended meaning. As has already been stated in this work, the right to exist as a corporation, or the "primary franchise" must be distinguished from the powers and privileges vested in it, or granted to it, generally called "secondary franchises."⁶⁴

Atchison, T. & S. F. Ry. Co., 176 Mo. 687, 63 L. R. A. 761, 75 S. W. 776.

⁵⁸ State v. Des Moines City R. Co., 135 Iowa 694, 109 N. W. 867.

⁵⁹ State v. Higby Co., 130 Iowa 69, 114 Am. St. Rep. 409, 106 N. W. 382.

⁶⁰ State Railroad Commission v. People, 44 Colo. 345, 22 L. R. A. (N. S.) 810, 98 Pac. 7.

⁶¹ State v. Atchison, T. & S. F. Ry. Co., 176 Mo. 687, 63 L. R. A. 761, 75 S. W. 776.

⁶² State v. United States Endowment & Trust Co., 140 Ala. 610, 103 Am. St. Rep. 60, 37 So. 442.

⁶³ See §§ 3217-3220, *supra*.

⁶⁴ See §§ 14, 15, 1148, *supra*.

Proceedings by quo warranto at the common law were proper to reclaim a franchise, whether corporate or not, and the same rule has been held to exist in American states.⁶⁵ And statutes of our American states, substantially modeled after the statute of Anne, have been held to apply to the same franchises. Reference is had to the Wisconsin statute, which contains no words of limitation as to franchises, as is contained in the English statute.⁶⁶ The remedy by quo warranto is not only available to enforce the forfeiture of the primary franchise of a corporation or the corporate charter, and to oust a corporation from the usurpation of corporate powers,⁶⁷ but also to enforce the forfeiture of secondary or special franchises, privileges or consents,⁶⁸ and to recover the forfeited or usurped franchise.⁶⁹ It has been held under this statute that a defendant may be ousted from his possession of a franchise because he has not the capacity to hold it.⁷⁰ It has also been repeatedly determined that there must be user or possession of the office or franchise to authorize the information, and that a mere claim is insufficient.⁷¹ The proceeding may also be employed to oust foreign corporations from a state,⁷² and to oust officers of corporations who illegally hold office.⁷³

It is not the purpose in this chapter to enter into an extended discussion of the grounds for forfeiture of franchises, or the causes giving rise to the proceeding by quo warranto. As far as possible, the subject will be limited to matters of procedure.⁷⁴

§ 3226. — Corporations as "persons" within quo warranto statutes. Section 4 of the statute of Anne provided for the filing of informations in the nature of quo warranto against persons usurping or unlawfully holding offices or franchises.⁷⁵ The same words will be

⁶⁵ State v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

⁶⁶ Stats. 1898, § 3466. State v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

Stats. 1898, § 3466, providing for actions by the attorney general in the name of the state when any person usurps or unlawfully holds offices or franchises, includes all franchises within the meaning of the term as understood at common law, whether held by corporations or individuals. State v. Milwaukee, B. & L. G. R. Co., 116 Wis. 142, 92 N. W. 546; State v.

Portage City Water Co., 107 Wis. 441, 83 N. W. 697.

⁶⁷ See § 3227, *infra*.

⁶⁸ See § 3230, *infra*.

⁶⁹ State v. Business Men's Athletic Club, 178 Mo. App. 548, 163 S. W. 901.

⁷⁰ State v. Norcross, 132 Wis. 534, 122 Am. St. Rep. 998, 112 N. W. 40.

⁷¹ People v. Thompson, 16 Wend. (N. Y.) 655.

⁷² See § 3232, *infra*.

⁷³ See § 3233, *infra*.

⁷⁴ See chapter on Forfeiture, Dissolution and Winding Up, *infra*.

⁷⁵ See § 3220, *supra*.

found in a number of American statutes, and it has been held that the word "persons" includes corporations. The holdings to this effect are quite uniform,⁷⁶ and one court has pointed out that the quoted word applies to an artificial person when it is clear that such was the legislative intent, not only because of statutory rules of construction but because of elementary principles.⁷⁷

§ 3227. Determination of corporate existence and powers. The remedy by an information in the nature of quo warranto, or by the statutory substitute for such proceeding, is the proper remedy to try the right of a corporation to act as such, to enforce a forfeiture of the corporate charter, or to oust a corporation from the unauthorized exercise of corporate powers, whether there is a legal corporation which has forfeited its right to continue, or merely a de facto corporation exercising corporate powers without authority.⁷⁸ Thus the rem-

⁷⁶ *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867; *People v. Bleecker St. & F. F. R. Co.*, 140 N. Y. App. Div. 611, 125 N. Y. Supp. 1045; *State v. Seattle Gas & Electric Co.*, 28 Wash. 488, 70 Pac. 114, 68 Pac. 946; *State v. Milwaukee Independent Tel. Co.*, 133 Wis. 588, 114 N. W. 108, 315; *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

⁷⁷ *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

⁷⁸ *Arkansas. Darnell v. State*, 48 Ark. 321, 3 S. W. 365; *State v. Real Estate Bank*, 5 Ark. 595, 41 Am. Dec. 109.

Colorado. Crystal Park Co. v. Morton, 27 Colo. App. 74, 146 Pac. 566.

Illinois. People v. Union El. R. Co., 269 Ill. 212, 110 N. E. 1; *People v. Larsen*, 265 Ill. 406, 106 N. E. 947; *Wheeler v. Pullman Iron & Steel Co.*, 143 Ill. 197, 17 L. R. A. 818, 32 N. E. 420, aff'g 43 Ill. App. 626; *People v. Kankakee River Improvement Co.*, 103 Ill. 491; *Nelson Chesman & Co. v. Singer*, 183 Ill. App. 591; *Henssler v. A. G. Wiese Drug Co.*, 133 Ill. App. 539; *Lincoln Park Chapter No. 177 Royal Arch Masons v. Swatek*, 105 Ill. App. 604, aff'd 204 Ill. 228, 68 N. E. 429.

Indiana. State v. Portland National Gas Co., 153 Ind. 483, 53 L. R. A. 413, 74 Am. St. Rep. 314, 53 N. E. 1089.

Michigan. Linnell v. Gay, 162 Mich. 612, 127 N. W. 814; *Attorney General v. A. Booth & Co.*, 143 Mich. 89, 106 N. W. 868.

Missouri. State v. Standard Oil Co. 218 Mo. 1, 116 S. W. 902; *State v. Equitable Loan & Investment Ass'n of Sedalia*, 142 Mo. 325, 41 S. W. 916.

New Hampshire. State v. Fourth New Hampshire Turnpike, 15 N. H. 162, 41 Am. Dec. 690.

New Jersey. Allen v. Board of Education City of Passaic, 81 N. J. L. 135, 79 Atl. 101.

New Mexico. Community Ditches or Acequias of Tularosa Townsite v. Tularosa Community Ditch, 16 N. M. 750, 120 Pac. 301.

New York. People v. Phoenix Bank, 24 Wend. 431, 35 Am. Dec. 634.

Ohio. State v. Oberlin Building & Loan Ass'n, 35 Ohio St. 258.

Pennsylvania. Andel v. Duquesne, St. R. Co., 219 Pa. 635, 69 Atl. 278.

Tennessee. State v. White's Creek Turnpike Co., 3 Tenn. Ch. 163.

Texas. State v. Southern Pac. R. Co., 24 Tex. 80.

edy has been held proper where the charter of a corporation was improperly granted,⁷⁹ where the charter was fraudulently obtained or where organization under a general law was fraudulent as to the state or individuals,⁸⁰ where persons associate or assume to act as a corporate body without any statute authorizing them to incorporate, or under an unconstitutional statute, or under a constitutional statute without having substantially complied with all conditions precedent prescribed by the statute.⁸¹ Where an association of persons, in con-

As to the doctrine in relation to attack upon de facto corporations, see § 274 et seq., supra.

Under the Illinois statute (J. & A. Ann. St. ¶ 8687), proceedings in the nature of quo warranto may be prosecuted against a corporation where it does or omits any act which amounts to a surrender or forfeiture of its rights and privileges as a corporation. *People v. Union El. R. Co.*, 269 Ill. 212, 110 N. E. 1.

An attack upon the existence of an organization known as a teacher's retirement fund must be accomplished by quo warranto proceedings, and the question cannot be raised in an action by a teacher against a board of education to recover salary due. *Allen v. Board of Education City of Passaic*, 81 N. J. L. 135, 79 Atl. 101.

⁷⁹ *People v. Larsen*, 265 Ill. 406, 106 N. E. 947; *Clark v. Interstate Independent Tel. Co.*, 72 Neb. 883, 101 N. W. 977.

⁸⁰ *State v. Citizens Light & Power Co.*, 172 Ala. 232, 55 So. 193; *Morrow v. Edwards*, 9 Mackey (D. C.) 475; *Attorney General v. Stevens*, 1 N. J. Eq. 369, 22 Am. Dec. 526. See also *State v. Masons & Odd Fellows Joint Stock Ass'n*, 91 Kan. 9, 136 Pac. 930.

⁸¹ *Alabama. State v. Webb*, 97 Ala. 111, 38 Am. St. Rep. 151, 12 So. 377.

California. People v. Montecito Water Co., 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236; *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 19 Pac. 693, 18 Pac. 85; *People v. Self-*

ridge, 52 Cal. 331; *People v. Stockton & V. R. Co.*, 45 Cal. 306, 13 Am. Rep. 178; *People v. Chambers*, 42 Cal. 201.

Colorado. People v. Cheeseman, 7 Colo. 376, 3 Pac. 716.

Illinois. Distilling & Cattle Feeding Co. v. People, 156 Ill. 448, 47 Am. St. Rep. 200, 41 N. E. 188; *Greene v. People*, 150 Ill. 513, 37 N. E. 842; *People v. Ottawa Hydraulic Co.*, 115 Ill. 281, 3 N. E. 413.

Indiana. Smith v. State, 140 Ind. 343, 39 N. E. 1060; *Holman v. State*, 105 Ind. 569, 5 N. E. 702; *State v. Beck*, 81 Ind. 500; *State v. Dillon*, 36 Ind. 388; *Hord v. Elliott*, 33 Ind. 220.

Michigan. Attorney General v. Lorman, 59 Mich. 157, 60 Am. Rep. 287, 26 N. W. 311; *Attorney General v. Hanchett*, 42 Mich. 436, 4 N. W. 182.

Minnesota. State v. Critchett, 37 Minn. 13, 32 N. W. 787.

Mississippi. State v. Brown & Johnston, 34 Miss. 688, 33 Miss. 500.

Montana. Territory v. Virginia Road Co., 2 Mont. 96.

New Jersey. National Docks Ry. Co. v. Central R. Co. of New Jersey, 32 N. J. Eq. 755.

New York. People v. De Grauw, 133 N. Y. 254, 30 N. E. 1006, rev'g 62 Hun 224, 16 N. Y. Supp. 697; *People v. Boston, H. T. & W. Ry. Co.*, 27 Hun 528.

Ohio. State v. Ackerman, 51 Ohio St. 163, 24 L. R. A. 298, 37 N. E. 828; *State v. Central Ohio Mut. Relief Ass'n*, 29 Ohio St. 399; *State v. Sherman*, 22 Ohio St. 411.

ducting the business of insurance, profess, without being legally incorporated, to limit their liability to the amount of money contributed by each, and assume to give perpetuity to the business by making membership certificates transferable by the assignment thereof by the members or their personal representatives, they are "acting as a corporation" within the meaning of a statute authorizing quo warranto proceedings.⁸² And when stockholders continue to act as such after the limitation of the period allowed for the corporation to exist, thereby usurping powers not belonging to them, there is a public grievance, warranting quo warranto proceedings.⁸³

In one case a statute provided that it should be lawful for any number of persons, not less than five, to organize a waterworks company "whenever" the common council of any city or incorporated village, or the municipal authority of any town in the state should, by resolution, declare it to be expedient to have works constructed for the purpose of supplying such city, village or town, and the inhabitants thereof, with water, but to be inexpedient for such city, town or village, to build such works under the power granted in its charter. It was held that such a resolution was a condition precedent to the right to organize a waterworks company under the statute, and in quo warranto proceedings by the state, an association attempted to be organized as a corporation under it, without such a resolution was ousted from the exercise of corporate powers.⁸⁴

If it is attempted to organize a corporation for a purpose which is not within the purview of the statute under which the attempt is made, the state may institute quo warranto proceedings and oust the association from the exercise of corporate powers;⁸⁵ and the same remedy is available when a corporation is guilty of exercising powers not authorized by its charter, to oust it from the further exercise of such powers.⁸⁶ But the proceeding does not lie to ascertain if the

The axiomatic principle that de facto corporations cannot be collaterally attacked has been referred to. See § 274, *supra*, and in general the entire chapter as to de facto corporations, §§ 273-321, *supra*, where a large number of cases is cited.

⁸² *Greene v. People*, 150 Ill. 513, 37 N. E. 842.

⁸³ *Linnell v. Gay*, 162 Mich. 612, 127 N. W. 814.

⁸⁴ *Attorney General v. Hanchett*, 42 Mich. 436, 4 N. W. 182.

⁸⁵ *State v. Critchett*, 37 Minn. 13, 32 N. W. 787; *State v. Business Men's Athletic Club*, 178 Mo. App. 548, 163 S. W. 901.

If a corporation is organized for unlawful purposes, quo warranto is an appropriate remedy for vacating its charter. *State v. Citizens Light & Power Co.*, 172 Ala. 232, 55 So. 193.

⁸⁶ *Alabama. North Birmingham v. State*, 166 Ala. 122, 139 Am. St. Rep. 17, 21 Ann. Cas. 1123, 52 So. 202.

California. See People v. Dasha-

defendants in good faith intend to carry out the expressed purpose of their organization.⁸⁷ In some states the statutes are so broad that it has been held that the remedy of quo warranto is available to determine the constitutionality of a statute, under which it is claimed that a corporation is usurping powers.⁸⁸

§ 3228. Abuse or misuse of franchises; violation of criminal laws; anti-trust acts. The remedy by quo warranto is available in the case of misuser or abuse of a corporate charter,⁸⁹ to effect the forfei-

way Ass'n, 84 Cal. 114, 12 L. R. A. 117, 24 Pac. 277.

Connecticut. See *State v. Norwalk & D. Turnpike Co.*, 10 Conn. 157.

Illinois. See *People v. North Chicago R. Co.*, 88 Ill. 537; *Illinois Midland Ry. Co. v. People*, 84 Ill. 426.

Indiana. See *State v. Portland Natural Gas Co.*, 153 Ind. 483, 53 L. R. A. 413, 74 Am. St. Rep. 314, 53 N. E. 1089.

Massachusetts. Attorney General v. Salem, 103 Mass. 138.

Michigan. *People v. Michigan Sanitarium & Benevolent Ass'n*, 151 Mich. 452, 115 N. W. 423; *Stewart v. Father Mathew Society*, 41 Mich. 67, 1 N. W. 931; *People v. River Raisin & L. E. R. Co.*, 12 Mich. 389, 86 Am. Dec. 64.

New Mexico. *Community Ditches or Acequias of Tularosa Townsite v. Tularosa Community Ditch*, 16 N. M. 750, 120 Pac. 301.

New York. *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843, 24 N. E. 834; *People v. Utica Ins. Co.*, 15 Johns. 353, 8 Am. Dec. 243.

Ohio. *State v. Standard Oil Co.*, 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; *State v. Oberlin Building & Loan Ass'n*, 35 Ohio St. 258.

Under the statute as to quo warranto (Comp. Laws, §. 9950 et seq.), a proceeding to forfeit the rights of a charitable corporation, alleged to be

in fact operated for profit, and which is also alleged to have usurped various powers, is within the statute. *People v. Michigan Sanitarium & Benevolent Ass'n*, 151 Mich. 452, 115 N. W. 423.

Comp. Laws, § 9950, subd. 5, authorizes the filing of an information in the nature of quo warranto when a corporation exercises franchises or privileges not conferred upon it by law. *People v. Michigan Sanitarium & Benevolent Ass'n*, 151 Mich. 452, 115 N. W. 423.

For a different view see *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020.

⁸⁷ *State v. Beck*, 81 Ind. 500.

⁸⁸ Section 1 of the Quo Warranto Act (J. & A. Ann. St. ¶ 8687). *People v. People's Gaslight & Coke Co.*, 205 Ill. 482, 98 Am. St. Rep. 244, 68 N. E. 950.

⁸⁹ **Alabama.** *State v. Birmingham Water Works Co.*, 185 Ala. 388, Ann. Cas. 1916 C 166, 64 So. 23.

Florida. *State v. Tampa Water Works Co.*, 57 Fla. 533, 22 L. R. A. (N. S.) 680, 48 So. 639.

Maine. *State v. York Light & Heat Co.*, 113 Me. 144, 93 Atl. 61.

Michigan. *People v. Michigan Sanitarium & Benevolent Ass'n*, 151 Mich. 452, 115 N. W. 423.

Missouri. *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902; *State v. Atchison, T. & S. F. Ry. Co.*, 176

ture of such charter. In such cases it must be shown that the acts complained of are detrimental to the public welfare, and are such as threaten or work substantial injury to the public, or violate the law or purpose for which the corporation was organized.⁹⁰ The remedy has been held available where charitable corporations or associations are guilty of misusing their powers;⁹¹ where a corporation organized for benevolent, scientific, religious and educational purposes was frequented by persons of evil repute who indulged in gambling, fighting and indecent practices to such an extent that the club maintained by the corporation became a public nuisance;⁹² where a social club engaged in the business of illegally selling intoxicating liquors;⁹³ and where another incorporated club held boxing contests in violation of the law.⁹⁴ The violation of a statute prohibiting the weighing of grain of citizens has also resulted in the bringing of a quo warranto proceeding and the entry of a judgment of ouster.⁹⁵ But the remedy

Mo., 687, 63 L. R. A. 761, 75 S. W. 776; *State v. Business Men's Athletic Club*, 178 Mo. App. 548, 163 S. W. 901.

Ohio. *State v. Standard Oil Co.*, 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541, 30 N. E. 279.

Wisconsin. *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

An information in the nature of quo warranto is the proper remedy against a corporation for abuse of power, misuse of privilege, misfeasance or nonfeasance. *State v. York Light & Heat Co.*, 113 Me. 144, 93 Atl. 61.

⁹⁰ *State v. Tampa Water Works Co.*, 57 Fla. 533, 22 L. R. A. (N. S.) 680, 48 So. 639; *People v. Union El. R. Co.*, 269 Ill. 212, 110 N. E. 1; *State v. Business Men's Athletic Club*, 178 Mo. App. 548, 163 S. W. 901.

Where a misuser is relied upon as the foundation for proceedings to procure a forfeiture of the corporate franchise, it must appear that there has been such neglect or disregard of the corporate trust, or such perversion of it to private purposes, as in some manner to lessen the utility of

the corporation to those for whose benefit it was instituted, or to work some public injury. *People v. Union El. R. Co.*, 269 Ill. 212, 110 N. E. 1.

⁹¹ *State v. Masons & Odd Fellows Joint Stock Ass'n*, 91 Kan. 9, 136 Pac. 930; *People v. Michigan Sanitarium & Benevolent Ass'n*, 151 Mich. 452, 115 N. W. 423.

⁹² *State v. Springfield African Social & Improvement Club*, 169 Mo. App. 137, 154 S. W. 458.

⁹³ *Canon City Labor Club v. People*, 21 Colo. App. 37, 121 Pac. 120.

⁹⁴ *State v. Business Men's Athletic Club*, 178 Mo. App. 548, 163 S. W. 901.

⁹⁵ Missouri Laws 1913, p. 372, providing that it is unlawful for any corporation to weigh the grain of citizens and charge therefor, or to issue certificates of weight for grain deposited in public warehouses, is a valid enactment, and a judgment of ouster will be entered in quo warranto proceedings, where it appears that a corporation violates such statute. *State v. Merchants' Exchange of St. Louis*, 269 Mo. 346, 190 S. W. 903.

has been held not available where a carrier was charged with the violation of a custom of gratuitously performing certain services in delivering grain, as no legal right could be predicated upon such custom, and in any event merely private rights were involved.⁹⁶

These instances of abuse and misuser of the corporate franchise include offenses against the criminal laws as well as against other statutes. It has been held that a corporation can so offend against the laws of a state as to justify quo warranto proceedings to forfeit its charter, and such offenses may be against the common law as well as against the statutes.⁹⁷

Corporations guilty of violating anti-trust statutes, or of entering into conspiracies in restraint of trade, may be proceeded against by quo warranto,⁹⁸ regardless of the existence of other remedies.

§ 3229. Nonuser of franchises. At the common law, as well as under the statute of Anne, proceedings by information in the nature of quo warranto were available to effect the forfeiture of a granted franchise in case of nonuser or long neglect of such franchise.⁹⁹ The same rule applies at the present time, not only when the common-law remedy is invoked, but when the statutory substitute for such remedy is availed of. And the proceeding for this cause may be brought not only to forfeit the special or secondary franchises owned by a corporation, but also to forfeit the corporate charter, when such a state of facts exists.¹ Most of the cases dealing with forfeiture for nonuser refer, however, to the secondary franchises or to granted licenses or privileges.²

§ 3230. Abuse, misuser, nonuser or usurpation of licenses, privileges and special or secondary franchises. The proceeding by an information in the nature of quo warranto, or the statutory substitute for such remedy, is the proper proceeding to effect the forfeiture of a special franchise, license or privilege, in the cases of usurpation, abuse, misuser or nonuser of the granted right.³ So the remedy has

⁹⁶ *State v. Atchison, T. & S. F. Ry. Co.*, 176 Mo. 687, 63 L. R. A. 761, 75 S. W. 776.

⁹⁷ *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

⁹⁸ *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

The right to proceed against corporations for conspiracies in restraint of trade is derived from the common law and the common-law method was

by an information in the nature of quo warranto. *State v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S. W. 145.

⁹⁹ §§ 3218-3220, *supra*.

¹ *Kavanaugh v. St. Louis*, 220 Mo. 496, 119 S. W. 552; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

² See § 3230.

³ *Alabama. State v. Birmingham Water Works Co.*, 185 Ala. 388, Ann.

been held available against a telephone company when its permit to use the streets was improperly granted or was granted without authority of law,⁴ or where such privilege has terminated. In fact the proceeding has been held proper to determine the question whether such right might be terminated, and whether there was a breach of conditions of the ordinance granting the privilege.⁵ The privilege of occupying streets for laying gas pipes and installing other necessary apparatus, has been held a "franchise" within the meaning of a statute authorizing quo warranto proceedings;⁶ and the same decision

Cas. 1916 C 166, 64 So. 23; North Birmingham v. State, 166 Ala. 122, 139 Am. St. Rep. 17, 21 Ann. Cas. 1123, 52 So. 202.

Illinois. People v. Commercial Telephone & Telegraph Co., 277 Ill. 265, L. R. A. 1917 D 704, 115 N. E. 379; People v. Central U. Tel. Co., 232 Ill. 260, 83 N. E. 829.

Iowa. State v. Des Moines City R. Co., 135 Iowa 694, 109 N. W. 867.

Kansas. Olathe v. Missouri & K. I. R. Co., 78 Kan. 193, 96 Pac. 42.

Missouri. State v. West End Light & Power Co., 246 Mo. 653, 152 S. W. 76; State v. Light & Development Co. of St. Louis, 246 Mo. 618, 152 S. W. 67.

Washington. State v. Seattle Gas & Electric Co., 28 Wash. 488, 70 Pac. 114, 68 Pac. 946.

Wisconsin. State v. Milwaukee Elec. Railway & Light Co., 136 Wis. 179, 18 L. R. A. (N. S.) 672, 116 N. W. 900; State v. Milwaukee, B. & L. G. R. Co., 116 Wis. 142, 92 N. W. 546; State v. Portage City Water Co., 107 Wis. 441, 83 N. W. 697; State v. Madison St. Ry. Co., 72 Wis. 612, 1 L. R. A. 771, 40 N. W. 487.

Grants or consents of a city, made pursuant to legislative authority, spring from the people, and constitute a part of the franchise of the corporation. People v. Bleecker St. & F. F. R. Co., 140 N. Y. App. Div. 611, 125 N. Y. Supp. 1045 (referring to a street railroad).

⁴ People v. Commercial Telephone & Telegraph Co., 277 Ill. 265, L. R. A. 1917 D 704, 115 N. E. 379; People v. Chicago Tel. Co., 220 Ill. 238, 77 N. E. 245.

⁵ People v. Central U. Tel. Co., 232 Ill. 260, 83 N. E. 829.

⁶ State v. Seattle Gas & Electric Co., 28 Wash. 488, 70 Pac. 114, 68 Pac. 946.

The Washington statute (Bal. Code, § 5780) providing for quo warranto proceedings where any person usurps or unlawfully holds an office or "public franchise" must be construed to include the rights and privileges of using streets and alleys of a city for the laying of gas pipes and other apparatus, the statute being remedial and liberally construed. State v. Seattle Gas & Electric Co., 28 Wash. 488, 70 Pac. 114, 68 Pac. 946.

But New York Code Civ. Proc. § 1948, subd. 1, authorizing the attorney general to proceed against a person usurping or unlawfully holding a franchise, public office or office of a private corporation, has been held not to apply where a suit is brought to have it adjudged that certain consents or grants to a gas company to lay pipes in certain streets have terminated, on the ground that such consents are not franchises, strictly speaking. People v. Consolidated Gas Co., 130 N. Y. App. Div. 626, 115 N. Y. Supp. 393.

has been reached with respect to the right to operate a waterworks system,⁷ the right granted by an ordinance to operate an interurban railroad upon city streets,⁸ or to operate a street railroad upon such streets.⁹ Similarly the right to maintain a dam,¹⁰ the right to fish,¹¹ and the right of a turnpike company to collect tolls,¹² have been held franchises within the law as to quo warranto proceedings. And the remedy has been held available to challenge the validity of a dram-shop license held by a corporation.¹³

It is the rule that the remedy by quo warranto cannot be used for the enforcement or forfeiture of a municipal contract,¹⁴ although breaches of a municipal contract which amount to abuses of a franchise will authorize the proceeding.¹⁵ Also, a statute specifically authorizing actions to annul the "existence of corporations" does not authorize an action to forfeit and annul special grants or franchises, such as the grant to construct and operate a street railroad.¹⁶ In one important case brought to test the right of a corporation to maintain and operate street railway lines upon city streets, the company advanced the vital proposition that the controversy indicated by the pleadings involved a mere matter of contractual rights and obligations between the railway company and the city in which neither the state nor the general public had any interest, and therefore the rights involved were not triable in the statutory proceeding substituted for quo warranto, and instituted upon the relation of the county attorney or of private citizens.¹⁷ This position has found support in the de-

⁷ *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

⁸ *Olathe v. Missouri & K. I. R. Co.*, 78 Kan. 193, 96 Pac. 42.

⁹ *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867; *State v. Milwaukee Elec. Railway & Light Co.*, 136 Wis. 179, 18 L. R. A. (N. S.) 672, 116 N. W. 900; *State v. Milwaukee, B. & L. G. R. Co.*, 116 Wis. 142, 92 N. W. 546.

¹⁰ *State v. Norcross*, 132 Wis. 534, 122 Am. St. Rep. 998, 112 N. W. 40.

¹¹ An action in the nature of quo warranto to enjoin the corporate acts of defendant corporations and to declare void their fish licenses and locations, or franchises, should be brought on the relation of the prosecuting attorney. *State v. Point Rob-*

erts Reef Fish Co., 42 Wash. 409, 85 Pac. 22.

¹² *State v. Louisiana, B. G. & A. Gravel Road Co.*, 116 Mo. App. 175, 92 S. W. 153.

¹³ *People v. Heidelberg Garden Co.*, 233 Ill. 290, 84 N. E. 230, aff'g 124 Ill. App. 331.

¹⁴ *State v. Birmingham Water Works Co.*, 185 Ala. 388, Ann. Cas. 1916 C 166, 64 So. 23.

¹⁵ *State v. Birmingham Water Works Co.*, 185 Ala. 388, Ann. Cas. 1916 C 166, 64 So. 23.

¹⁶ Gen. Corp. Law, § 131 (taken from Code Civ. Proc. § 1798). *People v. Bleeker St. & F. F. R. Co.*, 140 N. Y. App. Div. 611, 125 N. Y. Supp. 1045.

¹⁷ See *State v. Des Moines City*

cisions of courts of undoubted prominence, notably those of Illinois and Michigan.¹⁸ But the Supreme Court of Iowa held that the contention, or the rule, was not supported by the weight of authority or by the better reason. It took the view that there might be ground for the proposition if the term "franchise" was limited to mean the mere right to corporate existence, and if rights subsequently acquired and based upon grants from or contracts with a municipality would not come within the definition, whereupon a question would arise whether an action would lie to test the usurpation or abuse of such granted rights. "But," said the court, "it is a thoroughly well-established proposition that rights granted to a corporation, either directly or by the state indirectly through the act of a minor municipality authorized by the state, are to be regarded as franchises no less than is the right to be a corporation." And the application of quo warranto or its statutory substitute to cases of this kind was held clearly in accord with the dictates of sound public policy. To say that the state had surrendered to the city all its power and authority to protect public interests against usurpation, neglect or abuse by a corporation of its own making, and that so long as the city authorities were content to remain quiescent, the state was powerless in the premises, would be to say that the state might surrender its sovereignty, and the legislature estop itself by an abdication of its legislative power. It was pointed out that the overwhelming weight of authority was in favor of the proposition that the action could be maintained in the name of the state.¹⁹

In order to justify an action of quo warranto, there must be something more than a mere claim of the franchise or privilege. There must be a usurpation or an unlawful holding or exercising of the franchise.²⁰

In the case of misuser or nonuser, a cause of forfeiture exists when

R. Co., 135 Iowa 694, 109 N. W. 867.

¹⁸ See *Belleville v. Citizens' Horse Ry. Co.*, 152 Ill. 171, 26 L. R. A. 681, 38 N. E. 584; *Board of Trade of Chicago v. People*, 91 Ill. 80; *People v. Mutual Gas Light Co.*, 38 Mich. 154.

¹⁹ *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867, quoting at length *State v. Madison St. Ry. Co.*, 72 Wis. 612, 1 L. R. A. 771, 40 N. W. 487, where the same question was considered and the same result

arrived at. That the proceeding was proper was also held in *Olathe v. Missouri & K. I. R. Co.*, 78 Kan. 193, 96 Pac. 42, where the Iowa case was referred to and the statement as to a grant of the kind involved being a franchise, was quoted.

The general proposition as to such grants being franchises has already been considered at length in this work, see §§ 14, 15, 1148, *supra*.

²⁰ *State v. Milwaukee, B. & L. G. R. Co.*, 116 Wis. 142, 92 N. W. 546.

there is a breach of the implied condition of a granted franchise that it shall be used for the public benefit.²¹

The failure of an owner to perform the conditions of the granted franchise operates to terminate the franchise, and to authorize the quo warranto proceeding to effect forfeiture, regardless of whether the owner is a domestic or foreign corporation.²²

A defendant may be ousted from possession of a granted franchise because it has not the capacity to hold it,²³ and the proceedings may be instituted for cause when the granted franchise is accepted. A corporation accepting such a franchise holds and exercises it as fully as if it has started to build its structure.²⁴

§ 3231. Illegal acts not amounting to usurpation of franchises. In a number of cases quo warranto proceedings have been instituted to question the validity of various corporate acts not amounting to usurpation or abuse of franchises. Inasmuch as the remedy is only available to redress grievances affecting the public, some of these cases are disposed of by denying relief on the ground that only private matters are involved.²⁵ In other cases, forfeiture has been sought for the violation of statutes as to keeping correct books of account at the principal place of business of the corporation, or for failure to file annual reports. While quo warranto proceedings are proper in such cases, it is not every failure to comply with the statute that will authorize a judgment of forfeiture. The question involves that of intent to violate the statute.²⁶

It is a general principle that quo warranto will not lie to test the

²¹ *State v. West End Light & Power Co.*, 246 Mo. 653, 152 S. W. 76; *State v. Light & Development Co. of St. Louis*, 246 Mo. 618, 152 S. W. 67.

²² *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

²³ Under St. 1898, § 3466. *State v. Noreross*, 132 Wis. 534, 122 Am. St. Rep. 998, 112 N. W. 40.

²⁴ *State v. Milwaukee, B. & L. G. R. Co.*, 116 Wis. 142, 92 N. W. 546.

²⁵ See § 3224, *supra*.

²⁶ Not every failure of a corporation to comply with the statute as to keeping correct books of account at its principal place of business, and allowing inspection of such books (*J. & A. Ann. St. ¶ 2430*) will expose

the corporation to a loss of its franchise, but the courts cannot say as a matter of law that any failure to comply with such a statute will not cause a forfeiture. *People v. Walker Opera House Co.*, 249 Ill. 106, 94 N. E. 159.

Forfeiture need not be decreed because a president of a corporation failed to make an annual report as required by the charter act, it not appearing that such failure was wilful or intentional. *State v. United States Endowment & Trust Co.*, 140 Ala. 610, 103 Am. St. Rep. 60, 37 So. 442.

See generally the chapter on Forfeiture and Dissolution, *infra*.

legality of corporate acts which do not amount to a usurpation of franchises, unless there is a statute authorizing such a proceeding. Thus the remedy is not available to test the legality of a corporation's title to, or possession of, property.²⁷

§ 3232. Ouster of foreign corporations. Proceedings by an information in the nature of quo warranto, or the statutory substitute for such remedy, are usually considered proper when it is sought to oust a foreign corporation from its right to do business in a state, as where the foreign corporation engages in business in violation of a statutory prohibition, or without complying with conditions precedent prescribed by the statutes of the state, or where such a company engages in transactions contrary to the public policy of the state.²⁸ In the same manner as domestic corporations, the proceeding may be brought when a foreign corporation violates the criminal laws of the state, as, for example, when an anti-trust statute is violated;²⁹ and the remedy is also available to forfeit licenses, privileges or secondary franchises held by a foreign company.³⁰

It has been held, however, that a judgment of ouster will not be entered where the corporation fails to comply with statutory conditions precedent as to obtaining a permit, when such failure is occa-

²⁷ *State v. Louisiana, B. G. & A. Gravel Road Co.*, 116 Mo. App. 175, 92 S. W. 153.

²⁸ *Alabama. Louisville & N. R. Co., v. State*, 154 Ala. 156, 45 So. 296.

Iowa. State v. Omaha & C. B. Railway & Bridge Co., 91 Iowa 517, 60 N. W. 121; *State v. Fidelity & Casualty Co.*, 77 Iowa 648, 42 N. W. 509.

Kansas. State v. William J. Lemp Brewing Co., 79 Kan. 705, 29 L. R. A. (N. S.) 44, 102 Pac. 504; *State v. Kansas Natural Gas Co.*, 71 Kan. 785, 81 Pac. 506.

Michigan. Attorney General v. A. Booth & Co., 143 Mich. 89, 106 N. W. 868.

Minnesota. State v. Fidelity & Casualty Ins. Co., 39 Minn. 538, 41 N. W. 108.

Nebraska. State v. Standard Oil Co., 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413.

Ohio. State v. Fidelity & Casualty Ins. Co., 49 Ohio St. 440, 16 L. R. A. 611, 34 Am. St. Rep. 573, 31 N. E. 658; *State v. Western Union Mut. Life Ins. Co.*, 47 Ohio St. 167, 8 L. R. A. 129, 24 N. E. 392.

²⁹ *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902; *State v. Standard Oil Co.*, 61 Neb. 28, 87 Am. St. Rep. 449, 84 N. W. 413; *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033 (where the proceeding is in equity).

³⁰ A proceeding to forfeit a franchise owned by a corporation, which franchise is not dependent upon corporate existence, may be maintained against the corporation entirely independently of whether it be a domestic or foreign body. *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

sioned by a bona fide belief that a permit is not necessary. In such a case the corporation will be given an opportunity to comply with the law.³¹

The action of public officers in issuing a certificate authorizing the corporation to do business in the state may be reviewed in quo warranto proceedings, as such officers act ministerially and not judicially in granting the certificate.³² A different question is presented where proceedings are brought to oust a company, and the corporation seeks a review of the action of public officers or a charter board in refusing to permit the transaction of business in the state. It has been held that such refusal will not be reviewed in the quo warranto proceeding.³³

§ 3233. Ouster of corporate officers. It seems to have been long settled in England that the office with respect to which the remedy by information would lie must have been public in nature, and that the usurpation of an office in a private corporation would not be inquired into in quo warranto proceedings. The remedy in that country was generally employed in cases of public or municipal corporations. By reason of these rules there was formerly some doubt in the decisions of this country as to whether the remedy was available for this purpose.³⁴ It may, however, now be regarded as well settled in this country that quo warranto is the proper remedy to determine the title to corporate offices and to oust an incumbent from the exercise thereof, as where such an office is usurped by a person who has no title thereto, either because there has been no appointment or election, because the appointment or election is void or voidable, or because the term of office of the incumbent has expired.³⁵

³¹ *State v. Omaha & C. B. Railway & Bridge Co.*, 91 Iowa 517, 60 N. W. 121.

³² *State v. Fidelity & Casualty Ins. Co.*, 39 Minn. 538, 41 N. W. 108; *State v. Fidelity & Casualty Ins. Co.*, 49 Ohio St. 440, 16 L. R. A. 611, 34 Am. St. Rep. 573, 31 N. E. 658.

³³ *State v. Kansas Natural Gas Co.*, 71 Kan. 785, 81 Pac. 506.

³⁴ *Hankins v. Newell*, 75 N. J. L. 26, 66 Atl. 929; *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790. See *State v. Standard Oil Co. of Kentucky*, 120 Tenn. 86, 119 S. W. 565.

³⁵ *Delaware. State v. Brooks* (Del. Super.), 74 Atl. 37.

Florida. Davidson v. State, 20 Fla. 784.

Georgia. McCarthy v. McKinney, 137 Ga. 292, 73 S. E. 394.

Illinois. People v. Healy, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599; *People v. Rittman*, 155 Ill. App. 523.

Indiana. Creek v. State, 77 Ind. 180.

Michigan. Attorney General v. Looker, 111 Mich. 498, 56 L. R. A. 947, 69 N. W. 929.

The application of quo warranto proceedings to the purpose of determining the title to office is an extension of the original purposes of the remedy. With respect to the common-law remedy by an information in the nature of quo warranto, it is well established that when the wrong complained of is the usurpation of an office, it must appear that there is a usurpation of an office public in character, since otherwise the people cannot be called upon in their sovereignty to petition for the redress of the wrong.³⁶ Offices of a private corporation are considered offices of a public character within the meaning that the remedy by information is available in case of usurpation.³⁷ In addition the statutes usually declare that the remedy by quo warranto is proper for this purpose, and specially enumerate "offices of private corporations" in stating that the remedy lies when offices or franchises are usurped or unlawfully held.³⁸ This is true not only of the

Missouri. *State v. Farris*, 45 Mo. 183; *State v. Kupferle*, 44 Mo. 154, 100 Am. Dec. 265.

New Jersey. *Smith v. Trustees Bethel African M. E. Church of Jersey City*, 89 N. J. L. 397, 99 Atl. 102; *Schilstra v. Van Den Heuvel*, 82 N. J. Eq. 155, 612, 90 Atl. 1056; *Overman v. Manly Drive Co.*, 77 N. J. L. 290, 71 Atl. 1125; *Hankins v. Newell*, 75 N. J. L. 26, 66 Atl. 929; *Barna v. Kirczow*, 71 N. J. Eq. 196, 63 Atl. 611.

New York. *People v. Albany & S. R. Co.*, 57 N. Y. 161; *People v. Albany & S. R. Co.*, 55 Barb. (N. Y.) 344; *Hartt v. Harvey*, 32 Barb. (N. Y.) 55; *People v. Tibbits*, 4 Cow. (N. Y.) 358; *Moir v. Provident Sav. Life Assur. Society*, 127 N. Y. App. Div. 591, 112 N. Y. Supp. 57; *People v. New York Casualty Co.*, 34 N. Y. Misc. 326, 69 N. Y. Supp. 775; *People v. John*, 80 N. Y. Misc. 418, 141 N. Y. Supp. 225 (referring to statutory substitute for remedy under Code Civ. Proc. § 1948).

Ohio. *State v. Bonnell*, 35 Ohio St. 10; *State v. McDaniel*, 22 Ohio St. 354.

Oregon. *Beard v. Beard*, 66 Ore. 512, 134 Pac. 1196, 133 Pac. 797.

Pennsylvania. *McDowell v. Wilson*, 252 Pa. 91, 97 Atl. 100; *Commonwealth v. Jankovic*, 216 Pa. 615, 65 Atl. 1099; *Commonwealth v. Stevens*, 168 Pa. St. 582, 32 Atl. 111; *Jenkins v. Baxter*, 160 Pa. St. 199, 28 Atl. 682; *Commonwealth v. Graham*, 64 Pa. St. 339; *Commonwealth v. Smith*, 45 Pa. St. 59; *Commonwealth v. Gill*, 3 Whart. (Pa.) 228; *Commonwealth v. Arrison*, 15 Serg. & R. (Pa.) 127; *Gallagher v. McAdams*, 49 Pa. Super. Ct. 81; *Com. v. Straus*, 32 Pa. Super. Ct. 389.

Vermont. *Clark v. Wild*, 85 Vt. 212, Ann. Cas. 1914 C 661, 81 Atl. 536.

See § 1826.

³⁶ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

³⁷ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

³⁸ *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599. The Act of June 14, 1836, P. L. 621 provides a complete method by which the title to an office may be inquired into through a writ of quo warranto. *Com. v. Straus*, 32 Pa. Super. Ct. 389. The Act of April 29, 1874, P. L. 73,

usual common-law statutes or the statutes patterned after the English statute of Anne, but also of statutes providing a substitute for quo warranto proceedings.³⁹ The extension of the remedy is also apparent by noting the statutes enacted in some states whereby the right to office is determined by trying the relator's title as well as that of the defendant.⁴⁰ Under such statutes the proceeding resolves itself into an election contest. At common law the proceeding by information was not so considered, but was brought solely for the purpose of trying and determining the fact of usurpation of the office by the defendant, and was one of ouster, regardless of the title of the relator. The court was not concerned, in the common-law proceeding, by the question who should occupy the usurped office.⁴¹

In accordance with the rule announced above, quo warranto is proper where there is a dispute as to the office of a director,⁴² a president,⁴³ a secretary,⁴⁴ or treasurer.⁴⁵ But a superintendent holding his office at the will of directors has been held not to hold an "office" within the meaning of a statute authorizing quo warranto proceedings.⁴⁶

Usually quo warranto proceedings are proper where the title of trustees of a church or religious corporation is disputed.⁴⁷ By another court it was said, however, that "The incorporation of an existent

§ 8, as to setting aside corporate elections on the petition of five stockholders does not repeal or amend the Act of June 14, 1836, P. L. 621, as to quo warranto to determine the title to an office. *Com. v. Straus*, 32 Pa. Super. Ct. 389.

³⁹ *People v. John*, 80 N. Y. Misc. 418, 141 N. Y. Supp. 225.

Title to office in a domestic corporation can only be determined by an action brought by the attorney general pursuant to Code Civ. Proc. § 1948. *People v. John*, 80 N. Y. Misc. 418, 141 N. Y. Supp. 225.

⁴⁰ See *State v. Heinmiller*, 38 Ohio St. 101.

⁴¹ *State v. Brooks* (Del. Super.), 74 Atl. 37.

⁴² *State v. Brooks* (Del. Super.), 74 Atl. 37; *People v. New York Casualty Co.*, 34 N. Y. Misc. 326, 69 N. Y. Supp. 775.

⁴³ *People v. Rittman*, 155 Ill. App.

523 (referring to the president of a fraternal insurance corporation); *Overman v. Manly Drive Co.*, 77 N. J. L. 290, 71 Atl. 1125.

⁴⁴ *McCarthy v. McKinney*, 137 Ga. 292, 73 S. E. 394; *Beard v. Beard*, 66 Ore. 512, 134 Pac. 1196, 133 Pac. 797.

⁴⁵ See *Com. v. Jankovic*, 216 Pa. 615, 65 Atl. 1099.

⁴⁶ *State v. Gronan*, 23 Nev. 437, 49 Pac. 41.

⁴⁷ *Schilstra v. Van Den Heuvel*, 82 N. J. Eq. 155, 612, 90 Atl. 1056.

A writ of quo warranto should issue where it appeared that an election of trustees of a church corporation was not held on the proper day, and was conducted in accordance with a "Book of Discipline" instead of the law of the state. *Smith v. Trustees Bethel African M. E. Church of Jersey City*, 89 N. J. L. 397, 99 Atl. 102.

religious body being that of the members thereof, it is a consequence that the selection, by the body, of trustees to effect the incorporation thereof is but an authoritative act of the body looking to the consummation of the incorporation—an agency which, when afforded, and when the major purpose is attained, is subject to change in personnel without the control or revision of civil tribunals. It follows, of course, that such trustees are not, at any time, the tenants of offices in a corporation created by authority of the state” within the purview of the statute authorizing quo warranto proceedings.⁴⁸

§ 3234. Effect of existence of other remedies—In general. Courts of equity do not as a rule declare or determine forfeitures,⁴⁹ and the remedy by injunction is wholly inconsistent with that of quo warranto. The latter remedy “goes to the life of the corporation informed against, while a proceeding to enjoin is necessarily predicated upon anticipation of the continuance of the defendant’s corporate existence.”⁵⁰ Accordingly it is usually held that the remedy in equity is improper to enforce the forfeiture of a franchise.⁵¹ The same rule applies to secondary franchises,⁵² although a somewhat different situation exists with respect to such franchises, or where only certain corporate powers are usurped. In such cases it is not necessary to terminate the existence of the corporation. There are quite a few cases where the termination of the existence of the corporation will not be of any public benefit and in fact will be harmful to the public.⁵³ In some states the remedy in equity is held available and exists coextensively with the remedy by quo warranto,⁵⁴ and in one state the

⁴⁸ *Dismukes v. State*, 176 Ala. 616, 58 So. 195.

⁴⁹ *Kavanaugh v. St. Louis*, 220 Mo. 496, 119 S. W. 552.

⁵⁰ *State v. People’s Ice, Storage & Fuel Co.*, 246 Mo. 168, 151 S. W. 101.

⁵¹ *State v. People’s Ice, Storage & Fuel Co.*, 246 Mo. 168, 151 S. W. 101; *Kavanaugh v. St. Louis*, 220 Mo. 496, 119 S. W. 552; *Clark v. Interstate Independent Tel. Co.*, 72 Neb. 883, 101 N. W. 977.

⁵² A bill in equity to enjoin a company from proceeding under its charter to lay railway tracks in a street, the basis of the relief sought being the invalidity of the franchise purported

to be granted, is in effect a quo warranto to challenge the validity of the charter and cannot be sustained by a private relator. *Thirteenth & Fifteenth Sts. Passenger R. Co. v. Broad St. Rapid Transit R. Co.*, 219 Pa. 10, 67 Atl. 901.

⁵³ The public benefit may be safeguarded by the relief afforded. See § 3269 et seq.

⁵⁴ Quo warranto is the proper remedy to forfeit the rights of a charitable corporation for misuser of powers, under Michigan Comp. Laws, § 9950 et seq., though the remedy in equity to restrain the unlawful acts is also available, under § 9755 et seq. *People v. Michigan Sanitarium & Benev-*

remedy against either domestic or foreign corporations, to secure the relief usually afforded by quo warranto proceedings, is by a suit in equity.⁵⁵ Also, in some cases it has been held that the remedy by injunction is to be preferred, on the ground that the remedy by quo warranto is inadequate. It has been so held where the forfeiture of franchises would not be of any public benefit, or where the act complained of was a nuisance.⁵⁶ But a statute providing a remedy in equity to enforce the performance of contracts of municipalities with public service corporations, has been held not a bar to quo warranto proceedings. The difference between the two remedies was referred to, and it was pointed out that the equitable remedy looked merely to the performance of the contract, while quo warranto was a remedy looking to the sovereign power of the state to correct abuses of franchises.⁵⁷

Corporations violating anti-trust acts may be proceeded against by a bill in equity, as well as by criminal proceedings, in addition to the remedy by quo warranto.⁵⁸ It has also been held that the pendency of proceedings under a statute by the directors of an insolvent corporation to dissolve it and distribute its assets through a receiver does not bar an action by the attorney general to enforce a forfeiture of the corporate charter, for the statute is merely permissive, and does not exclude the common-law remedy. Both actions may be carried on at the same time, but a judgment of dissolution in one action will operate as an abatement of the other.⁵⁹

olent Ass'n, 151 Mich. 452, 115 N. W. 423.

⁵⁵ *State v. Schlitz Brewing Co.*, 104 Tenn. 715, 78 Am. St. Rep. 941, 59 S. W. 1033.

⁵⁶ *State v. Louisiana, B. G. & A. Gravel Road Co.*, 116 Mo. App. 175, 92 S. W. 153.

Equity will take jurisdiction and an injunction will be granted to prevent a carrier from collecting rates in excess of those prescribed by law, even though the remedy by quo warranto exists (N. H. Pub. St. c. 240), as the latter remedy is inadequate and the forfeiture of the franchises would be of no benefit to the state, but of grave consequences to the defendant. *State v. Boston & M. R. R.*, 75 N. H. 327, 74 Atl. 542.

Where a corporation exacted and unlawfully collected tolls for the use of a road, such collection was a nuisance, and injunction was available to secure the freedom of the highway, as the proceeding by quo warranto would have been of a tedious nature, while injunction afforded immediate relief. *State v. Louisiana, B. G. & A. Gravel Road Co.*, 116 Mo. App. 175, 92 S. W. 153.

⁵⁷ *Code Ala.* 1907, § 3513. *State v. Birmingham Water Works Co.*, 185 Ala. 388, Ann. Cas. 1916 C 166, 64 So. 23.

⁵⁸ *State v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S. W. 145.

See the next section *infra*.

See generally Chap. 54.

⁵⁹ *People v. Murray Hill Bank*, 10

A statute incorporating a toll road company which provides for complaints by private persons when the road of such company is out of repair, does not provide a remedy which operates to abolish, repeal or modify the common-law and statutory remedies for the usurpation or nonuser of franchises.⁶⁰ It has been seen heretofore that, as a general rule, where there is an adequate remedy by quo warranto, equity has no jurisdiction, in the absence of statute, to determine the title to an office.⁶¹ Nor can mandamus ordinarily be employed for this purpose, though there is apparent an increasing tendency to employ the writ.⁶² Also an action by a trustee to recover damages for his wrongful expulsion from office is improper where the real question at issue is his title to the office.⁶³

§ 3235. — Remedy under criminal laws. As has already been noted, quo warranto proceedings are usually considered civil in nature,⁶⁴ and there is no merger of the civil liability in the criminal offense.⁶⁵ A corporation may be proceeded against by quo warranto for a misuser or perversion of its franchise, although its officers and agents at the same time may be amenable to the criminal law for the offenses committed by them in the perversion of such franchise. Neither one of these proceedings is a bar to the other,⁶⁶ and the corporation may be held to answer for its wrongful acts before its agents are tried and convicted of their guilty acts.⁶⁷ For instance, it has been

N. Y. App. Div. 328, 41 N. Y. Supp. 804.

⁶⁰ *Territory v. Virginia Road Co.*, 2 Mont. 96.

⁶¹ See §§ 1828-1831.

⁶² See § 1827.

The remedy by mandamus may be available when a corporate officer seeks to regain his position, but certiorari has been held not the proper remedy to review a resolution removing an officer. *Overman v. Manly Drive Co.*, 77 N. J. L. 290, 71 Atl. 1125.

⁶³ In an action by a trustee of a church to recover damages for his wrongful expulsion from office, where the real question at issue is the plaintiff's title to the office of trustee, a demurrer is properly sustained to the plaintiff's statement of claim, as the

statutory method by writ of quo warranto is adequate and exclusive to determine the questions raised. *McDowell v. Wilson*, 252 Pa. 91, 97 Atl. 100.

⁶⁴ See § 3219, *supra*.

⁶⁵ *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

⁶⁶ *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936; *State v. Delmar Jockey Club*, 200 Mo. 34, 98 S. W. 539, 92 S. W. 185; *State v. Springfield African Social & Improvement Club*, 169 Mo. App. 137, 154 S. W. 458.

⁶⁷ *State v. Delmar Jockey Club*, 200 Mo. 34, 98 S. W. 539, 92 S. W. 185;

held that violators of an anti-trust act may be proceeded against by indictment or information, and the remedies by information and in equity, also exist.⁶⁸ But the proceedings by information differ in form and consequence from a prosecution by indictment, as in the former case the state proceeds for the violation of the corporation's contract, and in the latter case it prosecutes for a violation of a public law.⁶⁹

When a quo warranto proceeding is brought against a corporation for the violation of an anti-trust act, it cannot contend that such proceeding deprives it of the equal protection of the laws, in that the corporate charter will be forfeited and a large fine imposed, whereas other corporations prosecuted criminally under the anti-trust law are subjected to lesser fines. This is in effect a claim that in a civil proceeding the defendants are not tried in the manner and subjected to the fine imposed in criminal cases.⁷⁰

III. PROCEDURE

§ 3236. Jurisdiction and venue. At the common law, the writ of quo warranto was prosecuted and determined before the king's justices at Westminster.⁷¹

In the United States, the question of jurisdiction is one which is to be determined by constitutional and statutory provisions on the subject;⁷² and a decision of a state supreme court, determining its own

State v. Springfield African Social & Improvement Club, 169 Mo. App. 137, 154 S. W. 458.

⁶⁸ *State v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S. W. 145.

The procedure provided by Missouri Rev. St. of 1899, § 8971, as to the forfeiture of charters by corporations violating the anti-trust laws, is not the exclusive remedy available to the state to correct abuses and usurpations by corporations. *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

⁶⁹ *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936.

⁷⁰ *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936.

⁷¹ The writ of quo warranto was originally returnable before the

king's justices at Westminster, but afterwards only before the justices in eyre, by virtue of the statutes of quo warranto (6 Edw. I, c. 1; 18 Edw. I, st. 2). When such justices gave place to the king's temporary commissioners of assize, the judges on the several circuits, a portion of the statute lost its effect, and the writ was prosecuted and determined before the king's justices at Westminster. 3 Bl. Com. 262.

⁷² See *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

The Peacemaker's Court of the Seneca Nation of Indians has no jurisdiction of an action to try title to the offices of trustees of the Iroquois Agricultural Society. *People v. John*, 80 N. Y. Misc. 418, 141 N. Y. Supp. 225.

jurisdiction, by a construction of the laws of the state, has been held conclusive upon the Supreme Court of the United States.⁷³

In some states jurisdiction to issue writs of quo warranto is conferred upon the supreme or appellate courts, by virtue of constitutional provisions,⁷⁴ and in other states, the circuit courts have jurisdiction of such proceedings.⁷⁵

When a quo warranto proceeding may be brought in a supreme court, a precedent suit in another court is not necessary.⁷⁶

A respondent who appears and pleads issuably cannot subsequently object that the court has no jurisdiction of the case, if the cause is of a character within the power of the court to try.⁷⁷

As to the venue of quo warranto proceedings, it has been held that such a proceeding does not involve any of the subjects specified by a statute as to the venue of actions to recover possession of realty, for partition and for the foreclosure of real estate mortgages, and requiring such actions to be brought where the subject of the action is situated. Such decision was rendered in a proceeding to forfeit a franchise where the corporation claimed that it had a freehold in the streets of a city.⁷⁸

§ 3237. Parties plaintiff—State. Both the original writ of quo warranto, and the information, were exclusive prerogative remedies

⁷³ Where a quo warranto proceeding is brought to oust certain corporations, and it appears that the constitution of the state confers jurisdiction upon the supreme court to issue writs of quo warranto, the decision and judgment of such court necessarily implies that it had jurisdiction of the subject-matter and authority to enter a judgment of ouster and fine under such clause of the constitution, and such ruling will be held conclusive upon the Supreme Court of the United States, regardless of whether the judgment is civil or criminal or both combined. *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936.

⁷⁴ *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

Missouri R. S. 1909, § 3444, conferring the right to inquire into al-

leged unlawful acts of misuser and nonuser of a franchise upon the circuit court of the county where the corporation is organized, does not confer exclusive jurisdiction, as Const. art. VI, § 3, confers jurisdiction upon the Supreme Court to issue quo warranto and other remedial writs, and similar jurisdiction is conferred upon the Court of Appeals by other sections. *State v. Springfield African Social & Improvement Club*, 169 Mo. App. 137, 154 S. W. 458.

⁷⁵ *State v. Portage City Water Co.*, 107 Wis. 441, 83 N. W. 697.

⁷⁶ *Attorney General v. A. Booth & Co.*, 143 Mich. 89, 106 N. W. 868.

⁷⁷ *Attorney General v. A. Booth & Co.*, 143 Mich. 89, 106 N. W. 868.

⁷⁸ *Smith v. State*, 140 Ind. 343, 39 N. E. 1060 (referring to *1 Burns*, 1894, § 308).

which could only be availed of at the instance of the crown,⁷⁹ and the proceedings by information were instituted in the name of the crown upon the information of the attorney general.⁸⁰ The practice gradually developed of allowing the master of the crown office, head of the Department of Justice of the King's Bench Division, to exhibit informations on the relation of private individuals to enforce certain of their rights in offices, franchises and the like. These actions were brought by the master of the crown office in his own name on the relation of the private individual. The vexatious and irresponsible character of this litigation led to the enactment of the statutes of 4 and 5, William and Mary, c. 18, which required the private individual to enter into a recognizance in the sum of twenty pounds and obtain leave of court before he could require the master of the crown office to file the information on his relation.⁸¹ The statute of 9 Anne, c. 20, extending the remedy to private persons for the redress of their wrongs, operated to change the procedure, so that the suit was brought in the name of the king upon the relation of a private individual.⁸²

Regardless of its origin, the prerogative character of the proceeding is preserved from its earliest uses down to the present time,⁸³ and the common-law proceeding is instituted by the attorney general, on behalf of the state, instead of the king, when such a proceeding is brought in those states where the common law obtains.⁸⁴ And it is the accepted doctrine that only the sovereign power can assert a breach of condition of a corporate franchise by an action in the nature of quo warranto.⁸⁵ "An information for the purpose of dissolving the corporation, or of seizing its franchises," said Chief Justice Parsons of the Massachusetts court, "cannot be prosecuted but by the authority of the commonwealth, to be exercised by the legislature, or by the attorney or solicitor general acting under its direction, or ex officio in its behalf. For the commonwealth may waive any breaches of any condition, expressed or implied, on which the corporation was created,

⁷⁹ *People v. Union Consol. El. R. Co.*, 263 Ill. 32, Ann. Cas. 1915 C 388, 105 N. E. 12.

⁸⁰ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790; *State v. Home Brewing Co. of Indianapolis*, 182 Ind. 75, 105 N. E. 909.

⁸¹ See *State v. Home Brewing Co. of Indianapolis*, 182 Ind. 75, 105 N. E. 909.

⁸² *Brooks v. State*, 3 Boyce (Del.) 1,

51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

⁸³ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

⁸⁴ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790. See *State v. Biedler* (Del. Super.), 99 Atl. 278.

⁸⁵ *Village of Fredonia v. Fredonia Natural Gas Light Co.*, 169 N. Y. App. Div. 690, 155 N. Y. Supp. 212,

and we cannot give judgment for the seizure by the commonwealth of the franchises of any corporation, unless the commonwealth be a party in interest to the suit, and thus assenting to the judgment." ⁸⁶ Accordingly, in the absence of a statute to the contrary, quo warranto proceedings, in this country, are instituted by, and can only be instituted by, the authority of the state, the commonwealth or the people. ⁸⁷

The proceeding by information in states where statutes have been enacted, which statutes are usually modeled after the statute of Anne,

⁸⁶ *Com. v. Union Fire & Marine Ins. Co.*, 5 Mass. 230; 4 Am. Dec. 50.

⁸⁷ *United States. Gaylord v. Ft. Wayne, M. & C. R. Co.*, 6 Biss. 286, Fed. Cas. No. 5,284.

Delaware. *Brooks v. State*, 3 Boyce 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790; *State v. Biedler* (Del. Super.), 99 Atl. 278.

Illinois. *People v. Larsen*, 265 Ill. 406, 106 N. E. 947; *People v. North Chicago R. Co.*, 88 Ill. 537; *Ross v. Chicago, B. & Q. R. Co.*, 77 Ill. 127.

Indiana. *State v. Home Brewing Co. of Indianapolis*, 182 Ind. 75, 105 N. E. 909.

Iowa. *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

Kansas. *State v. Inner Belt Ry. Co.*, 74 Kan. 413, 87 Pac. 696.

Louisiana. *Atchafalaya Bank v. Dawson*, 13 La. 497; *In re Louisiana Sav. Bank & Safe Deposit Co.*, 35 La. Ann. 196; *State v. Attorney General*, 30 La. Ann. 954.

Maryland. *Hodges v. Baltimore Union Passenger Ry. Co.*, 58 Md. 603; *New Central Coal Co. v. George's Creek Coal & Iron Co.*, 37 Md. 537; *Planters' Bank v. Bank of Alexandria*, 10 Gill. & J. 346.

Massachusetts. *Rice v. National Bank of Commonwealth*, 126 Mass. 300; *Com. v. Union Fire & Marine Ins. Co.*, 5 Mass. 230, 4 Am. Dec. 50.

Michigan. *Attorney General v. A. Booth & Co.*, 143 Mich. 89, 106 N. W. 868; *Heap v. Heap Mfg. Co.*, 97 Mich. 147, 56 N. W. 349.

Missouri. *Hovelman v. Kansas City Herse R. Co.*, 79 Mo. 632.

Montana. *Territory v. Virginia Road Co.*, 2 Mont. 96.

New Hampshire. *Sewall's Falls Bridge v. Fisk & Norcross*, 23 N. H. 171.

New Jersey. *Terhune v. Potts*, 47 N. J. L. 218; *State v. Patterson & H. Turnpike Co.*, 21 N. J. L. 9.

New York. *Village of Fredonia v. Fredonia Natural Gas Light Co.*, 169 App. Div. 690, 155 N. Y. Supp. 212.

North Carolina. *Bass v. Beanoke Navigation & Water-Power Co.*, 111 N. C. 439, 19 L. R. A. 247, 16 S. E. 402; *Buncombe Turnpike Co. v. McC arson*, 1 Dev. & B. 306; *Houston v. Neuse River Nav. Co.*, 8 Jones L. 476.

Pennsylvania. *Hinchman v. Philadelphia & W. C. Turnpike Road*, 160 Pa. St. 150, 28 Atl. 652; *In re Western Pennsylvania R. Co.'s Appeal*, 104 Pa. St. 399; *Kuhn v. United States Bank*, 2 Ashm. 170; *Com. v. Farmers' Bank*, 2 Grant's Cas. 392.

Tennessee. *State v. White's Creek Turnpike Co.*, 3 Tenn. Ch. 163; *La Grange & M. R. Co. v. Rainey*, 7 Cold. 420; *State v. Butler*, 15 Lea 104.

Texas. *State v. Paris R. Co.*, 55 Tex. 76; *State v. Rio Grande R. Co.*, 41 Tex. 217; *Oriental Oil Co. v. State*, — Tex. Civ. App. —, 135 S. W. 722.

Virginia. *South & W. R. Co. v. Com.*, 104 Va. 314, 51 S. E. 824.

is generally entitled in the name of the state, upon the relation of a private person, and represented by a state or county attorney.⁸⁸ It has been held of no importance in a statutory proceeding whether it was entitled in the name of the state alone or in the name of the state upon the relation of a designated officer or private citizen, the state being the plaintiff in each instance.⁸⁹ Probably there are no exceptions to the rule that the proceeding being in theory a prosecution, must be prosecuted in the name of the state or a public officer representing the sovereignty.⁹⁰ However, as has already been noted, quo warranto proceedings are now regarded as civil in nature,⁹¹ and this has operated to render the state merely a nominal plaintiff. In a great many of the cases that are now brought, the state cannot be claimed to be the real party in interest; this is true of a suit where directors of a corporation seek, by means of this ancient writ, to oust others who claim to be entitled to the offices. In such an action, the form and the name of the party plaintiff has not been changed, but the state merely permits its name to be used as it is only by such an action that such an issue can be tried. Private counsel, as a matter of course, represent the real plaintiff, and neither the state nor its representative has or shows the slightest interest in such a case when it is filed by the plaintiff.⁹²

§ 3238. — Attorney general or other public officer as relator. At the common law the attorney general was usually designated as the proper officer to institute quo warranto proceedings.⁹³

The statutes usually designate what officer shall institute quo warranto proceedings. In most states, the officer named is the attorney

⁸⁸ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

The expression "upon the relation of," etc., means no more than "upon the complaint of" or "upon the information of," etc. *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

⁸⁹ Proceedings under Code, tit. 21, c. 9, § 4313 et seq. *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

⁹⁰ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

⁹¹ § 3223, supra.

⁹² *State v. Biedler* (Del. Super.), 99 Atl. 278.

The quo warranto proceeding which may be brought by a citizen when the question of usurpation or intrusion into a municipal office or franchise is involved, resembles a civil suit between parties. *Bonynge v. Frank*, 89 N. J. L. 239, 98 Atl. 456.

⁹³ *State v. Biedler* (Del. Super.), 99 Atl. 278; *People v. Bleecker St. & F. F. R. Co.*, 140 N. Y. App. Div. 611, 125 N. Y. Supp. 1045.

See subsection 3237, supra.

general;⁹⁴ in other states the prosecuting attorney is named,⁹⁵ or the circuit,⁹⁶ or district attorney,⁹⁷ and some statutes designate both the attorney general and the prosecuting attorney.⁹⁸ Sometimes the officer designated to institute quo warranto proceedings depends upon the purpose of the suit.⁹⁹

In states where statutes have been enacted naming the officer who is to begin such suits, it is usually held that the attorney general is not a common-law officer, and his duties are only such as are prescribed by the statutes. Accordingly, if another officer is invested with the authority to institute this kind of suits, the attorney general has no common-law right to bring quo warranto proceedings.¹ The

94 Massachusetts. Attorney General v. New York, N. H. & H. R. Co., 197 Mass. 194, 83 N. E. 408.

Michigan. Linnell v. Gay, 162 Mich. 612, 127 N. W. 814.

New Hampshire. State v. Boston & M. R. R., 75 N. H. 327, 74 Atl. 542.

New Jersey. Bonyng v. Frank, 89 N. J. L. 239, 98 Atl. 456.

Texas. Oriental Oil Co. v. State, — Tex. Civ. App. —, 135 S. W. 722.

In a quo warranto proceeding under Texas Rev. St., § 4343, to forfeit the charter of a corporation, an attempt to confer authority to institute the proceeding upon the district or county attorney is in violation of Const. art. 4, § 22. Oriental Oil Co. v. State, — Tex. Civ. App. —, 135 S. W. 722.

95 Burns 1914, §§ 1188, 1189. State v. Home Brewing Co. of Indianapolis, 182 Ind. 75, 105 N. E. 909.

96 State v. Modern Horseshoe Club, 167 Mo. App. 644, 150 S. W. 719.

97 Canon City Labor Club v. People, 21 Colo. App. 37, 121 Pac. 120.

98 Michigan Pub. Acts 1899, No. 255, §§ 2, 3, as to unlawful combinations. Attorney General v. Booth & Co., 143 Mich. 89, 106 N. W. 868.

99 Under Va. Code 1904, § 3023, a quo warranto proceeding may be instituted in the name of the commonwealth against a corporation for a

nonuse or misuse of its corporate franchises, not only by the attorney general or the attorney for the commonwealth for the proper county, but also by private persons under certain conditions. South & W. R. Co. v. Com., 104 Va. 314, 51 S. E. 824.

A quo warranto proceeding to forfeit the charter of a railroad because of its failure to have constructed and in operation a certain number of miles of its road as required by its charter, must be commenced by the state alone, under Va. Code 1904, p. 733, § 1313a, cl. 58. South & W. R. Co. v. Com., 104 Va. 314, 51 S. E. 824.

A proceeding under the Texas Act of 1907 (Acts First Called Session 30th Leg.), c. 23, p. 502, as to the forfeiture of corporate charters for the failure to pay franchise taxes, must be instituted by the attorney general. Oriental Oil Co. v. State, — Tex. Civ. App. —, 135 S. W. 722.

In Oklahoma, the insurance commissioner is the proper party to bring a suit to forfeit the charter of an insurance company, and to oust it from doing business in the state. State v. Hooker, 33 Okla. 522, 126 Pac. 231.

¹State v. Home Brewing Co. of Indianapolis, 182 Ind. 75, 105 N. E. 909 (reviewing statutes and decisions as to the power of the attorney general); State v. Seattle Gas & Electric

fact that the proper officer refuses to act does not authorize the attorney general to appear, and if he does act, without authority, he cannot be heard to assert that the respondent has waived objections to the capacity of the relator.²

§ 3239. — Municipal corporation as relator or plaintiff. The extension of quo warranto proceedings so as to authorize the institution of suits by private relators has resulted, especially where the forfeiture of secondary franchises is the object of the proceeding, in the bringing of suits of this nature by municipal corporations. Thus it has been held that a city may maintain a quo warranto proceeding to forfeit the franchise of an interurban railway,³ or may appear as relator in a proceeding to forfeit the franchise of an electric light company.⁴ It has even been held that the city may sue in its own name as plaintiff rather than in the name of the state on the city's relation,⁵ and it has also been held, in a suit to forfeit the franchise of a gas company, that the city was the real party in interest.⁶

Co., 28 Wash. 488, 70 Pac. 114, 68 Pac. 946.

Indiana Acts of 1899, p. 219 (Burns 1914, § 9270), providing that the attorney general shall have charge of and shall prosecute all civil actions brought in the name of the state, contains no express grant of authority to file an information in the nature of quo warranto, and in view of the legislative policy of the state to give such duty into the hands of the prosecuting attorney alone, and also in view of the proviso to the statute mentioned, stating that the act in question shall not affect the authority given to prosecuting attorneys, it cannot be held that the attorney general has any statutory authority to file informations in the nature of quo warranto. *State v. Home Brewing Co. of Indianapolis*, 182 Ind. 75, 105 N. E. 909.

² Under the Washington statute (Bal. Code, § 5781), the prosecuting attorney is the only officer who can institute quo warranto proceedings on his own motion. *State v. Seattle*

Gas & Electric Co., 28 Wash. 488, 70 Pac. 114, 68 Pac. 946.

An attorney general who is not authorized to institute a quo warranto proceeding to oust a gas company of its franchises to use city streets, cannot be heard to assert that the respondent has waived objections as to the form of the action or as to the capacity of the relator. *State v. Seattle Gas & Electric Co.*, 28 Wash. 488, 70 Pac. 114, 68 Pac. 946, on rehearing.

³ *Olathe v. Missouri & K. I. R. Co.*, 78 Kan. 193, 96 Pac. 42.

⁴ *State v. Light & Development Co. of St. Louis*, 246 Mo. 618, 152 S. W. 67.

⁵ *Olathe v. Missouri & K. I. R. Co.*, 78 Kan. 193, 96 Pac. 42.

⁶ This is true where it appears that the franchise was granted by the state, subject to obtaining consent of the city, as in such case the state was not particularly interested in the question whether the city granted permission by its ordinances or suffered use of the streets without adopting an

§ 3240. — Private person as relator. By statute in some states, quo warranto proceedings may be brought in the name of the state on the relation of private individuals, or by a private individual in his own name.⁷

The statutes authorizing such proceedings vary considerably and authorize the suit under certain conditions, such as imposing the requirement that the relator give security for costs,⁸ a condition which will be found in the English statutes.⁹

Also, some statutes authorize suits on the relation of private parties when the public officer refuses to act.¹⁰ It has been held competent for the legislature to authorize such procedure, even when the object of the suit is to determine and declare a forfeiture of a corporate charter,¹¹ and, very properly, proceedings to determine the title to a corporate office are frequently, if not usually, instituted by private relators.¹² In this latter case, the state may be said to be merely a nominal party plaintiff, and the proceeding is in reality a private

ordinance licensing the gas company. *People v. Union Gas & Electric Co.*, 254 Ill. 395, Ann. Cas. 1916 B 201, 98 N. E. 768.

7 Alabama. *Floyd v. State*, 177 Ala. 169, 59 So. 280; *State v. United States Endowment & Trust Co.*, 140 Ala. 610, 103 Am. St. Rep. 60, 37 So. 442; *Tuscaloosa Scientific & Art Ass'n v. State*, 58 Ala. 54.

Colorado. *Canon City Labor Club v. People*, 21 Colo. App. 37, 121 Pac. 120.

Iowa. *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

Kansas. *Miller v. Town of Palermo*, 12 Kan. 14.

New Jersey. *Bonynge v. Frank*, 89 N. J. L. 239, 98 Atl. 456.

Virginia. *South & W. R. Co. v. Com.*, 104 Va. 314, 51 S. E. 824.

8 *Floyd v. State*, 177 Ala. 169, 59 So. 280; *State v. United States Endowment & Trust Co.*, 140 Ala. 610, 103 Am. St. Rep. 60, 37 So. 442.

9 See *State v. Home Brewing Co. of Indianapolis*, 182 Ind. 75, 105 N. E. 909.

As to statute of 4 and 5 William

and Mary, c. 18, as to security for costs, see § 3237, *supra*.

10 *Canon City Labor Club v. People*, 21 Colo. App. 37, 121 Pac. 120. See *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867; *State v. Milwaukee Independent Tel. Co.*, 133 Wis. 588, 114 N. W. 108, 315.

Under Va. Code of 1904, § 3023, a quo warranto proceeding may be instituted in the name of the commonwealth against a corporation for non-use or misuse of the corporate franchises, by private persons upon the failure or refusal of the attorney general or of the commonwealth's attorney to apply for the writ. *South & W. R. Co. v. Com.*, 104 Va. 314, 51 S. E. 824.

As to cases dealing with the proposition that a private relator cannot bring the proceeding when the public officer refuses to act, see § 3241, *infra*.

11 See *Tuscaloosa Scientific & Art Ass'n v. State*, 58 Ala. 54; *State v. Consolidation Coal Co.*, 46 Md. 1.

12 *Decker v. Daudt*, 74 N. J. L. 790, 67 Atl. 375; *Com. v. Straus*, 32 Pa. Super. Ct. 389.

one.¹³ But as a general rule the authorization to private relators does not turn the proceeding into a private action to protect purely private rights.¹⁴

The fact that the relator may be benefited by the result, incidentally, is not a ground for denying relief, if the interests of the public are safeguarded and protected.¹⁵ As frequently happens, especially in the case of seeking a forfeiture of secondary franchises, abutting owners and taxpayers have special interests different from that of the general public, authorizing them to act.¹⁶ Under the statute of 9 Anne, c. 20, which is followed in some states, the relator must have a special interest in the matter of inquiry, although a slight interest may be sufficient.¹⁷ And under other statutes it has been held that leave of court will not be granted unless it appears that the relator acts in good faith in vindication of his own rights or those of the public or a portion of the public.¹⁸

As to the effect of authorization to private individuals to bring quo warranto proceedings, the rules vary according to the statute in-

*Proceedings to determine the title to a corporate office may be instituted either by the person entitled to the office, or by a stockholder. *Com. v. Stevens*, 168 Pa. St. 582, 32 Atl. 111.

¹³ See § 3237, *supra*.

¹⁴ *State Railroad Commission v. People*, 44 Colo. 345, 22 L. R. A. (N. S.) 810, 98 Pac. 7. See *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867; *Attorney General v. A. Booth & Co.*, 143 Mich. 89, 106 N. W. 868.

¹⁵ *Floyd v. State*, 177 Ala. 169, 59 So. 280; *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

Under the Indiana statute (*Burns* 1914, §§ 1188, 1189), an information against corporations doing or omitting acts which amount to a surrender or forfeiture of their rights and privileges as a corporation, or when they exercise power not conferred by law, may be filed by the prosecuting attorney alone, as the purpose is to take back what the state has granted, the life of the corporation, and in such a purpose there can be no interest singular to one person, but

the interest is common to all who constitute the state. *State v. Home Brewing Co. of Indianapolis*, 182 Ind. 75, 105 N. E. 909.

¹⁶ Under the Wisconsin statute (*St.* 1898, § 3466) a quo warranto proceeding may be brought by a taxpayer to oust a telephone company from exercising franchises when the attorney general refuses to act, and it appears that the city's money may be unlawfully and unnecessarily wasted through an unauthorized channel. *State v. Milwaukee Independent Tel. Co.*, 133 Wis. 588, 114 N. W. 108, 315.

An abutting owner has an interest in the street distinct and different from that of the general public, and when the county attorney refuses to act, he may appear as relator in a proceeding to test the right of a corporation to maintain and operate street railway lines upon such street. *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

¹⁷ *State v. Tularosa Community Ditch*, 19 N. M. 352, 143 Pac. 207.

¹⁸ *Bonynge v. Frank*, 89 N. J. L. 239, 98 Atl. 456.

volved. Thus it has been held that the relator is not a party to the proceeding and cannot control it;¹⁹ that an information is sufficient when founded upon and supported by the affidavit of a private party, although he is not formally a party to the information;²⁰ that the defect in failing to join a relator as plaintiff may be cured after suit is brought;²¹ and in Alabama, it has been held that the private relator cannot confess error and dismiss the suit without leave of court.²²

§ 3241. — Right and duty of public officers to institute proceedings. In the absence of statutory limitations, the attorney general may usually institute quo warranto proceedings at his own discretion,²³ and his right so to act comes from the common law,²⁴ by which arbitrary discretion was lodged in the attorney general to determine whether he would move, and this discretion could not be controlled or reviewed.²⁵

The statutes on this subject vary considerably, but provisions are frequently found for a suit by the attorney general upon his own relation, or upon the relation of some private person,²⁶ or providing that the attorney general may proceed at his own discretion without

¹⁹ *People v. Pratt*, 15 Mich. 184; *State v. Douglas County Road Co.*, 10 Ore. 198.

²⁰ *State v. Brooks* (Del. Super.), 74 Atl. 37.

²¹ *People v. Walker*, 23 Barb. (N. Y.) 304.

²² *Tuscaloosa Scientific & Art Ass'n v. State*, 58 Ala. 54.

²³ *Attorney General v. New York, N. H. & H. R. Co.*, 197 Mass. 194, 83 N. E. 408.

²⁴ *Bonyng v. Frank*, 89 N. J. L. 239, 98 Atl. 456.

²⁵ *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599.

Under the Illinois act (J. & A. Ann. St. ¶ 8687) the discretion possessed by the attorney general at common law is no doubt possessed by the attorney general or state's attorney in all cases which are in fact prosecutions on the part of the people and which involve no individual grievance of the relator. *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599.

²⁶ *Linnell v. Gay*, 162 Mich. 612, 127 N. W. 814.

An information in the nature of quo warranto brought to question the right of a telephone company to occupy streets, is properly brought by the public prosecutor, either of his own accord or at the instance of any individual whom he may name as relator. *People v. Commercial Telephone & Telegraph Co.*, 277 Ill. 265, L. R. A. 1917D 704, 115 N. E. 379.

Under the Washington statute (Bal. Code, § 5781), the information in the nature of quo warranto may be filed by the prosecuting attorney in the superior court of the proper county, upon his own relation whenever he shall deem it his duty to do so, or shall be directed to act by the court or other competent authority, or by any other person on his own relation, whenever he claims an interest in the office or franchise which is the subject of the information. *State v. Seattle Gas & Electric Co.*, 28 Wash. 488, 70 Pac. 114, 68 Pac. 946.

leave of court, whereas such leave is required when a private person desires to prosecute.²⁷

The statute of 9 Anne, c. 20, provides that "it shall and may be lawful to and for," the proper officer, by leave of court to file or "exhibit" the information. The Illinois statute, similar to this English statute, provides that the proper officer "may present a petition" to the court or judge thereof for leave to file the information.²⁸

A statute as to a complaint by an interested private person has been held not to limit the proper officer's right to act,²⁹ and a statute conferring jurisdiction upon railroad commissioners to proceed against railroads violating the law of the state has been held not to preclude the attorney general from proceeding of his own motion when he concludes that the interests of the public require it.³⁰

If a suit is for the benefit of the public, it is immaterial that the public officer was induced to act at the suggestion of a private person,³¹ and it has been held where leave was properly obtained by the proper officer, that an objection could not be made because such public officer was not a party to the suit.³²

The proper officer also has discretion as to what court he will bring the proceedings in.³³

A somewhat difficult question is presented where the legislature extends the scope of the remedy by quo warranto to include the enforcement of private rights but fails to impose by express words a positive duty upon the state's attorney or other official to proceed at the instance of the private relator, or fails to provide that the proceeding may be instituted without the co-operation of such officers. It has sometimes been held that the arbitrary discretion of the public prosecutor still exists as at common law, and that if he refuses to lend his name to the proceeding, the individual relator is without remedy, even though the refusal of the officer results from political, selfish or other improper considerations.

In other states, relief for the relator has been suggested by various methods, not substantially different so far as the result to be attained

²⁷ *Bonynge v. Frank*, 89 N. J. L. 239, 98 Atl. 456.

²⁸ *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599.

²⁹ *State v. Modern Horseshoe Club*, 167 Mo. App. 644, 150 S. W. 719.

³⁰ Pub. Stat. c. 155, § 15. *State v. Boston & M. R. R.*, 75 N. H. 327, 74 Atl. 542.

³¹ Information in the nature of quo

warranto under Pub. Acts 1899, No. 255, as to unlawful combinations. *Attorney General v. A. Booth & Co.*, 143 Mich. 89, 106 N. W. 868.

³² *People v. Lihme*, 193 Ill. App. 341, aff'd 269 Ill. 351, Ann. Cas. 1916 E 959, 109 N. E. 1051.

³³ *Attorney General v. A. Booth & Co.*, 143 Mich. 89, 106 N. W. 868.

is concerned. Thus it has been held that if the proper officer declines to act, the court will peremptorily order him to make the application or direct it to be made by another person, according to the circumstances.³⁴

The claim of arbitrary discretion of the officer has been denied, and writs of mandamus have been issued to compel him to act when a probable or prima facie case was presented by the relator.³⁵ It has been held under the statute of Anne that the public officer is without discretion and must apply at the instance of a private relator, the only discretion being in the court in granting leave. This statute does not expressly require the officer to file an application for leave when presented.³⁶

In Illinois it was for a time the practice of the attorney general to cause the actual parties to the controversy, or their attorneys, to appear before him, whereupon he held a hearing as to whether he should file the application for leave. When the matter was presented to the supreme court, it was held that this practice was improper, and if the

³⁴In *re Bank of Mt. Pleasant*, 5 Ohio 249. See also *State v. Dahl*, 69 Minn. 108, where it was said that under some circumstances it might become the duty of the court to permit an information to be filed by a private person, even though he has no personal interest in the question distinct from the public interest, notwithstanding the attorney general refuses to consent to the filing.

³⁵Where jurisdiction is given the courts to enforce the rights of private individuals by quo warranto, it is manifest that the power to determine whether the suit should be brought should not be lodged in the legal representative of the sovereign power, when the right of the citizen is substantial and the concern of the state with regard to the litigation is practically or entirely theoretical. *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599.

The discretion as to whether the suit should be brought in such case is with the court or judge alone. See *State v. Barry*, 3 Minn. 190, where mandamus was issued requiring the

attorney general to make application. And see also *Lamoreaux v. Attorney General*, 89 Mich. 146, 50 N. W. 812, where the claim of arbitrary discretion of the attorney general was denied.

In many cases where the individual relator has a private and personal interest in the suit, the public also has a substantial interest, and no injury can result to the public by requiring the prosecutor to proceed, as the court or judge is vested with sound legal discretion to determine whether leave to file the information should be granted. *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599.

In *Cain v. Brown*, 111 Mich. 657, mandamus to compel a prosecuting attorney to file an information was denied on the ground that the prosecutor was justified in considering the evidence presented to him as insufficient. The remedy was entertained without question, however.

³⁶*Rex v. Wardhoper*, 4 Burr. 1964; *Rex v. Trelawney*, 3 Burr. 1616.

relator presented a *prima facie* case, the officer's duty to act was absolute and enforceable by mandamus.³⁷

There are some decisions which hold that mandamus will not issue to compel the proper officer to act,³⁸ and in some states the matter has been settled by the enactment of statutes permitting the private person to act when the public officers refuse.³⁹

In other states, the statutes permit an appeal to the courts from the decision of the public officer, in which case the private person has no authority to apply for leave. In the same manner the proceedings cannot be instituted by another officer, when the proper designated officer refuses to act.⁴⁰

§ 3242. Parties defendant. In a quo warranto proceeding brought because of the misuser, usurpation or nonuser of powers, privileges or franchises, by a corporation, or to effect the dissolution of a legally existing corporation, the corporation is the proper and only party defendant, but if it is sought to challenge the existence of the corporation, the individuals who usurp the corporate franchise should be named as parties.⁴¹ This rule results because the filing of an informa-

³⁷ *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599.

When the legislature extended the right to private individuals to assert private rights by quo warranto, it was intended that they should have an opportunity to seek redress for their wrongs by making application to a court, or judge thereof, for leave to file an information. *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599.

³⁸ *State v. Attorney General*, 30 La. Ann. 954; *State v. Patterson & H. Turnpike Co.*, 21 N. J. L. 9.

³⁹ Code Civ. Proc. § 320. *Canon City Labor Club v. People*, 21 Colo. App. 37, 121 Pac. 120.

See § 3240, *supra*.

⁴⁰ *State v. Point Roberts Reef Fish Co.*, 42 Wash. 409, 85 Pac. 22.

Under the Washington statute (Bal. Code, § 5781), informations may be filed by the prosecuting attorney in the superior court of the proper county, upon his own relation, whenever he shall deem it his duty to do

so, or shall be directed by the court or other competent authority. *State v. Point Roberts Reef Fish Co.*, 42 Wash. 409, 85 Pac. 22.

An information under the Washington statute (Bal. Code, § 5780) to inquire into the usurpation or unlawful holding of gas franchises by a corporation, which does not allege that the prosecuting attorney was requested to bring the action and his refusal to act, or that any request was made of him, but which shows that the proceeding was instituted by the attorney general, is insufficient as there is no statutory authority authorizing the institution of such suit by the attorney general. *State v. Seattle Gas & Electric Co.*, 28 Wash. 488, 70 Pac. 114, 68 Pac. 946.

⁴¹ *California*. *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 19 Pac. 693, 18 Pac. 85.

Compare *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236.

Illinois. *People v. Larsen*, 265 Ill.

tion against an association in its corporate name, either for the purpose of forfeiting its corporate charter, or for the purpose of ousting it from the exercise of certain corporate powers, is an admission of its corporate existence, and will estop the state from afterwards claiming that it had not been legally incorporated.⁴² This is the general rule and is well established, although there are exceptions and under the statutes of some states the corporation may be made a party.⁴³

406, 106 N. E. 947; *People v. Rodenberg*, 254 Ill. 386, 98 N. E. 764; *Cheshire v. People*, 116 Ill. 493, 6 N. E. 486.

Indiana. *Mud Creek Draining Co. v. State*, 43 Ind. 236.

Missouri. *State v. Business Men's Athletic Club*, 178 Mo. App. 548, 163 S. W. 901; *State v. Louisiana, B. G. & A. Gravel Road Co.*, 116 Mo. App. 175, 92 S. W. 153; *State v. Hannibal & R. C. Gravel Road Co.*, 37 Mo. App. 496.

Nebraska. *State v. Lincoln Traction Co.*, 90 Neb. 535, 134 N. W. 278; *State v. Lincoln St. R. Co.*, 80 Neb. 333, 14 L. R. A. (N. S.) 336, 114 N. W. 422.

New Mexico. *State v. Tularosa Community Ditch*, 19 N. M. 352, 143 Pac. 207.

Oklahoma. *Armstrong v. State*, 29 Okla. 161, Ann. Cas. 1913 A 565, 116 Pac. 770.

⁴² See § 353, *supra*, and the following decisions:

Illinois. *People v. Central U. Tel. Co.*, 232 Ill. 260, 83 N. E. 829; *North & S. Rolling Stock Co. v. People*, 147 Ill. 234, 24 L. R. A. 462, 35 N. E. 608; *People v. Citizens Tel. Co.*, 186 Ill. App. 260.

Mississippi. *State v. Commercial Bank*, 33 Miss. 474.

Missouri. *State v. Business Men's Athletic Club*, 178 Mo. App. 548, 163 S. W. 901.

Nebraska. *State v. Lincoln Traction Co.*, 90 Neb. 535, 134 N. W. 278; *State v. Lincoln St. R. Co.*, 80 Neb. 333, 14 L. R. A. (N. S.) 336, 114 N. W. 422.

New Mexico. *State v. Tularosa Community Ditch*, 19 N. M. 352, 143 Pac. 207.

New York. See *People v. Rensselaer & S. R. Co.*, 15 Wend. 113, 30 Am. Dec. 33.

Ohio. *State v. Cincinnati Gas Light & Coke Co.*, 18 Ohio St. 262.

Pennsylvania. *Com. v. New York, L. E. & W. C. & R. Co.*, 10 Pa. Co. Ct. 129.

A prosecution against a telephone company by its corporate name is an admission of corporate existence. *People v. Central U. Tel. Co.*, 232 Ill. 260, 83 N. E. 829.

Where the sole respondent is a consolidated corporation sued in its corporate name, the state is estopped to question the corporate existence of the respondent. *State v. Lincoln Traction Co.*, 90 Neb. 535, 134 N. W. 278.

When a corporation was formed for objects and purposes which are duly authorized, but included in its articles are objects not authorized by statute, an information attacking the conduct of the corporation as to the unauthorized acts is not in violation of the rule that in a proceeding against the corporation its existence is admitted. *State v. Business Men's Athletic Club*, 178 Mo. App. 548, 163 S. W. 901.

⁴³ *Floyd v. State*, 177 Ala. 169, 59 So. 280. The state may bring an action of quo warranto to test the validity of a corporate organization either against the persons who officially undertake to exercise its powers

A number of corporations charged with abuse or usurpation of corporate rights, a condition which has frequently arisen where corporations were charged with violations of anti-trust acts, may be joined as defendants.⁴⁴ On the other hand, the proceedings may be brought against one corporation alone.⁴⁵ In the former case, the dismissal of respondents found to be not guilty does not warrant an objection that there was an illegal and unwarranted joinder of parties,⁴⁶ and when only the corporations are named as parties defendant, the court will not disregard corporate forms and look to the stockholders as the guilty persons.⁴⁷

A proceeding to forfeit secondary franchises may be maintained against a grantee who fails to comply with the conditions of such franchises,⁴⁸ and in such a proceeding it is immaterial that the corporation which granted the franchises in question to the defendant was not a de jure corporation, as the charter of a corporation not a party to the suit cannot be questioned.⁴⁹

With regard to proceedings against officers usurping corporate offices, it is well established that several officers may be named as defendants, as where trustees of a corporation are involved. The contention that such a joinder of parties is improper is based on the theory that each officer holds an independent position which must be made the subject of a separate suit. The point arose as long ago as 1776, in a case affecting the officers of a town, and was overruled by Lord Mansfield and his associates. This decision has been followed in cases affecting officers of private corporations.⁵⁰

and franchises or against the organization itself by the name it assumes. *Gardner v. State*, 77 Kan. 742, 95 Pac. 588; *State v. Inner Belt Ry. Co.*, 74 Kan. 413, 87 Pac. 696. By calling the corporation into court by its corporate name to answer the charge that it was illegally incorporated the state does not thereby conclusively admit its legal existence. *State v. Inner Belt Ry. Co.*, 74 Kan. 413, 87 Pac. 696.

Montana. It is competent to bring an information against a corporation and at the same time to charge the corporation with usurping its corporate powers. *Territory v. Virginia Road Co.*, 2 Mont. 96.

⁴⁴ *State v. Armour Packing Co.*, 265 Mo. 121, 176 S. W. 382; *State v.*

Standard Oil Co., 218 Mo. 1, 116 S. W. 902.

⁴⁵ A proceeding under Pub. Acts 1899, No. 255, as to unlawful combinations, is not defective because one corporation alone is named as respondent, and it cannot be claimed that the respondent cannot be prosecuted alone. *Attorney General v. A. Booth & Co.*, 143 Mich. 89, 106 N. W. 868.

⁴⁶ *State v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S. W. 145.

⁴⁷ *State v. Missouri Pac. R. Co.*, 241 Mo. 1, 144 S. W. 863.

⁴⁸ *State v. Norcross*, 132 Wis. 534, 122 Am. St. Rep. 998, 112 N. W. 40.

⁴⁹ *People v. Citizens Tel. Co.*, 186 Ill. App. 260.

⁵⁰ *Bonyng v. Frank*, 89 N. J. L.

§ 3243. Application for leave to file information—At common law and under English statutes. Neither the statute of Anne nor the common law required the attorney general to obtain leave to file an information where only public rights were involved,⁵¹ but leave of court was necessary in “proceedings in the nature of quo warranto” in certain cases, and in this manner the proceeding retained its prerogative character.⁵² These common-law proceedings are instituted upon motion for a rule upon the defendant to show cause why leave should not be granted to file the information,⁵³ and are heard upon the affidavits and counter-affidavits of the parties,⁵⁴ and the granting of leave rests in the sound discretion of the court.⁵⁵ When so granted the rule is made absolute and the information filed.⁵⁶

§ 3244. — Rule in United States. In general, under the American statutes, leave of court is not required when the proceedings are instituted by the attorney general or other officer,⁵⁷ but such leave is required when the proceeding is instituted on the relation of private persons, or when the suit is begun by such private persons in the case of refusal of the public officer to act.⁵⁸ This is similar to the rules under

239, 98 Atl. 456 (as to trustees of a cemetery company).

As to the decision of Lord Mansfield, see *Symmers v. King*, Cowp. 489.

A precedent of an information against several persons usurping the offices of Burgess and freemen of a borough is given in 6 *Wentworth's Pleadings* 154.

⁵¹ *People v. Union El. R. Co.*, 269 Ill. 212, 110 N. E. 1; *People v. Union Consol. El. R. Co.*, 263 Ill. 32, Ann. Cas. 1915 C 388, 105 N. E. 12.

⁵² *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790; *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

⁵³ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

⁵⁴ The rule to show cause why leave to file an information should not be granted issues upon the ex parte application of the relator. *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.)

1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

⁵⁵ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

⁵⁶ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

⁵⁷ *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867. (Under Code, tit. 21, c. 9; §§ 4315, 4316.)

The attorney general need not obtain leave of court before instituting proceedings unless it is expressly required by statute. *People v. Boston, H. T. & W. Ry. Co.*, 27 Hun (N. Y.) 528.

⁵⁸ *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867; *Bonyng v. Frank*, 89 N. J. L. 239, 98 Atl. 456.

If an action is brought by private relators, and the public officer appears and files a substituted petition before issue is joined, to which the corporation appears and answers, the preliminary proceedings, dealing with the

the English statutes. Under other statutes, the necessity of obtaining leave depends upon the object and purpose of the proceeding.⁵⁹ Under still other statutes leave is required in all cases where the remedy is by information in the nature of quo warranto,⁶⁰ and it has been held that such a statute does not violate constitutional provisions as taking away powers conferred upon the executive department and transferring them to the judicial department.⁶¹

Usually, in the case of application by a private person, the relator must have a special interest in the subject of inquiry. This was the rule under the statute of Anne.⁶² The object is to safeguard the courts and persons who do have an interest against being burdened with litigation at the instance of mere intermeddlers. If there is any preponderance of authority on this question, it is to the effect that only a slight interest is necessary to qualify a person to apply for leave to prosecute the action.⁶³

Some statutes provide for the granting of leave when "probable ground" for the proceeding exists. The quoted words mean "a reasonable ground of presumption that a charge is or may be well founded." And the petition need do no more than set up a state of facts, apparently true, sufficient to induce a reasonable belief that rights, privileges, franchises or offices are being usurped, intruded

refusal of the public officer, may be ignored. *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

⁵⁹ In an action under N. Y. Gen. Corp. Law, § 131, to annul corporate charters, the court is vested with discretion to grant or withhold leave to bring the proceeding. *People v. Bleecker St. & F. F. R. Co.*, 140 N. Y. App. Div. 611, 125 N. Y. Supp. 1045.

In actions under N. Y. Code Civ. Proc. § 1948, subd. 1, against persons usurping or unlawfully holding franchises or offices, no leave of court is required. *People v. Bleecker St. & F. F. R. Co.*, 140 N. Y. App. Div. 611, 125 N. Y. Supp. 1045.

⁶⁰ *People v. Union El. R. Co.*, 269 Ill. 212, 110 N. E. 1.

Section 1 of the Illinois statute as to quo warranto (*J. & A. Ann. St.* ¶ 8687) provides that leave to file an information must be obtained in all cases, including those where the

state's attorney or attorney general acts upon his own accord, as well as cases where he acts at the instance of a private relator. *People v. Union Consol. El. R. Co.*, 263 Ill. 32, Ann. Cas. 1915 C 388, 105 N. E. 12.

⁶¹ Under *J. & A. Ann. St.* ¶ 8687, the judicial department cannot coerce public officers to proceed by quo warranto, and merely determines if there is probable ground for the proceeding. *People v. Union Consol. El. R. Co.*, 263 Ill. 32, Ann. Cas. 1915 C 388, 105 N. E. 12.

⁶² See § 3240, supra.

⁶³ See *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

Leave of court will not be granted unless the relator is acting in good faith in vindication of his own rights or those of the public or a portion of the public. *Bonyng v. Frank*, 89 N. J. L. 239, 98 Atl. 456.

upon, or unlawfully exercised by a corporation or person in violation of the law, when such is the case, to the detriment of the public.⁶⁴

The granting or refusal of leave to file an information is generally a matter of discretion with the court,⁶⁵ and the discretion involved is not an arbitrary personal discretion of the judge, but a sound legal discretion according to law, the exercise of which may be reviewed.⁶⁶

It has been held that the remedy by quo warranto will not be given if other adequate relief is available⁶⁷ and in proceedings to try title to an office, the court has no discretion to issue the writ unless the defendant's title is shown to be defective. Even when such defect is shown, the writ does not necessarily issue.⁶⁸

The hearing is usually held upon the presentation of the petition, and affidavits and counter-affidavits.⁶⁹ But the issues should not be passed upon when supported only by affidavits.⁷⁰

⁶⁴ *People v. Union El. R. Co.*, 269 Ill. 212, 110 N. E. 1.

A petition for leave to file an information in the nature of quo warranto sets forth probable ground for the institution of the proceedings when it alleges violation of the statutes in the issuance and delivery of stock and bonds, and that the corporation has not exercised its functions, powers and rights for more than ten years. *People v. Union El. R. Co.*, 269 Ill. 212, 110 N. E. 1.

A petition for leave to file an information in the nature of quo warranto, which alleges that the corporation has issued stock and bonds to the extent of \$1,000,000 in excess of the consideration in money, labor and property received is not sufficient to show probable cause for the granting of leave to file the information, as it should appear that the overissue was fraudulent. *People v. Union Consol. El. R. Co.*, 263 Ill. 32, Ann. Cas. 1915 C 388, 105 N. E. 12.

⁶⁵ *Canon City Labor Club v. People*, 21 Colo. App. 37, 121 Pac. 120; *People v. People's Gaslight & Coke Co.*, 205 Ill. 482, 98 Am. St. Rep. 244, 68 N. E. 950; *Com. v. Straus*, 32 Pa. Super. Ct. 389.

⁶⁶ *People v. Union El. R. Co.*, 269 Ill. 212, 110 N. E. 1; *People v. Mackey*, 255 Ill. 144, 99 N. E. 370; *People v. People's Gaslight & Coke Co.*, 205 Ill. 482, 98 Am. St. Rep. 244, 68 N. E. 950; *People v. Rittman*, 155 Ill. App. 523.

⁶⁷ *Attorney General v. New York, N. H. & H. R. Co.*, 197 Mass. 194, 83 N. E. 408.

⁶⁸ *Clark v. Wild*, 85 Vt. 212, Ann. Cas. 1914 C 661, 81 Atl. 536.

⁶⁹ *People v. People's Gaslight & Coke Co.*, 205 Ill. 482, 98 Am. St. Rep. 244, 68 N. E. 950.

⁷⁰ Under the Michigan statute as to quo warranto proceedings (5 Howell, 2nd Ed., § 14082) providing that informations may be filed by the prosecuting attorney, or any citizen, where the petitioners file a petition to determine why certain persons exercise the privileges of a certain corporation, the court should allow the information to be filed, and should not pass upon the issues raised, which were supported only by affidavits. *Vertin v. Houghton Circuit Judge*, — Mich. —, 161 N. W. 940.

When the refusal of the public officer to act is involved, and such officer satisfactorily shows that he acted from a sense of official duty, uninfluenced by private interests or motives, it is unnecessary to enter into a discussion of the conduct of the parties who seem to have been interested in bringing about the suit.⁷¹

§ 3245. — Notice of application. It has been held that the granting of leave to file an information does no more than to designate the relator as a person who may lawfully call the defendants into court for the trial of the disputed question of law or fact according to the ordinary course of procedure, and when the statute does not require it, there can be no objection to the granting of leave without notice to the defendants. The order granting leave adjudicates nothing against the defendants and does not deprive them of personal or property rights, wherefore it does not deprive them of due process of law or the equal protection of the law.⁷²

§ 3246. — Waiver of failure to obtain leave. As only a want of jurisdiction of the subject-matter cannot be waived and the court has jurisdiction of quo warranto proceedings, the failure to obtain leave to file an information may be waived. So where a respondent corporation appears and pleads issuably, it cannot subsequently object that leave to file the information was not obtained, even though there was nothing in the summons or copy served to indicate that leave had not been granted. In such a case it has been held that the files and records should have shown if leave had been granted, and when it was wanting the respondent should have presumed its absence, and moved to dismiss before pleading.⁷³

§ 3247. — Setting aside leave. The common-law rule granting leave to file an information, like other rules, is subject to a motion to discharge, which when made should be accompanied with a corresponding motion to dismiss the information.⁷⁴ Similarly, the order granting leave, may be set aside, under some statutes, in the exercise of the court's judicial discretion.⁷⁵ It has been held that the preliminary proceedings are *ex parte*, and the order granting leave may

⁷¹ *People v. People's Gaslight & Coke Co.*, 205 Ill. 482, 98 Am. St. Rep. 244, 68 N. E. 950.

⁷² *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

⁷³ *Attorney General v. A. Booth*

& Co., 143 Mich. 89, 106 N. W. 868.

⁷⁴ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

⁷⁵ *People v. Union El. R. Co.*, 269 Ill. 212, 110 N. E. 1.

be set aside at any time during the term when it was granted, when it appears that leave was improvidently or inadvertently granted, under a misapprehension of the law or the facts. Counter-affidavits simply denying the allegations of the petition are not sufficient to show that leave was improvidently granted.⁷⁶ On the other hand, it has been held also that the granting of leave is simply a preliminary question, and when once decided, the discretion of the court or judge is exhausted, and the ruling granting leave cannot be reviewed or collaterally attacked upon a motion to dismiss.⁷⁷

§ 3248. Pleadings in general. The pleadings in quo warranto proceedings should conform, as far as possible, to the general principles and forms of pleadings which govern in civil actions,⁷⁸ and statutory requirements which are enacted should also be complied with when applicable.⁷⁹ Also since the original proceedings were common-law proceedings, the common-law rules govern,⁸⁰ and equitable rules, generally speaking, are not applicable.⁸¹

§ 3249. Information or complaint—Theory and form. The information is usually regarded as the first step in the pleadings,⁸² and in some states is merely a plain statement of facts like that of a complaint in any other cause of action.⁸³ It has been held that a statute requiring the complaint or information to set forth concisely and clearly the act or omission complained of, is within the legislative competency.⁸⁴

⁷⁶ *People v. Union El. R. Co.*, 269 Ill. 212, 110 N. E. 1.

⁷⁷ *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

⁷⁸ *People v. Heidelberg Garden Co.*, 233 Ill. 290, 84 N. E. 230, *aff'g* 124 Ill. App. 331; *State v. York Light & Heat Co.*, 113 Me. 144, 93 Atl. 61; *State v. Grimm*, 220 Mo. 483, 119 S. W. 626; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

The rule results from the nature of the proceeding. See § 3223, *supra*.

⁷⁹ *State v. Missouri Pac. R. Co.*, 240 Mo. 35, 144 S. W. 1088. But see *State v. Missouri Pac. R. Co.*, 206 Mo. 28, 103 S. W. 936.

A quo warranto proceeding which does not meet the statutory requirement as to parties and procedure can-

not be maintained. *Louisville & N. R. Co. v. State*, 154 Ala. 156, 45 So. 296.

Montana Practice Act, § 1, providing a civil remedy for the enforcement of private rights, does not apply to informations in the nature of quo warranto. *Territory v. Virginia Road Co.*, 2 Mont. 96.

⁸⁰ *People v. Heidelberg Garden Co.*, 233 Ill. 290, 84 N. E. 230, *aff'g* 124 Ill. App. 331.

⁸¹ *State v. People's Ice, Storage & Fuel Co.*, 246 Mo. 168, 151 S. W. 101.

⁸² *Louisville & N. R. Co. v. State*, 154 Ala. 156, 45 So. 296.

⁸³ *State v. Seattle Gas & Electric Co.*, 28 Wash. 488, 70 Pac. 114, 68 Pac. 946.

⁸⁴ *Louisville & N. R. Co. v. State*, 154 Ala. 156, 45 So. 296.

The common-law proceeding by information being in theory, as at one time it was in fact, a prosecution, the information as a pleading is less of a narr. than a complaint or accusation against the defendant for an offense.⁸⁵ The criminal form of the information, and its common-law form are evident in some states where it has been held that constitutional provisions as to prosecutions apply. Thus the information must not only be in the name of the people, but must conclude "against the peace and dignity of the same."⁸⁶ And the information has been held the official call of the state, or its law officer, to show by what authority the corporation assumes to exercise a particular franchise. It is not of the character of a petition in an ordinary case either in law or equity.⁸⁷

§ 3250. — Sufficiency. The sufficiency of an information is generally measured by the rules applicable to civil cases,⁸⁸ and if acts of misuser are relied upon, such acts or omissions must be stated clearly and concisely.⁸⁹ A petition alleging abuse of corporate powers, mismanagement of the corporate affairs by the officers, and the false and fraudulent extension of the charter, clearly states a cause of action,⁹⁰ and an information charging that the charter of a railroad company was obtained for a fraudulent purpose, so that the corporation could condemn certain property which the corporators had failed to acquire by purchase, has been held not demurrable.⁹¹ An allegation of breach of a "franchise contract," instead of the franchise merely, does not show an error of material importance.⁹²

Informations charging conspiracies, frauds and similar offenses, always call for a wide range of evidence and the issues should be presented in a clear, concise and definite manner.⁹³ There is a distinction where a conspiracy to do an unlawful act by unlawful means is charged, and where a conspiracy to do a lawful act by unlawful means is charged, it being unnecessary in the former case to set out means employed in performing the act, while in the latter, the un-

⁸⁵ *Brooks v. State*, 3 *Boyce* (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

⁸⁶ *People v. Larsen*, 265 Ill. 406, 106 N. E. 947.

⁸⁷ *State v. Missouri Pac. R. Co.*, 206 Mo. 28, 103 S. W. 936.

⁸⁸ *State v. Armour Packing Co.*, 265 Mo. 121, 176 S. W. 382.

⁸⁹ *State v. York Light & Heat Co.*, 113 Me. 144, 93 Atl. 61.

⁹⁰ *State v. Masons & Odd Fellows Joint Stock Ass'n*, 91 Kan. 9, 136 Pac. 930.

⁹¹ *Com. v. Bush Bluff R. Co.*, 116 Va. 48, 81 S. E. 66.

⁹² *State v. Birmingham Water Works Co.*, 185 Ala. 388, Ann. Cas. 1916 C 166, 64 So. 23.

⁹³ *State v. Missouri Pac. R. Co.*, 240 Mo. 35, 144 S. W. 1088.

lawful means must be set out.⁹⁴ A defective petition may be held sufficient where no specific objection is made to its uncertainty or indefiniteness,⁹⁵ or where demurrers thereto are abandoned.⁹⁶

The information need not anticipate any defense which may be made,⁹⁷ and unnecessary statements of facts therein may be treated as surplusage.⁹⁸

§ 3251. — Prayer. The prayer may be disregarded in determining whether the information states a cause of action,⁹⁹ and the relief granted does not depend upon the prayer, nor upon the theory of the pleader, but upon the allegations made and the evidence in support of such allegations.¹

§ 3252. — Conclusions. A complaint is defective as being based upon conclusions of law, where it does not allege facts showing the interest of the public or the misuser of the corporate franchise.² An information is also insufficient when it charges an agreement to destroy competition, but does not allege the rates agreed upon nor the

⁹⁴State v. Arkansas Lumber Co., 260 Mo. 212, 169 S. W. 145.

⁹⁵In a quo warranto proceeding where both an unlawful act and a conspiracy are charged, and it is sought to forfeit the franchises of corporations for entering into a conspiracy in restraint of trade, a petition though vague, uncertain and indefinite, will be held sufficient, especially where it appears that no demurrer to the petition was filed, and the only demurrer offered was a demurrer ore tenus, objecting in limine, because the petition stated no cause of action, which demurrer will not reach mere uncertainty or indefiniteness of averment. State v. Arkansas Lumber Co., 260 Mo. 212, 169 S. W. 145.

⁹⁶State v. Armour Packing Co., 265 Mo. 121, 176 S. W. 382.

⁹⁷People v. Central U. Tel. Co., 232 Ill. 260, 83 N. E. 829.

⁹⁸State v. Missouri Pac. R. Co., 206 Mo. 28, 103 S. W. 936.

If a pleading sets forth sufficient facts to constitute a cause of action,

unnecessary statements therein may be disregarded. State v. Armour Packing Co., 265 Mo. 121, 176 S. W. 382.

Where informations are vague and obscure, but charge the respondents with the creation and consummation of a monopoly, unnecessary matter therein may be treated as surplusage. State v. Armour Packing Co., 265 Mo. 121, 176 S. W. 382.

⁹⁹State v. Missouri Pac. R. Co., 240 Mo. 35, 144 S. W. 1088.

¹The merit of an information to forfeit the charter of a water company does not rest upon the theory of the pleader or his notions of the appropriate relief to be granted, but primarily upon the allegations of misconduct, and if these be sufficient, the court may administer appropriate relief. State v. Birmingham Water Works Co., 185 Ala. 388, Ann. Cas. 1916 C 166, 64 So. 23.

See § 3269 et seq., infra.

²State v. York Light & Heat Co., 113 Me. 144, 93 Atl. 61.

length of time that such rates should continue in force.³ Similarly a charge that a corporation is in complete control of another company, merely states a conclusion.⁴ But when it is sought to forfeit the charter of a water company for the failure to furnish pure water, the evidence upon which the charge is based need not be pleaded. Impurity is in itself a fact and not a conclusion.⁵

§ 3253. — Pleading leave of court and relator's capacity. In some states, leave of court, necessary as a condition precedent to the maintenance of the action, must be pleaded and proved.⁶

It has been held that when the forfeiture of a secondary franchise of benefit to the inhabitants of a municipality is sought, the information must show that it was filed at the request of the city.⁷

§ 3254. — Alleging existence of corporation and office. Informations attacking the legal existence of corporations must show that the defendants are acting as a corporation without being incorporated,⁸

³ State v. Missouri Pac. R. Co., 240 Mo. 35, 144 S. W. 1088.

⁴ State v. Missouri Pac. R. Co., 241 Mo. 1, 144 S. W. 863.

⁵ State v. Birmingham Water Works Co., 185 Ala. 388, Ann. Cas. 1916 C 166, 64 So. 23.

⁶ People v. Bleecker St. & F. F. R. Co., 140 N. Y. App. Div. 611, 125 N. Y. Supp. 1045.

⁷ An information to oust a gas company from the usurpation of the franchise of laying gas pipes, etc., which is brought on the relation of the attorney general and which does not allege that the city officers have neglected to discharge their duties with respect to streets, or that they collude with the respondent corporation in violating the law, or that the information is filed at the request of the city, is insufficient, as it will not be presumed that the city or its officers are violating the law, and it should appear that the information was filed at the request of the city. State v. Seattle Gas & Electric Co., 28 Wash. 488, 70 Pac. 114, 68 Pac. 946.

⁸ An information which alleges that

the defendants have pretended to organize themselves as a corporation, and are acting as such without being legally incorporated, states facts sufficient to constitute a cause of action. State v. Beck, 81 Ind. 500.

When a number of individuals assume to act as a corporation an information containing a general denial of their right to do so will be sufficient to put them to their plea of justification. People v. Ottawa Hydraulic Co., 115 Ill. 281, 3 N. E. 413.

An information alleging that the defendants have been usurping the franchise of a corporation under a certain name, and by that name have attempted to acquire, hold and use certain streets for the purpose of operating a street railway, sufficiently states that the defendants are acting as a corporation without being incorporated. Smith v. State, 140 Ind. 343, 39 N. E. 1060.

An information which does not allege, either specifically or generally, that the defendants are not incorporated, but charges that the defendants did not intend to construct a

or, in the case of nonuser, that the corporate franchise has been abandoned.⁹

If an information alleges the usurpation of a franchise, privilege or right exercised through individuals as officers, it is not necessary to make the inconsistent allegation that the office exists.¹⁰ If an information challenges the corporation's existence and sets out facts as to the defendant's title which, together with other facts appearing in the statutes, make the title good, the information is necessarily bad.¹¹

When corporate existence must be alleged, it is not sufficient to state that the defendant is a "pretended corporation" without showing its creation.¹²

Where corporate offices are usurped, the information, under some statutes, need not put the relator's title in issue, but the defendant may do so, and the court will then determine which claimant is entitled to the office.¹³

§ 3255. — Alleging usurpation. The office of the information is not to tender issues of fact, but simply to call upon the defendant, in general terms, to show by what warrant or charter the privilege claimed is held or exercised.¹⁴ Accordingly it is usually held that the allegation of usurpation may be of the most general character, and it is sufficient to allege generally that the defendant is exercising and holding the license, privilege or franchise in question without lawful authority.¹⁵ This rule as to general charges of usurpation is

railroad but to use the corporation as a means of condemning property is insufficient, as proper remedies may be applied if the defendants should carry out their purpose. *State v. Kingan*, 51 Ind. 142.

⁹ An information alleging that the defendant for more than three years prior to the action has used and still does use the franchise of being a body corporate, that such franchise is claimed under a certain statute as to the incorporation of a toll road company and that the defendant has abandoned the road, states a cause of action when treated as a complaint. *Territory v. Virginia Road Co.*, 2 Mont. 96.

¹⁰ *People v. Rodenburg*, 254 Ill. 386, 98 N. E. 764.

¹¹ *People v. Ottawa Hydraulic Co.*, 115 Ill. 281, 3 N. E. 413.

¹² *State v. Minahan Bldg. Co.*, 141 Wis. 400, 123 N. W. 258.

¹³ Under the Act of 1895 (P. L. 82; Comp. St. p. 4214, § 12). *Bonyng v. Frank*, 89 N. J. L. 239, 98 Atl. 456.

¹⁴ *People v. Central U. Tel. Co.*, 232 Ill. 260, 83 N. E. 829.

The chief characteristics of an information are the accusation of usurpation and the demand that the defendant show the authority for his claim. *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

¹⁵ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790; *People v. Central U. Tel. Co.*, 232 Ill. 260, 83

based upon the common-law rule, and is an ancient one. One of the most celebrated state trials in history was a case tried by the common-law remedy by an information in the nature of quo warranto, the trial being held in the city of London in 1682-1683. The proceeding was instituted by King Charles the Second, by his attorney general, against the corporation of London, and charged usurpation without regal grant of the liberties and privileges of the city. As a result the metropolis of the kingdom was deprived of its charter and magistrates until restored by King James in 1688. In that case the information charged usurpation in the most general terms, without stating the causes of forfeiture, and the defendants pleaded incorporation and showed the title by which they exercised the franchises of the city, and traversed the charge of usurpation. The attorney general by his replication did not take issue on the matter of justification, but showed causes for forfeiture, and the pleading thereafter proceeded as in civil causes. The court held that the information might charge usurpation generally and was sufficient, and that the replication setting out the causes of forfeiture specially was not a departure.¹⁶ Similar holdings will be found in the decisions of this country where this English case is cited as authority for the holding.¹⁷ Some courts

N. E. 829; *State v. Grimm*, 220 Mo. 483, 119 S. W. 626; *State v. Missouri Pac. R. Co.*, 206 Mo. 28, 103 S. W. 936; *People v. Bank of Niagara*, 6 Cow. (N. Y.) 196.

¹⁶ A report of this case will be found in 3 Hargrave's *State Trials* 545. Blackstone in his commentaries speaks of this and similar cases as follows:

"During the violent proceedings that took place in the latter end of the reign of King Charles the Second, it was among other things thought expedient to new-model most of the corporation towns in the kingdom; for which purpose many of those bodies were persuaded to surrender their charters, and informations in the nature of quo warranto were brought against others, upon a supposed or frequently a real, forfeiture of their franchises by neglect or abuse of them. And the consequence was, that the liberties of most of them were seized into the hands of the king, who

granted them fresh charters with such alterations as were thought expedient; and during their state of anarchy, the crown named all their magistrates. This exertion of power, though perhaps in summo jure it was for the most part strictly legal, gave a great and just alarm; the new-modelling of all corporations being a very large stride towards establishing arbitrary power; and therefore it was thought necessary at the revolution to bridle this branch of the prerogative, at least so far as regarded the metropolis, by statute 2 W. & M. c. 8, which enacts, that the franchises of the city of London shall never hereafter be seized or forejudged for any forfeiture or misdemeanor whatsoever." 3 Bl. Com. 263.

¹⁷ See *People v. Bank of Niagara*, 6 Cow. (N. Y.) 196 (decided in 1826). See also *Territory v. Virginia Road Co.*, 2 Mont. 96.

In *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas.

apparently limit the rule, however, to the usurpation of secondary franchises, and require informations for the purpose of forfeiting corporate charters, either for nonuser, misuser or usurpation of powers to show specifically the acts relied upon as grounds for forfeiture, so that the corporation may know what it is called upon to defend.¹⁸ A general accusation of usurpation is usually considered a statement of fact and presents an issue of which the defendant may take advantage of by the plea, but the demand that the defendant show authority for his claim is not a statement of fact and presents no issue.¹⁹

Aside from the right to make a general charge, the state or people also have the privilege of making the information specific and setting out particular acts as usurpations of authority, or of setting out particular causes of forfeiture.²⁰

§ 3256. — Alleging misuse by formation of conspiracy. Under some statutes the manner of effecting a conspiracy in restraint of trade need not be alleged, and informations charging a misuse of powers because of such conspiracies are simplified.²¹ Such informations need not state the charge with the same technical strictness as where crimes are charged, the proceedings being civil in character.²²

1915 A 1133, 79 Atl. 790, decided in 1911, a person was charged with the usurpation of the office of director of a corporation. The same result was arrived at as in the English case, Delaware being a state where the common law obtains. It was pointed out that the English decision was handed down 28 years before the statute of Anne was enacted.

¹⁸ *State v. Missouri Pac. R. Co.*, 240 Mo. 35, 144 S. W. 1088; *State v. Grimm*, 220 Mo. 483, 119 S. W. 626.

¹⁹ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

²⁰ *People v. Central U. Tel. Co.*, 232 Ill. 260, 83 N. E. 829.

²¹ Under Mo. Rev. St. 1909, § 10310. *State v. Armour Packing Co.*, 265 Mo. 121, 176 S. W. 382.

²² *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

An information charging corporations with violations of the anti-trust laws in general terms, without stating

the facts which constitute the pool, trust or combination, will nevertheless be held sufficient. *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902. See also *State v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S. W. 145.

The state is not required to allege and prove the facts in detail constituting the mode or manner in which the corporation is violating the law and usurping powers not granted to it by its charter. *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

In a proceeding against several corporations charged with violation of the anti-trust laws, an information charging a combination to regulate, control and fix prices is sufficient, and a contention that the information should have charged a combination to maintain prices will not be sustained. *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902. See also *State v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S. W. 145.

§ 3257. Demurrer to information. Under the rule which permits the allegation of usurpation in the most general manner, a demurrer on the ground that the facts are not specifically alleged is out of place;²³ but when an information seeking the forfeiture of a corporate charter for nonuser, misuser, or usurpation of powers, sets out the causes of forfeiture in detail, and all the facts are pleaded, the respondent may be allowed to tender an issue of law by its demurrer.²⁴ In states where the proceedings are regulated by statute, an information has been held a pleading and demurrable for the failure to comply with the statute.²⁵

A demurrer admits the truth of averments that are well pleaded,²⁶ and in the case of usurpation of a corporate office, the demurrer may amount to an admission that the office is unlawfully held by the demurrant. In such a case, if the information shows that the demurrant is entitled to the office, the averments are inconsistent, and the demurrant will be entitled to judgment.²⁷ A demurrer *ore tenus*, objecting in limine because the petition states no cause of action, will not reach mere uncertainty or indefiniteness of averment.²⁸

When demurrers are incorporated into and made a part of the return or answer, no rulings being demanded or made thereon, the respondents stand in the position of having abandoned the demurrers by answering over.²⁹

§ 3258. Plea, answer or return. As a general rule, when a defendant is called upon to plead to an information which charges generally usurpation, he must admit or traverse the usurpation and disclaim, or justify title, right or authority in or to the thing that he is alleged to have usurped.³⁰ If the defendant admits usurpation or disclaims

²³ *State v. Missouri Pac. R. Co.*, 206 Mo. 28, 103 S. W. 936.

²⁴ *State v. Grimm*, 220 Mo. 483, 119 S. W. 626.

²⁵ *Louisville & N. R. Co. v. State*, 154 Ala. 156, 45 So. 296.

²⁶ *People v. Michigan Sanitarium & Benevolent Ass'n*, 151 Mich. 452, 115 N. W. 423. A demurrer to an information admits every material allegation, but not mere legal conclusions. *State v. Delmar Jockey Club*, 200 Mo. 34, 98 S. W. 539, 92 S. W. 185.

²⁷ *Bonyng v. Frank*, 89 N. J. L. 239, 98 Atl. 456.

²⁸ *State v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S. W. 145.

²⁹ *State v. Armour Packing Co.*, 265 Mo. 121, 176 S. W. 382.

³⁰ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

The people are not bound to show anything, and the defendant must answer by disclaiming or justifying. *People v. Central U. Tel. Co.*, 232 Ill. 260, 83 N. E. 829; *State v. Lincoln Traction Co.*, 90 Neb. 535, 134 N. W. 278.

So when the state challenges the authority of a corporation to do cer-

title, the prosecution is entitled to judgment.³¹ If the defendant traverses the usurpation and justifies under his title, he may have his rights determined by trial.³²

The plea of justification, which should be verified,³³ must show all the facts necessary to establish the lawful right of the defendant in the matter,³⁴ and is the first plea indicating the facts upon which the controversy has arisen.³⁵ In a proceeding against a corporation alleged to be transacting business without lawful warrant or authority, it is no answer to the information that there is a de facto corporation, as the defendants must either disclaim or justify, and a plea of justification must show substantial compliance with the statute.³⁶ In a proceeding against persons charged with having usurped the offices

tain things, it must either deny the charge, or, if it is exercising the authority complained of, it must justify its conduct by showing that it possesses the power and authority under its charter. *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

The demand that the defendant show authority for his claim is not a statement of fact, presents no issue and no issue can be taken by a plea. *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

³¹ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

³² *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

³³ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

³⁴ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790; *People v. Central U. Tel. Co.*, 232 Ill. 260, 83 N. E. 829.

When respondent corporation justifies it should plead the precise authority for its conduct. *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902; *State v. Lincoln Traction Co.*, 90 Neb. 535, 134 N. W. 278.

If the defendant justifies, its plea

must show that it not only had the right to use and enjoy the franchise or privilege, but that it still has such right, as the continued existence of the right is essential to the enjoyment of the license or privilege claimed. *People v. Walker Opera House Co.*, 249 Ill. 106, 94 N. E. 159; *People v. Central U. Tel. Co.*, 232 Ill. 260, 83 N. E. 829.

Where an information charges in general terms usurpation by a telephone company of city streets, a plea setting up the defendant's charter, the ordinance granting the privileges claimed to be usurped and alleging acceptance of such ordinance and compliance with its terms, is good. *People v. Central U. Tel. Co.*, 232 Ill. 260, 83 N. E. 829.

³⁵ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

Where the information questions the right of the defendants to have or use corporate franchises, the defendants must in their plea set out the matter specially that forms their defense, and upon that plea the attorney general takes issue. *Territory v. Virginia Road Co.*, 2 Mont. 96.

³⁶ *People v. Mackey*, 255 Ill. 144, 99 N. E. 370.

See § 3266, *infra*.

of directors of a corporation, where the title shown by the defendant in his plea is a justification for the act for which usurpation is charged, and is not a defense to a claim of title by the relator, such a justification cannot be the inducement of a special traverse, or otherwise accord with the purpose and theory of a special traverse.³⁷ The plea of not guilty is not a sufficient answer, as it amounts simply to a traverse of the allegation of usurpation, and, like the plea of non usurpavit, fails to respond to the demand of the information that the defendant show his title, right or authority.³⁸ Where the defendant's plea alleges facts showing its right to exercise the privilege claimed, and concludes with a traverse, under the *absque hoc*, of the general charge of the information, the only issuable part of such plea is the traverse under the *absque hoc*, and if the people desire to take issue they should join in the traverse by reaffirming the usurpation, in which case the defendant must prove the facts alleged in the plea.³⁹ These are the common-law rules, but as will be noted by the cases cited, such rules obtain in states where statutes have been enacted on the subject.

In other states, substantially the same rules obtain, but in a different form. Thus, it is usually held that when an information seeks the forfeiture of a corporate charter, the defendants are required to set forth in their answer facts showing legal incorporation,⁴⁰ or showing the charter or act of incorporation and acts of user under it.⁴¹ If the complaint sets out how the defendant was incorporated and the circumstances and facts rendering it illegal, a general denial is almost the only adequate and proper answer.⁴² And an answer that defendants never "used" the liberties, privileges and franchises of a corporation is sufficient when the information charges the defendants with "claiming, using and exercising" such franchise.⁴³ This is a rule of ancient origin, similar to the holdings under the statute of Anne.⁴⁴

A plea in the names of a portion of the officers of the corporation

³⁷ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

³⁸ *Brooks v. State*, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790. See *People v. Central U. Tel. Co.*, 232 Ill. 260, 83 N. E. 829.

³⁹ *People v. Central U. Tel. Co.*, 232 Ill. 260, 83 N. E. 829.

⁴⁰ *People v. Lowden*, 67 Cal. xx, 8 Pac. 66.

See this section, *supra*, as to plea of justification.

⁴¹ *State v. Brown & Johnston*, 34 Miss. 688, 33 Miss. 500.

⁴² *State v. Citizens Light & Power Co.*, 172 Ala. 232, 55 So. 193.

⁴³ *People v. Thompson*, 16 Wend. (N. Y.) 655.

⁴⁴ See § 3220, *supra*.

may be regarded as a plea in behalf of all the officers and stockholders.⁴⁵

The question as to whether a foreign corporation may operate a railroad in a state without express charter power may be presented by an answer to a writ,⁴⁶ and a pleading which denies that a foreign corporation has increased its capital stock, unless such result followed from certain facts stated, not including the filing of a certificate of increase with the state officer, in effect denies the filing of the certificate and thereby puts the question of increase in issue.⁴⁷

Where a respondent corporation seeks to set up the defense of another action pending, and alleges that "substantially the same allegations as are in the petition and writ herein contained" are pleaded, and that "the issues in both proceedings are identically the same," such allegations are merely the conclusions of the pleader.⁴⁸

A plea in abatement and to the merits may be joined in the same answer and heard at the same time.⁴⁹

When a relator challenges the sufficiency of a return and moves for judgment on the pleadings, the facts in the return which may be in dispute as between the petition and return must be taken as the facts of the case.⁵⁰

§ 3259. Replications and demurrers to pleas; issues. When the information charges usurpation generally, the issue is formed by the plea and replication,⁵¹ and a replication setting out the causes of forfeiture specially is held not a departure.⁵² This is in accordance with the common-law method of pleading already referred to as to the propriety of general charges of usurpation in the information.⁵³

⁴⁵ Where a plea in the names of three defendants states that they are the directors of the corporation, and asserts its legal existence and its right to use the franchises involved in the suit, it will be regarded as a claim of the directors that they are members of the corporation and as being a plea in behalf of all officers and stockholders against whom the proceeding is brought. *State v. Sherman*, 22 Ohio St. 411.

⁴⁶ *Louisville & N. R. Co. v. State*, 154 Ala. 156, 45 So. 296.

⁴⁷ *State v. St. Louis & S. F. R. Co.*, 81 Kan. 404, 105 Pac. 685.

⁴⁸ *State v. Springfield African*

Social & Improvement Club, 169 Mo. App. 137, 154 S. W. 458.

⁴⁹ *State v. Seattle Gas & Electric Co.*, 28 Wash. 488, 70 Pac. 114, 68 Pac. 946.

⁵⁰ *State v. Merchants' Exch. of St. Louis*, 269 Mo. 346, 190 S. W. 903.

⁵¹ *Territory v. Virginia Road Co.*, 2 Mont. 96.

⁵² A state may charge usurpation of a franchise in the information, and in the reply over a forfeiture, without the reply being open to objection upon the ground of departure. *State v. West End Light & Power Co.*, 246 Mo. 653, 152 S. W. 76.

⁵³ See § 3255, *supra*.

Similarly, new and different issues are not framed when an information demands a showing of the defendant's authority to act as a corporation and to do business, which authority the pleas attempt to show, by a replication alleging violation of the statutes of states where the proceeding is brought and where the defendant is incorporated.⁵⁴ Nor does a departure arise where an information charges the exercise of powers not authorized by the corporation's charter, which allegations are denied by the plea, by subsequent replications alleging violations of statutes as to keeping correct books of account at the corporation's principal place of business and as to allowing examination of such books.⁵⁵ And if a defendant corporation sets up an apparent title to a secondary franchise, the people may show in the replication that the right to use streets has terminated.⁵⁶ A replication merely denying averments in a return and stating that the respondent has complied with the terms of an ordinance under which the franchise is used, has been held a violation of a statute forbidding a general denial of general averments of performance of conditions precedent.⁵⁷

A replication must answer so much of the plea as it professes to answer, and if it is bad in part, it is wholly bad. Where an information contains two counts, charging the unlawful exercise of the privilege of using streets for gas mains and pipes, and also charging the unlawful use of streets and alleys for electric poles and wires, and a defense of estoppel is alleged to the whole information, a replication purporting to be a complete answer to the defense, but which contains no allegations as to the use of the streets for the sale and distribution of electricity, is bad.⁵⁸

The relator may demur to a plea traversing usurpation and justifying,⁵⁹ and a demurrer reaches back and attaches to the first substantial defect of the pleadings.⁶⁰ Where a plea to an original count in an information alleged the legal authority of the corporation to act for the purposes named in its charter and a demurrer thereto was overruled, subsequent replications questioning the legal authority of the corporation were properly demurred to, as this was the question disposed of by the first demurrer, and the only way for the plaintiff

⁵⁴ Attorney General v. A. Booth & Co., 143 Mich. 89, 106 N. W. 868.

⁵⁵ People v. Walker Opera House Co., 249 Ill. 106, 94 N. E. 159.

⁵⁶ People v. Central U. Tel. Co., 232 Ill. 260, 83 N. E. 829.

⁵⁷ State v. Tampa Water Works
57 Fla. 533, 22 L. R. A. (N. S.) 680,
48 So. 639.

⁵⁸ People v. Union Gas & Electric Co., 260 Ill. 392, 103 N. E. 245.

⁵⁹ Brooks v. State, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

⁶⁰ People v. Central U. Tel. Co., 232 Ill. 260, 83 N. E. 829.

to raise the question on appeal was to abide by the first demurrer.⁶¹

Where a general replication is filed and withdrawn, and, after demurrers have been sustained to all other replications, the plaintiff asks for leave to file another general replication, he has the burden of showing some reason for his action and some injury resulting from the refusal of the request, and the court in its discretion may deny the request.⁶² The action of a court in sustaining a demurrer to certain paragraphs of an answer is without prejudice where such paragraphs only professed to answer paragraphs of the complaint which were eliminated by a demurrer.⁶³

Usually the sole question triable in quo warranto proceedings is whether the defendant has right or title to the privilege, franchise or right which is claimed to be usurped.⁶⁴

§ 3260. Amendment of pleadings. An information or complaint is subject to amendment like other pleadings,⁶⁵ and in some states the statutes expressly allow the amendment of the information.⁶⁶

§ 3261. Joinder and splitting of causes of action. It is not objectionable to rely on two or more grounds of usurpation in one information, but it has been held in such case that each ground should be stated in a separate count or paragraph.⁶⁷ This rule does not permit the

⁶¹ Thus in a quo warranto proceeding, where the original counts in the information charged that the defendant corporation was organized for more than one distinct purpose, wherefore its organization was unlawful, and that it was operating a building for opera-house purposes when it was only entitled to operate a building for military purposes, the action of the plaintiff in filing replications to a plea setting out the incorporation of the company to operate a building for military and other purposes and denying usurpation of franchises, after a demurrer was overruled, operated to admit the sufficiency of the plea, in law to bar recovery. *People v. Walker Opera House Co.*, 249 Ill. 106, 94 N. E. 159.

⁶² *People v. Union Gas & Electric Co.*, 260 Ill. 392, 103 N. E. 245.

⁶³ *Polk v. State*, 154 Ala. 148, 45 So. 652.

⁶⁴ In a proceeding to test the claim of right to exercise a pretended franchise, the sole question triable is whether the defendant possesses the right in fact referable to the grant. *State v. Kenosha Elec. R. Co.*, 145 Wis. 337, 129 N. W. 600.

⁶⁵ *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

⁶⁶ Mo. Rev. St. 1909, § 1848, permitting amendments before final judgment, is by § 1864 extended to informations in the nature of quo warranto, and an amendment so as to allege the continuation of the acts complained of up to the time of the trial should be allowed under such sections. *State v. Business Men's Athletic Club*, 178 Mo. App. 548, 163 S. W. 901.

⁶⁷ *Louisville & N. R. Co. v. State*, 154 Ala. 156, 45 So. 296.

bringing of a duplex action, as where an information against a water company is based on one statute as to excluding corporations from franchises for specified misconduct and also on another statute as to excluding a person from an office or franchise unlawfully held or usurped.⁶⁸ There is no splitting of causes of action in proceeding against a corporation to forfeit its street railway franchise, and then later proceeding against the same corporation to forfeit heat, light and power franchises. And in such a case, the judgment in the first suit confirming the corporation's right to its franchise is not a bar to the second suit.⁶⁹

§ 3262. Abatement of proceedings; dismissal. In ordinary circumstances any defendant in a suit may abate the same, by voluntarily doing all the things which the pleadings in the cause pray the court to compel him to do, and this may be done on motion at any stage of the litigation, before or after trial, or before or after an appeal is granted. But, where a proceeding is brought against several corporations for violating the anti-trust laws, the formation and entering into the trust or conspiracy constitutes the abuse or usurpation of power complained of, and is the gist of the action, and one of the respondents cannot voluntarily withdraw from the state and thus terminate the action. A confession as broad as the charges in the information is necessary.⁷⁰

A decree dismissing the suit on the merits is proper where there is no showing that the proceeding is brought or authorized by the officer charged by law with the duty of instituting the suit.⁷¹

Where a constitutional provision authorizes an insurance commissioner to bring proceedings to forfeit the charter of an insurance company, the county attorney is an unnecessary party and has no authority to dismiss such a proceeding instituted by the commissioner.⁷² In some states, if the proper officer brings the suit and it is dismissed without the knowledge of the private relators, they may ask the court to direct the officer to proceed with the case and if the court refuses, an appeal may be taken.⁷³

⁶⁸ *State v. Birmingham Water Works Co.*, 185 Ala. 388, Ann. Cas. 1916 C 166, 64 So. 23.

⁶⁹ *State v. Lincoln Traction Co.*, 90 Neb. 535, 134 N. W. 278.

⁷⁰ *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

As to pleas in abatement, see § 3258, *supra*.

⁷¹ *State v. Seattle Gas & Electric Co.*, 28 Wash. 488, 70 Pac. 114, 68 Pac. 946.

⁷² *State v. Hooker*, 33 Okla. 522, 126 Pac. 231.

⁷³ *State v. Point Roberts Reef Fish Co.*, 42 Wash. 409, 85 Pac. 22.

When private persons bring the suit because of the refusal of the proper officer to act, the appearance of such officer and his offer to unite in the prosecution affords no ground for the compulsory dismissal of the relators.⁷⁴

Where it does not appear that leave to file an information was obtained, the respondent corporation should move to dismiss the case before pleading. To appear and plead issuably operates to waive the failure to obtain leave.⁷⁵

§ 3263. Right to trial by jury. The practice has been almost universal to submit questions of fact arising in quo warranto proceedings to a jury, but the cases in which the question of the right to such trial has been adjudicated are very few.⁷⁶ In quo warranto proceedings brought at the common law to vacate charters, the right to a trial by jury seems to have been accorded universally to determine disputed questions of fact.⁷⁷ The same right was accorded in some cases when alleged usurpers were to be ousted from office, although there is a conflict of authority as to this point, and there is authority for the view that the right was not allowed.⁷⁸ The statute of 3 Geo. II, c. 25, provided for a jury trial in quo warranto proceedings.⁷⁹

The general rule to be gathered from the American decisions is that a jury trial will be allowed in proceedings to forfeit franchises,⁸⁰ and

⁷⁴ *State v. Des Moines City R. Co.*, 135 Iowa 694, 109 N. W. 867.

⁷⁵ *Attorney General v. A. Booth & Co.*, 143 Mich. 89, 106 N. W. 868.

See also § 3247, *supra*.

⁷⁶ See *State v. Standard Oil Co.* of Kentucky, 120 Tenn. 86, 110 S. W. 565.

⁷⁷ *Louisiana & N. W. R. Co. v. State*, 75 Ark. 435, 5 Ann. Cas. 637, 88 S. W. 559.

⁷⁸ *State v. Johnson*, 26 Ark. 281, is one of the leading American authorities to sustain the view that trial by jury was not a right at common law on quo warranto proceedings to oust an alleged usurper from office. There is much conflict of authority on this question, and although this Arkansas case was subsequently followed in that state, it seems that the weight of authority is against its view.

⁷⁹ See *State v. Standard Oil Co.* of Kentucky, 120 Tenn. 86, 110 S. W. 565.

⁸⁰ See the following decisions:

Alabama. *State v. Burnett*, 2 Ala. 140.

Arkansas. *Louisiana & N. W. R. Co. v. State*, 75 Ark. 435, 5 Ann. Cas. 637, 88 S. W. 559.

Indiana. *Reynolds v. State*, 61 Ind. 392.

Kansas. *State v. Allen*, 5 Kan. 213.

Massachusetts. *Attorney General v. Sullivan*, 163 Mass. 446, 28 L. R. A. 455, 40 N. E. 843 (reviewing cases).

Michigan. *People v. Doesburg*, 16 Mich. 133.

New York. *People v. Albany & S. R. Co.*, 57 N. Y. 161.

Pennsylvania. *Com. v. Delaware & H. Canal Co.*, 43 Pa. St. 295.

in some states the right is guaranteed by constitutional provisions.⁸¹ In Tennessee, where equitable proceedings may be brought to secure the relief formerly obtained by quo warranto proceedings, the right to a jury trial is guaranteed by statute.⁸² In Missouri the right is apparently denied.⁸³

§ 3264. Reference of questions of fact. The appointment of a referee in quo warranto proceedings is improper, generally speaking, as such proceedings are not equitable in nature. Nevertheless, cases have arisen where a referee was appointed, and because of the failure to make timely objections, the reference has been sustained. Thus it was held in one case that the action of the trial court in overruling a motion to set aside the order appointing the referee, and to strike out the testimony taken by him, could not be objected to when the motions were made after the referee's report had been submitted. In the same case it was held that the action of the trial court in setting aside the findings of the referee and making independent findings would not be set aside on appeal on the ground that the referee's findings were supported by substantial evidence. The case involved a charge of entering into a conspiracy in restraint of trade, and the reference was treated on appeal as a reference by compulsion.⁸⁴

In some states, the practice obtains of appointing some learned lawyer, styled a commissioner, to take the testimony when questions of fact arise in original proceedings before the appellate court and

⁸¹ *State v. Cobb*, 24 Okla. 662, 24 L. R. A. (N. S.) 639, 104 Pac. 361.

In quo warranto proceedings in courts of original jurisdiction brought under the statutes to annul, vacate and cancel a charter or franchise or any other property right (not including title to public office), the right of trial by jury of issues of fact is a constitutional right. *Louisiana & N. W. R. Co. v. State*, 75 Ark. 435, 5 Ann. Cas. 637, 88 S. W. 559.

⁸² *Shannon's Code*, § 5172. *State v. Standard Oil Co. of Kentucky*, 120 Tenn. 86, 110 S. W. 565.

⁸³ *State v. Springfield African Social & Improvement Club*, 169 Mo. App. 137, 154 S. W. 458.

In a quo warranto proceeding having for its object the forfeiture of

the franchise or the confiscation of the whole or part of the property of a corporation, a jury trial will not be granted. *State v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S. W. 145.

Corporations who fail to request a jury in a timely manner waive the right to trial by jury, and cannot object. *State v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S. W. 145.

In Missouri there is but one case where a jury trial was ordered in a quo warranto proceeding, timely request therefor having been made. See *State v. Light & Development Co. of St. Louis*, 246 Mo. 618, 152 S. W. 67; *State v. Townsley*, 56 Mo. 107.

⁸⁴ *State v. People's Ice Storage & Fuel Co.*, 246 Mo. 168, 151 S. W. 101.

when the introduction of such testimony in proof or disproof of the questions involved is necessary.⁸⁵ Such a commissioner may be appointed in quo warranto proceedings, but he has only the bare authority of a special commissioner appointed to take depositions and return them to the court, and all his rulings upon the law and the evidence are subject to review, when exceptions are timely filed thereto by either party.⁸⁶

§ 3265. Evidence. The burden of sustaining a plea of justification is upon the defendant,⁸⁷ and when the existence of the corporation is attacked, the defendants have the burden of showing legal incorporation,⁸⁸ by showing substantial compliance with the statute authorizing incorporation.⁸⁹

When it is claimed that a corporation was formed to sell stock of another company at a fictitious increase in value, evidence of the value of the stock should be limited to the time of the transaction. And in such a case, the value of the plant, assets and franchise of the old company would be admissible in determining the real value of the stock.⁹⁰ And when several corporations are charged with entering into a conspiracy in restraint of trade, testimony going back to the time of the inception of the illegal arrangement is admissible, even though the combination was subsequently changed by the elimination of some of the guilty parties. In such a case declarations of a president of one of the companies are admissible to connect him with the conspiracy, and such declarations during the conspiracy are admissible against those engaged with him in the common enterprise.⁹¹ In

⁸⁵ State v. Arkansas Lumber Co., 260 Mo. 212, 169 S. W. 145.

⁸⁶ State v. Arkansas Lumber Co., 260 Mo. 212, 169 S. W. 145, holding that the commissioner does not have the power to admit or to exclude testimony in the same manner and to the same extent as a trial court, regardless of statements in the order appointing him, and that his findings of fact and conclusions of law, though persuasive, are not binding upon the supreme court.

⁸⁷ Brooks v. State, 3 Boyce (Del.) 1, 51 L. R. A. (N. S.) 1126, Ann. Cas. 1915 A 1133, 79 Atl. 790.

If the plea of justification is traversed by the reply, the burden is on the respondent to establish his

right. State v. Lincoln Traction Co., 90 Neb. 535, 134 N. W. 278.

⁸⁸ People v. Lowden, 67 Cal. xx, 8 Pac. 66. See also §§ 421, 422, supra.

⁸⁹ People v. Montecito Water Co., 97 Cal. 276; 33 Am. St. Rep. 172, 32 Pac. 236; People v. Stockton & V. R. Co., 45 Cal. 306, 13 Am. Rep. 178; People v. Cheeseman, 7 Colo. 376, 3 Pac. 716; State v. Wood, 13 Mo. App. 139.

See § 3266, infra.

⁹⁰ State v. Citizens Light & Power Co., 172 Ala. 232, 55 So. 193.

⁹¹ State v. People's Ice, Storage & Fuel Co., 246 Mo. 168, 151 S. W. 101.

See generally Chap. 54, infra.

a proceeding to oust directors alleged to be illegally holding office, the complainant has the burden of making out the case.⁹² In such a case, where the evidence does not show the time when notices of an election were sent to stockholders, but it is stated that they were sent in accordance with the by-laws, it will be presumed that they were seasonably sent.⁹³

§ 3266. Defenses in general. When the existence of a corporation is attacked by the state, the defendants are bound to show as a defense, the existence of a corporation de jure by showing a valid law authorizing incorporation and a substantial compliance with the conditions precedent prescribed by the statute.⁹⁴ And a proceeding inquiring into and ascertaining the validity of the objects and purposes for which the corporation was organized is not prevented by the fact that the defendants procured a pro forma decree and had a certificate of incorporation issued.⁹⁵ Proceedings to forfeit a corporate charter because of misuser of the franchise, in that criminal statutes have been violated, are not prevented by the existence of remedies imposing penalties and punishments.⁹⁶ And it is no defense to a proceeding to forfeit the charter of a charitable corporation for misuser of powers, that by the entry of a judgment of ouster donations to the corporation would be lost to the people to be benefited.⁹⁷

Questions as to the equitable property rights of a street railway

⁹² *Clark v. Wild*, 85 Vt. 212, Ann. Cas. 1914 C 661, 81 Atl. 536.

⁹³ *Clark v. Wild*, 85 Vt. 212, Ann. Cas. 1914 C 661, 81 Atl. 536.

See generally § 1640.

⁹⁴ *Alabama*. *State v. Webb*, 97 Ala. 111, 38 Am. St. Rep. 151, 12 So. 377.

California. *People v. Montecito Water Co.*, 97 Cal. 276, 33 Am. St. Rep. 172, 32 Pac. 236; *People v. Selfridge*, 52 Cal. 331; *People v. Stockton & V. R. Co.*, 45 Cal. 306, 13 Am. Rep. 178; *People v. Chambers*, 42 Cal. 201.

Colorado. *People v. Cheeseman*, 7 Colo. 376, 3 Pac. 716.

Illinois. *People v. Mackey*, 255 Ill. 144, 99 N. E. 370.

Indiana. *Holman v. State*, 105 Ind. 569, 5 N. E. 702; *State v. Bethlehem*

& Z. Gravel Road Co., 32 Ind. 357.

Michigan. *Attorney General v. Lorman*, 59 Mich. 157, 60 Am. Rep. 287, 26 N. W. 311; *Attorney General v. Hanchett*, 42 Mich. 436, 4 N. W. 182.

Minnesota. *State v. Critchett*, 37 Minn. 13, 32 N. W. 787.

Ohio. *State v. Central Ohio Mut. Relief Ass'n*, 29 Ohio St. 399.

See, in this connection, §§ 182, 418.

⁹⁵ *State v. Business Men's Athletic Club*, 178 Mo. App. 548, 163 S. W. 901.

⁹⁶ *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

See § 3235, *supra*.

⁹⁷ *People v. Michigan Sanitarium & Benevolent Ass'n*, 151 Mich. 452, 115 N. W. 423.

But see § 3269 et seq., *infra*.

company are not involved when it is charged with unlawfully occupying city streets.⁹⁸

§ 3267. Laches; limitation statutes. As a general rule, mere delay on the part of the state in instituting quo warranto proceedings will not bar such proceedings. Laches cannot be imputed to the state.⁹⁹ The rule has been applied in proceedings to forfeit a franchise of a light company for nonuser,¹ and in suits to forfeit corporate charters.² The circumstances may be such, however, as to warrant the application of the doctrines of waiver and estoppel.³ And there may be an imputation of laches in cases where there is a formal defect in the organization of the corporation, acquiesced in by the state. The doctrine of laches may also be applied to proceedings for the benefit of a private relator.⁴

In some states, quo warranto proceedings may be barred by statutes of limitation,⁵ in which case want of knowledge does not prevent the running of the statute.⁶ But when there is such a statute and quo

⁹⁸ *State v. Lincoln St. R. Co.*, 80 Neb. 333, 14 L. R. A. (N. S.) 336, 114 N. W. 422.

⁹⁹ *State v. Webb*, 97 Ala. 111, 38 Am. St. Rep. 151, 12 So. 377; *People v. Mackey*, 255 Ill. 144, 99 N. E. 370; *People v. Pullman's Palace-Car Co.*, 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664; *State v. Light & Development Co. of St. Louis*, 246 Mo. 618, 152 S. W. 67. But see *State v. Miami Exporting Co.*, 11 Ohio 126.

¹ *State v. Light & Development Co. of St. Louis*, 246 Mo. 618, 152 S. W. 67.

² *People v. Mackey*, 255 Ill. 144, 99 N. E. 370; *People v. Pullman's Palace-Car Co.*, 175 Ill. 125, 64 L. R. A. 366, 51 N. E. 664.

A contention of laches is without merit in a suit to forfeit the charter of a corporation shown to be a party to a combination in restraint of trade at the time of suit. *State v. Armour Packing Co.*, 265 Mo. 121, 176 S. W. 382.

³ See § 3268, *infra*.

⁴ *People v. Union El. R. Co.*, 269 Ill. 212, 110 N. E. 1.

⁵ *Missouri Rev. St.* 1909, § 10303, conferring jurisdiction upon circuit courts of proceedings to prevent corporations and individuals from entering into conspiracies in restraint of trade, is almost identical with section 4 of the Sherman Act, and the anti-trust statutes are penal in nature, the penalty being the death of the corporation, or confiscation of its property, wherefore the statute of limitations (§ 1890) applies, especially when aided by § 1914, and proceedings by quo warranto are barred after the lapse of three years. *State v. Arkansas Lumber Co.*, 260 Mo. 212, 169 S. W. 145.

Ohio Rev. St. § 6789, requiring actions to forfeit charters to be commenced within five years after the act complained of, applies to a quo warranto proceeding commenced by the attorney general. There is no exception so that the statute can be held to apply only to proceedings by prosecuting attorneys. *State v. Standard Oil Co.*, 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541, 30 N. E. 279.

⁶ *State v. Standard Oil Co.*, 49 Ohio

warranto proceedings are instituted, it has been held sufficient if the last of the acts relied upon as showing usurpation has taken place within the time limited, as the usurpation of corporate powers is a continuing cause of action.⁷ In the case of misuser of powers, it cannot be contended that the suit is barred by limitations, when it appears that the respondent corporation is a member of a conspiracy in restraint of trade at the time of the suit.⁸

§ 3268. Estoppel; waiver. There may be a waiver of the failure to comply with statutes as to organization, or a cure of defects and irregularities, in which case the state will be estopped to institute proceedings against the corporation because of such defects or irregularities.⁹ But the fact that a person on whose relation a proceeding is instituted at one time acted as an officer of the corporation alleged to be usurping its franchise, and induced the defendants to purchase such franchise by representing it to be valid, has been held not to create an estoppel so as to bar a suit by the attorney general.¹⁰ And the fact that the state, in an indictment against property for an offense, has described such property as that of the corporation, does not estop it from subsequently maintaining quo warranto proceedings to contest the validity of the organization of the corporation.¹¹

In regard to secondary franchises, a waiver of forfeiture may arise from the action of the legislative body clothed with authority to grant the franchise.¹² But usually the mere acts of city officials recognizing the corporation or its franchise do not operate to give rise to the application of the doctrines of waiver and estoppel and to prevent the suit by the state.¹³ In some states, it is held that the doctrine of

St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541, 30 N. E. 279.

⁷ *People v. Rensselaer Ins. Co.*, 38 Barb. (N. Y.) 323. See also *People v. Stanford*, 77 Cal. 360, 2 L. R. A. 92, 19 Pac. 693, 18 Pac. 85.

⁸ *State v. Armour Packing Co.*, 265 Mo. 121, 176 S. W. 382.

⁹ *Alabama. State v. Webb*, 110 Ala. 214, 20 So. 462; *Boykin v. State*, 96 Ala. 16, 11 So. 66.

California. People v. Perrin, 56 Cal. 345.

Illinois. People v. Farnham, 35 Ill. 562; *Jameson v. People*, 16 Ill. 257, 63 Am. Dec. 304.

Indiana. McCulloch v. State, 11

Ind. 424 (where subscriptions to capital stock of a corporation were received through agents under the superintendence of the state).

Michigan. Attorney General v. Joy, 55 Mich. 94, 20 N. W. 806.

¹⁰ *People v. Lowden*, 67 Cal. xx, 8 Pac. 66.

¹¹ *State v. Beck*, 81 Ind. 500.

¹² *State v. West End Light & Power Co.*, 246 Mo. 653, 152 S. W. 76.

¹³ A proceeding to forfeit the charter of a lighting company is not prevented on the grounds of waiver and estoppel because the board of public improvements approves a transfer of the franchise and grants permits to

estoppel in pais may be invoked against a city when it is the real party in interest in a quo warranto proceeding.¹⁴ And a telephone company will not be ousted from its use of streets, merely because the company granting its license to such defendant corporation was not a de jure corporation, where the facts show user with the consent of the city, creating an estoppel.¹⁵ This is a defense depending upon the facts, and an estoppel will not arise unless the evidence supports such defense.¹⁶

string wires, because the mayor and council approve the company's bond, because the city assessor assesses the franchise, or because the city attorney gives a legal opinion favorable to the company. *State v. West End Light & Power Co.*, 246 Mo. 653, 152 S. W. 76.

The right of a state to recall a lighting franchise cannot be waived by acts of city officers in accepting a bond of the company in issuing a permit for wires, by assessing the franchise, or by the act of the city attorney in giving an opinion in the company's favor. *State v. Light & Development Co. of St. Louis*, 246 Mo. 618, 152 S. W. 67.

Acts of city officials in accepting a bond of a light company will not operate to bar a proceeding to oust such company from its franchise because of nonuser, since such officials have no power to create the obligation to give bond or to waive that obligation. *State v. Light & Development Co. of St. Louis*, 246 Mo. 618, 152 S. W. 67.

¹⁴ *People v. Union Gas & Electric Co.*, 254 Ill. 395, Ann. Cas. 1916 B 201, 98 N. E. 768.

Thus a city may be estopped from ousting a gas company from the use of streets because permission was not granted, when the city has treated the corporation for a number of years as if it were in the lawful exercise of its franchise and has induced and permitted the company to expend

large sums of money to comply with other ordinances. *People v. Union Gas & Electric Co.*, 254 Ill. 395, Ann. Cas. 1916 B 201, 98 N. E. 768.

In a quo warranto proceeding to forfeit the charter of a water company, so as to enable a city to exercise an option to purchase the plant, as was required by the ordinance granting the company its franchise, acts of the city might be considered in determining whether the right to enforce the forfeiture had been waived, and when it appeared that the city had for a considerable time compelled the company to improve its plant at great expense, that the stockholders and officers had attempted in good faith to show the cost of the plant, and that the failure to keep proper accounts occurred before the present stockholders became interested in the business, the court in the exercise of its discretion would deny quo warranto, on the ground that the forfeiture had been waived. *State v. Janesville Water Co.*, 92 Wis. 496, 32 L. R. A. 391, 66 N. W. 512.

¹⁵ *People v. Citizens Tel. Co.*, 186 Ill. App. 260.

¹⁶ In a quo warranto proceeding brought to oust a telephone company from occupying streets, a contention that the village consented to a transfer of powers and privileges to the defendant company, and to the occupation of streets was not supported by the evidence. *People v. Commercial*

§ 3269. Judgment—In general. Considerable uncertainty exists as to the relief that may be granted in quo warranto proceedings, and this uncertainty arises principally from the change in the nature of the proceedings, and from the fact that the proceeding at one time was wholly criminal in nature. The uncertainty in this respect affects not only the allowance of a judgment of ouster or seizure of a usurped franchise, liberty or privilege, but also the amount of the fine that is to be imposed.¹⁷ In addition uncertainty arises from the various objects of quo warranto proceedings and the difference where proceedings are instituted by private relators and by public officials. Thus, in some states, a judgment of fine and forfeiture is proper when the proceeding is brought by the attorney general, but such judgment is improper when the proceeding is brought by a private relator, in which case the judgment shall be that the corporation be excluded from the franchise or privilege not conferred by law.¹⁸ The interests of the public are also to be considered in granting forfeitures, and attention will be given to the question whether the corporation acted wilfully in misusing its powers.

At the common law, a distinction existed as to whether a judgment of ouster or of seizure should be entered when franchises, privileges or rights were usurped.¹⁹

§ 3270.—Forfeiture of charter; ouster from franchises or powers.

As a general rule, if the corporation has been guilty of acts or omissions which, by its charter or some other statute, are made a cause of forfeiture of its franchise to be a corporation, and the proceedings

Telephone & Telegraph Co., 277 Ill. 265, L. R. A. 1917 D 704, 115 N. E. 379.

¹⁷ *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936.

See § 3223, *supra*.

¹⁸ *Attorney General v. New York, N. H. & H. R. Co.*, 197 Mass. 194, 83 N. E. 408.

¹⁹ In *People v. Rensselaer & S. R. Co.*, 15 Wend. (N. Y.) 113, 30 Am. Dec. 33, Savage, C. J., declared the English rule to be that when a liberty is wrongfully usurped and upon no title, a judgment of ouster shall be entered, but when a granted liberty

has been misused, judgment of seizure into the king's hand shall be given, the reason being that that which came from the king is returned there by seizure, but that which never came from him but was usurped shall be declared null and void; that judgment of ouster is rendered against individuals unlawfully assuming to be a corporation, and is rendered against the corporation for exercising a franchise not granted by the charter, in which case the corporation is ousted of its franchise, but not of being a corporation; while judgment of seizure is given against a corporation for forfeiture of its corporate privileges.

are instituted by or on behalf of the state to enforce the forfeiture, the court has no discretion to refuse a judgment of forfeiture.²⁰

When a corporation has merely violated its charter by doing unauthorized acts or where it has been guilty of neglect, the court is vested with discretion to determine whether a judgment of ouster of the franchise to be a corporation shall be rendered or whether the corporation shall be only ousted from the exercise of the powers illegally assumed or required to perform the duties neglected; and in determining this question the court will consider both the interests and welfare of the public and the interests of stockholders and creditors.²¹

The general rule that courts are extremely reluctant to adjudge forfeitures has been held to apply to corporate privileges and franchises; ²² and it has been held that a forfeiture should not be allowed except upon express limitation, or for a plain abuse of power by which the corporation fails to fulfil the design and purpose of its organiza-

20 Colorado. *People v. City Bank of Leadville*, 7 Colo. 226, 3 Pac. 214; *Canon City Labor Club v. People*, 21 Colo. App. 37, 121 Pac. 120.

Illinois. *People v. National Sav. Bank*, 129 Ill. 618, 22 N. E. 288; *People v. Kankakee River Improvement Co.*, 103 Ill. 491.

Missouri. *State v. Louisiana, B. G. & A. Gravel Road Co.*, 116 Mo. App. 175, 92 S. W. 153.

New York. *People v. Buffalo Stone & Cement Co.*, 131 N. Y. 140, 15 L. R. A. 240, 29 N. E. 947.

Ohio. *State v. Oberlin Building & Loan Ass'n*, 35 Ohio St. 258; *State v. Pennsylvania & O. Canal Co.*, 23 Ohio St. 121.

Texas. *State v. Southern Pac. R. Co.*, 24 Tex. 80.

A judgment of dissolution will not be rendered except in case of the abuse or misuse of corporate franchises which are of the very essence of the contract between the state and corporation and where the acts in question have been repeated and wilful. So a judgment dissolving a corporation is proper where its franchise was obtained by false and fraudulent statements as to its purpose,

the real object of the corporation being the illegal sale of intoxicating liquors. *Canon City Labor Club v. People*, 21 Colo. App. 37, 121 Pac. 120.

21 Alabama. *Floyd v. State*, 177 Ala. 169, 59 So. 280; *State v. United States Endowment & Trust Co.*, 140 Ala. 610, 103 Am. St. Rep. 60, 37 So. 442.

Indiana. *State v. Portland Natural Gas Co.*, 153 Ind. 483, 53 L. R. A. 413, 74 Am. St. Rep. 314, 53 N. E. 1089.

New York. *People v. Ulster & D. R. Co.*, 128 N. Y. 240, 28 N. E. 635.

Ohio. *State v. Oberlin Building & Loan Ass'n*, 35 Ohio St. 258. See also *State v. Standard Oil Co.*, 49 Ohio St. 137, 15 L. R. A. 145, 34 Am. St. Rep. 541, 30 N. E. 279; *State v. Farmer's College*, 32 Ohio St. 487.

Rhode Island. *State v. Pawtuxet Turnpike Corporation*, 8 R. I. 182.

Vermont. *State v. Essex Bank*, 8 Vt. 489.

22 Olathe v. Missouri & K. I. R. Co., 78 Kan. 193, 96 Pac. 42; *State v. York Light & Heat Co.*, 113 Me. 144, 93 Atl. 61.

tion.²³ So, in a suit to forfeit the franchise of an interurban railway because of the violations of city ordinances, it was held that such violations as to equipment and service were not so serious as to warrant forfeiture, and the city should attempt to obtain relief by other remedies.²⁴ It is also held proper to decree a forfeiture only of the usurped or misused franchise, leaving the corporation intact,²⁵ and this may be done though the state claims the forfeiture of the whole.²⁶ Thus it is held that if a corporation is unlawfully usurping franchises in certain respects and there is no evidence of mala fides or a stubborn persistence in the usurpation, the corporate existence will not be forfeited, but a judgment will be rendered ousting the company from the franchises that are usurped.²⁷ Also, when a corporation exercises powers not conferred by law, it may be ousted from such powers, without affecting the corporation's existence.²⁸

Even the wilful and fraudulent abuse of franchises or neglect of duty will not necessarily result in forfeiture, as such abuse or neglect must affect the public, and if only private interests are affected, there are other remedies.²⁹ The facts may be such as to present an estoppel also.³⁰

²³ *State v. United States Endowment & Trust Co.*, 140 Ala. 610, 103 Am. St. Rep. 60, 37 So. 442.

²⁴ *Olathe v. Missouri & K. I. R. Co.*, 78 Kan. 193, 96 Pac. 42.

²⁵ According to the common law of most of the states, if the franchises of a corporation are not dependent upon each other, it is competent for the court in the exercise of its discretion to decree a forfeiture of the misused franchise only. See *State v. Boston & M. R. R.*, 75 N. H. 327, 74 Atl. 542.

²⁶ *State v. Norcross*, 132 Wis. 534, 122 Am. St. Rep. 998, 112 N. W. 40.

²⁷ *State v. Atlantic City & S. R. Co.*, 77 N. J. L. 465, 72 Atl. 111.

The charter of a corporation will not be forfeited for misuser, or for nonuser or neglect, unless it was wilful and fraudulent, or at least due to culpable negligence, or unless the legislature has prescribed expressly the penalty of forfeiture. *People v. Bristol & R. Turnpike Road*, 23 Wend. (N. Y.) 222, 236.

²⁸ *State v. Louisiana, B. G. & A. Gravel Road Co.*, 116 Mo. App. 175, 92 S. W. 153.

²⁹ *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020; *People v. North River Sugar Refining Co.*, 121 N. Y. 582, 9 L. R. A. 33, 18 Am. St. Rep. 843, 24 N. E. 834.

³⁰ In a quo warranto action brought to effect the forfeiture of the franchise of a lighting company, relief will be denied when it appears that the real party in interest, desirous of effecting the forfeiture, is a rival competing company, that it has known of the facts upon which the ground of forfeiture is based for several years and permitted the defendant company to build up its business in order that it might effect the forfeiture and then seize such business, when two successive attorneys general had declined to move in the interest of the public, and when the party trying to effect the forfeiture had also resorted to improper prac-

§ 3271. — **Fines; damages.** The common-law proceedings by quo warranto resulted in the punishment of the usurper, as well as the forfeiture of the usurped franchise.³¹ This was the result of the criminal nature of the proceedings, and while similar relief is afforded, at the present time, there are practically no decisions dealing with the nature and amount of the fine which may be imposed when quo warranto is treated as a civil proceeding. The references to the subject both in opinions and textbooks are few and casual. Usually Blackstone's statement that the writ is now used for the trying of the civil right, "the fine being nominal only" is repeated, and the general practice, as well as some American authorities, would seem to indicate that only a nominal fine can be imposed.³² In other states, however, the rulings are to the effect that a substantial fine may be imposed.³³ Under the statute of Anne the amount of the fine to be paid was not fixed, but was left to the discretion of the court "regulated by the provisions of Magna Charta and the Bill of Rights that excessive fines ought not to be demanded."³⁴

It has been held that damages cannot be awarded in quo warranto,³⁵ but the Supreme Court of the United States states that when the fine

tices. *State v. Oconto Elec. Co.*, 165 Wis. 467, 161 N. W. 789.

³¹ *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599. See also *State v. Standard Oil Co. of Kentucky*, 120 Tenn. 86, 110 S. W. 565; *State v. Norcross*, 132 Wis. 534, 122 Am. St. Rep. 998, 112 N. W. 40.

The remedy by information in the nature of quo warranto is properly a criminal method of prosecution, as well to punish the usurper by fine as to oust him for the usurpation of the franchise. 3 Bl. Com. 263.

³² *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936.

Blackstone's statement is as follows: "The remedy by information in the nature of quo warranto has been applied to the mere purposes of trying the civil right, seizing the franchise or ousting the wrongful possessor, the fine being nominal only." 3 Bl. Com. 263.

³³ See *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936, as to Missouri rule; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

In a quo warranto proceeding against a corporation brought for the violation of anti-trust statutes, the corporate rights of the respondents may be taken from them or fines or suspensions imposed, but such judgments are not regarded as punishments for the commission of crime, but as results which follow the failure of the corporation to live up to its implied contract with the state. *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902.

³⁴ *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936.

³⁵ *State v. Louisiana, B. G. & A. Gravel Road Co.*, 116 Mo. App. 175, 92 S. W. 153.

is considered as in the nature of a civil penalty, the case is within the principle which permits the recovery of punitive damages.³⁶ No federal question arises on a ruling that punitive damages may be recovered for the violation of the corporation's implied contract when it appears that the defendants acted wilfully and wantonly. This does not mean that there is no limit to the power to impose fines. The power is always limited by the obligation to administer justice and no more to assess excessive damages than to impose excessive fines.³⁷

§ 3272. — Effect of prayer for relief. The relief to be granted does not depend upon the prayer, but upon the allegations of the complaint and the evidence in support thereof,³⁸ and the prayer does not constitute a part of the notice guaranteed by the due process clause of the Federal Constitution. While the judgment must not go beyond that to which the plaintiff is entitled on proof of the allegations made, the court may grant other and different relief than that for which the complainant prayed.³⁹

§ 3273. — Stay. A writ of ouster against corporations found guilty of violating anti-trust statutes may be stayed and suspended, on condition that the corporation obey the laws, the court still retaining jurisdiction of the matter.⁴⁰

§ 3274. Costs. Some of the American statutes authorize an award of costs against the relator in the event of a judgment in favor of the defendant.⁴¹ In a proceeding in the name of the people on the relation

³⁶ *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936.

Where a defendant has acted wantonly and perversely, or with such malice as implies a spirit of mischief or criminal indifference to civil obligations, damages may be assessed, even in civil cases, by way of punishment, in some states. *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936.

³⁷ *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936.

³⁸ *State v. Birmingham Water Works Co.*, 185 Ala. 388, Ann. Cas.

1916 C 166, 64 So. 23; *Canon City Labor Club v. People*, 21 Colo. App. 37, 121 Pac. 120; *State v. York Light & Heat Co.*, 113 Me. 144, 93 Atl. 61.

³⁹ *Standard Oil Co. v. State of Missouri*, 224 U. S. 270, 56 L. Ed. 760, Ann. Cas. 1913 D 936.

⁴⁰ The purpose of the stay is that the attorney general may move for vacation of the stay if the company violates the laws and that the court may act, if it sees fit, independently of the attorney general. *State v. Standard Oil Co.*, 251 Mo. 271, 158 S. W. 601.

⁴¹ *People v. Healy*, 230 Ill. 280, 15 L. R. A. (N. S.) 603, 82 N. E. 599.

of an individual to oust a gas and electric company from the use of streets of a city, it has been held that such an award against the relator is not erroneous, as the suit in effect is a suit by the city to protect its property, even when prosecuted in the name of the state. Such a suit does not come within the principle exempting municipal corporations from liability for costs, in quasi criminal actions for the enforcement of its ordinances.⁴²

§ 3275. Receivership. Receivers are not usually appointed in quo warranto proceedings. The nature of the proceeding is such as to render this kind of relief inappropriate.

The appointment of a receiver was denied in one case where the petitioners claimed that the defendants fraudulently obtained money from persons by assuming to act as a corporation and sought the adjustment of the rights of contributors of such money.⁴³ Similar relief was denied in another case where a judgment for the failure to pay franchise taxes was sought, and the plaintiff wished to have the corporate property sold and the proceeds distributed.⁴⁴

§ 3276. Appeal and review. Quo warranto proceedings are usually reviewed by appeal⁴⁵ and when a case is tried in the lower court on the theory that it is a quo warranto proceeding, it will be so considered on appeal, even though the plaintiffs prayed for injunctive relief.⁴⁶

When title to an office is involved the fact that the relator's term of office has expired pending the appeal does not deprive him of the right to have the judgment affirmed.⁴⁷

Objections to defects or imperfections in an information must be preserved in the statutory manner,⁴⁸ and if the corporate name of the

⁴² *People v. Union Gas & Electric Co.*, 260 Ill. 392, 103 N. E. 245.

⁴³ *State v. American Sugar Manufacturing & Refining Co.*, 90 Kan. 449, 133 Pac. 864.

⁴⁴ Quo warranto proceedings under Rev. St. tit. 93, art. 4343. *Oriental Oil Co. v. State*, — Tex. Civ. App. —, 135 S. W. 722.

⁴⁵ A quo warranto proceeding under Texas Rev. St. tit. 93, art. 4343, can be revised only by appeal, and not by writ of error. *Oriental Oil Co. v. State*, — Tex. Civ. App. —, 135 S. W. 722.

A proceeding under the Texas Act

of 1907, c. 23, p. 502, providing for forfeiture of a corporate charter for the failure to pay a franchise tax, for the collection of the tax and the appointment of a receiver, may be reviewed by writ of error. *Oriental Oil Co. v. State*, — Tex. Civ. App. —, 135 S. W. 722.

⁴⁶ *State v. People's Ice Storage & Fuel Co.*, 246 Mo. 168, 151 S. W. 101.

⁴⁷ *Decker v. Daudt*, 74 N. J. L. 790, 67 Atl. 375.

⁴⁸ Section four of the Illinois Quo Warranto Act (J. & A. ¶ 8690), points out the manner in which defects or imperfections in an information may

respondent is alleged, and it so appears and pleads, the corporate existence cannot be questioned on appeal.⁴⁹ Questions going to the jurisdiction of the court may be raised for the first time in an appellate court,⁵⁰ and the same rule applies to the question whether the complaint states a cause of action.⁵¹ A defense of former adjudication or prior acquittal must be properly pleaded and preserved to be available on review. Such a defense will not be considered when presented in the lower court by mere oral argument.⁵²

Usually the discretion of the court in granting or refusing leave to file an information, is subject to review.⁵³ A judgment of ouster will be affirmed where the findings are supported by the evidence.⁵⁴

be taken advantage of, and if such a method is not pursued and the sufficiency of the information passed upon by the lower court, the question will not be passed upon on review. *People v. Union El. R. Co.*, 269 Ill. 212, 110 N. E. 1.

⁴⁹ *People v. Citizens Tel. Co.*, 186 Ill. App. 260.

See § 353 and § 3242, *supra*.

⁵⁰ *South & W. R. Co. v. Com.*, 104 Va. 314, 51 S. E. 824.

⁵¹ This question may be considered as the judgment must fail if the foundation upon which it stands is materially defective. *Territory v. Virginia Road Co.*, 2 Mont. 96.

⁵² *State v. Armour Packing Co.*, 265 Mo. 121, 176 S. W. 382.

⁵³ *People v. Union El. R. Co.*, 269 Ill. 212, 110 N. E. 1; *People v. Mackey*, 255 Ill. 144, 99 N. E. 370.

The decision of the court in granting or in refusing leave to file an information must be affirmed on appeal unless there was an abuse of discretion. *Canon City Labor Club v. People*, 21 Colo. App. 37, 121 Pac. 120; *People v. People's Gaslight & Coke Co.*, 205 Ill. 482, 98 Am. St. Rep. 244, 68 N. E. 950.

⁵⁴ *State v. William J. Lemp Brewing Co.*, 79 Kan. 705, 29 L. R. A. (N. S.) 44, 102 Pac. 504.

CHAPTER 50

MANDAMUS

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I. GENERAL CONSIDERATIONS

§ 3277. The remedy in general. A considerable number of the actions brought by or against corporations are proceedings to compel the performance of some legal duty, where the proper remedy is mandamus. To enter into an extended discussion of the general features of this remedy is somewhat beyond the scope of the work, but a brief résumé of the nature of the proceeding may be considered proper, in order to show the application and availability of mandamus where corporations or their officers are involved.

Mandamus is a proceeding at law.¹ The writ issued was, in its character, prerogative,² though much of this prerogative character has been lost, and the action has been modified by statutes in the various states, so that the proceeding is usually treated as in the nature of a civil action.³ The writ has been spoken of as the most arbitrary of all the forms in which judicial authority is exercised.⁴ It shuts out the right of trial by jury and substitutes for the ordinary and cautious mode of judicial proceeding an extremely harsh and summary one,⁵ and is an unreasoning, inflexible and peremptory command to do a particular thing therein specified without condition, limitation or terms of any kind.⁶

Its office is to execute and not to adjudicate, and accordingly the proceeding cannot be brought to adjust mutual claims or rights,⁷ as

¹ *State v. New Haven & N. R. Co.*, 41 Conn. 134; *Seymour Water Co. v. Seymour*, 163 Ind. 120, 70 N. E. 514; *State v. Bank of Conception*, 174 Mo. App. 589, 163 S. W. 945; *State v. German Mut. Life Ins. Co. of St. Louis*, 169 Mo. App. 354, 152 S. W. 618; *Beard v. Beard*, 66 Ore. 512, 134 Pac. 1196, 133 Pac. 797.

² *Dintenfass v. Amber Star Films Corporation*, — R. I. —, 99 Atl. 516.

³ *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428; *Seymour Water Co. v. Seymour*, 163 Ind. 120, 70 N. E. 514.

⁴ "Much of the former strictness which applied to mandamus proceed-

ings has been done away with, and they have been made to approach more nearly to other forms of action." See *Jackson v. Hopkins*, 113 Md. 557, 78 Atl. 4.

⁴ *State v. Board Managers Presbyterian Hospital of New Orleans*, 131 La. 163, 59 So. 108; *State v. New Orleans & C. R. Co.*, 37 La. Ann. 589.

⁵ *State v. Board Managers Presbyterian Hospital of New Orleans*, 131 La. 163, 59 So. 108; *State v. New Orleans & C. R. Co.*, 37 La. Ann. 589.

⁶ *State v. Bank of Conception*, 174 Mo. App. 589, 163 S. W. 945.

⁷ *State v. Bank of Conception*, 174 Mo. App. 589, 163 S. W. 945.

instead of a mere judgment settling simply the rights of litigants and subject to execution by ordinary process, mandamus invokes an arbitrary judicial mandate, and the remedy is properly characterized as extraordinary.⁸

A remedy as extraordinary as this is somewhat sparingly employed,⁹ and the writ will issue only in cases of necessity,¹⁰ not as a matter of right, but in the discretion of the court,¹¹ where other remedies fail.¹² As the rule is usually stated, mandamus will not lie where there is any other plain, speedy, specific and adequate remedy at law.¹³

⁸ *State v. New Orleans & C. R. Co.*, 37 La. Ann. 589.

Mandamus is an extraordinary writ. *Seymour Water Co. v. Seymour*, 163 Ind. 120, 70 N. E. 514; *Dennett v. Acme Mfg. Co.*, 106 Me. 476, 76 Atl. 922; *Selectmen of Gardner v. Templeton St. R. Co.*, 184 Mass. 294, 68 N. E. 240.

⁹ *Withington v. Bradley*, 111 Me. 384, 89 Atl. 201.

¹⁰ *Selectmen of Gardner v. Templeton St. R. Co.*, 184 Mass. 294, 68 N. E. 340; *Borough of New Brighton v. New Brighton Water Co.*, 247 Pa. 232, 93 Atl. 327.

¹¹ *United States. Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428.

Connecticut. State v. Middlesex Banking Co., 87 Conn. 483, 88 Atl. 861.

Iowa. State v. Ottumwa Railway & Light Co., 160 N. W. 336.

Kansas. Potwin Place v. Topeka Ry. Co., 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 309.

Maine. Eaton v. Manter, 114 Me. 259, 95 Atl. 948; *Withington v. Bradley*, 111 Me. 384, 89 Atl. 201; *White v. Manter*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890; *Dennett v. Acme Mfg. Co.*, 106 Me. 476, 76 Atl. 922.

Maryland. Jackson v. Hopkins, 113 Md. 557, 78 Atl. 4.

Minnesota. State v. De Groat, 109 Minn. 168, 134 Am. St. Rep. 764, 123 N. W. 417.

Missouri. State v. Bank of Conception, 174 Mo. App. 589, 163 S. W. 945.

Rhode Island. Dintenfass v. Amber Star Films Corporation, 99 Atl. 516.

¹² *State v. Bank of Conception*, 174 Mo. App. 589, 163 S. W. 945.

Mandamus is granted to prevent a failure of justice and where there is no other adequate and effectual remedy. *Selectmen of Gardner v. Templeton St. R. Co.*, 184 Mass. 294, 68 N. E. 340.

¹³ *California. Miller v. Imperial Water Co. No. 8*, 156 Cal. 27, 24 L. R. A. (N. S.) 372, 103 Pac. 227.

Delaware. Bay State Gas Co. v. State, 4 Pennw. 497, 56 Atl. 1120.

Florida. Merchants Broom Co. v. Butler, 70 Fla. 397, 70 So. 383; *State v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359, 44 So. 213.

Georgia. State v. Georgia Medical Society, 38 Ga. 608, 95 Am. Dec. 408.

Kansas. Larabee Flour Mills Co. v. Missouri Pac. R. Co., 74 Kan. 808, 88 Pac. 72; *State v. Missouri Pac. Ry. Co.*, 33 Kan. 176, 5 Pac. 772.

Louisiana. State v. New Orleans & C. R. Co., 37 La. Ann. 589.

Maine. Dennett v. Acme Mfg. Co., 106 Me. 476, 76 Atl. 922; *Railroad Com'rs v. Portland & O. C. R. Co.*, 63 Me. 269, 18 Am. Rep. 208.

Michigan. People v. State Ins. Co., 19 Mich. 392.

Nebraska. State v. Fremont, E. & M. Val. R. Co., 22 Neb. 313, 35 N. W. 118.

Nevada. State v. Jumbo Extension Min. Co., 30 Nev. 192, 133 Am. St.

The writ does not supersede other legal remedies, but rather supplies the want of a legal remedy,¹⁴ and mandamus is usually available though an indictment will lie for the failure to do the thing required.¹⁵ The existence of an equitable remedy is not a bar to mandamus,¹⁶ although the existence of such a remedy may be taken into consideration as a factor in determining whether the writ should issue.¹⁷ If mandamus will afford sufficient relief, equity has no jurisdiction,¹⁸ and the proper method to compel corporations to perform their charter duties is by mandamus and not by a suit in equity.¹⁹

Rep. 715, 16 Ann. Cas. 896, 94 Pac. 74; State v. Wright, 10 Nev. 167.

New Jersey. Borough of Rutherford v. Hudson River Traction Co., 73 N. J. L. 227, 63 Atl. 84; State v. Paterson, N. & N. Y. R. Co., 43 N. J. L. 505; State v. Elizabethtown Water Co., 83 N. J. Eq. 216, 89 Atl. 1039.

Tennessee. Mobile & O. R. Co. v. Wisdom, 5 Heisk. 125.

Texas. International Water Co. v. El Paso, 51 Tex. Civ. App. 321, 112 S. W. 816.

Wisconsin. State v. Milwaukee Medical College, 128 Wis. 7, 3 L. R. A. (N. S.) 1115, 116 Am. St. Rep. 21, 8 Ann. Cas. 407, 106 N. W. 116.

An adequate remedy sufficient to constitute a bar to mandamus must be such as is calculated to afford relief upon the very subject of the controversy. *Dennett v. Acme Mfg. Co.*, 106 Me. 476, 76 Atl. 922.

A party is not deprived of the right to mandamus by the existence of a plain and adequate remedy, as such remedy must also be one "in the ordinary course of the law" (*Gen. St. 1901, § 5185*). *Larabee Flour Mills Co. v. Missouri Pac. R. Co.*, 74 Kan. 808, 88 Pac. 72.

Mandamus does not apply to a right given by statute for the enforcement of which a special statutory remedy is provided which is adequate and effectual. *Selectmen of Gardner v. Templeton St. R. Co.*, 184 Mass. 294, 68 N. E. 340.

¹⁴*State v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359, 44 So. 213.

¹⁵*People v. State Ins. Co.*, 19 Mich. 392; *Borough of Rutherford v. Hudson River Traction Co.*, 73 N. J. L. 227, 63 Atl. 84; *In re Trenton Water Power Co.*, 20 N. J. L. 659.

¹⁶*Borough of Rutherford v. Hudson River Traction Co.*, 73 N. J. L. 227, 63 Atl. 84.

¹⁷*State v. Bank of Conception*, 174 Mo. App. 589, 163 S. W. 945.

¹⁸*Bourke v. Olcott Water Co.*, 84 Vt. 121, Ann. Cas. 1912 D 108, 78 Atl. 715.

¹⁹*Wurster v. New York*, 136 N. Y. App. Div. 408, 120 N. Y. Supp. 1029, 115 N. Y. Supp. 192; *In re Wheeler*, 62 N. Y. Misc. 37, 115 N. Y. Supp. 605.

Mandatory injunction is seldom used when there is an adequate legal remedy, and injunction is a preventative, whereas mandamus is a remedial process. *Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 20 L. R. A. 161, 16 S. E. 514.

While mandatory injunctions are often granted where the defendant is guilty of a continuing wrong, they are not granted where the only ground of equitable relief is a failure of the defendant to perform an independent public duty which he owes to the plaintiff individually as well as to others. *Cox v. Malden & M. Gas Light Co.*, 199 Mass. 324, 17 L. R. A.

It is competent for the legislature to provide that the writ may issue in cases where it would not theretofore be allowed²⁰ and this power of the legislature has been exercised in a large number of cases, many of which apply to corporations. In addition, the remedy has been extended by the courts from time to time, and it has been held to lie in many instances where it was formerly thought that it did not apply.²¹

§ 3278. General principles controlling employment of writ. The remedy of mandamus is available against a corporation or its officers in the absence of any other adequate, legal remedy, to compel it or them to perform a specific, public duty, imperatively and unequivocally imposed, either in express terms or by necessary implication, by the general law or by the corporate charter.²² This jurisdiction by

(N. S.) 1235, 127 Am. St. Rep. 503, 85 N. E. 180.

It is not the function of a writ of mandamus to operate as a continuing mandatory injunction. *Public Service Commission for First Dist. v. Interborough Rapid Transit Co.*, 172 N. Y. App. Div. 324, 158 N. Y. Supp. 480.

²⁰ *Public Service Commission of First Dist. v. New York R. Co.*, 77 N. Y. Misc. 487, 136 N. Y. Supp. 720.

²¹ *People v. Utah Gold & Copper Mines Co.*, 135 N. Y. App. Div. 418, 119 N. Y. Supp. 852.

²² *United States. Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 492, 35 L. Ed. 1092.

Alabama. *Michener v. Carroll*, 135 Ala. 409, 33 So. 168; *State v. Mobile & M. R. Co.*, 59 Ala. 321.

California. *Perrine v. San Jacinto Valley Water Co.*, 4 Cal. App. 376, 88 Pac. 293.

Connecticut. *State v. Ousatonie Water Co.*, 51 Conn. 137.

Delaware. *Bay State Gas Co. v. State*, 4 Pennw. 497, 56 Atl. 1120.

Florida. *State v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359, 44 So. 213; *State v. Jacksonville St. R. Co.*, 29 Fla. 590, 10 So. 590.

Georgia. *Savannah & O. Canal Co.*

v. Shuman, 91 Ga. 400, 44 Am. St. Rep. 43, 17 S. E. 937.

Illinois. *People v. Illinois Cent. R. Co.*, 241 Ill. 471, 89 N. E. 744; *People v. Chicago & A. R. Co.*, 55 Ill. 95, 8 Am. Rep. 631.

Louisiana. *State v. Colorado Southern, N. O. & P. R. Co.*, 120 La. 9, 44 So. 905; *State v. New Orleans & C. R. Co.*, 37 La. Ann. 589.

Maine. *Dennett v. Acme Mfg. Co.*, 106 Me. 476, 76 Atl. 922.

Michigan. *People v. State Ins. Co.*, 19 Mich. 392.

Minnesota. *State v. Southern Minnesota R. Co.*, 18 Minn. 40.

Missouri. *State v. Hannibal & St. J. R. Co.*, 86 Mo. 13.

Nevada. *State v. Jumbo Extension Min. Co.*, 30 Nev. 192, 133 Am. St. Rep. 715, 16 Ann. Cas. 896, 94 Pac. 74.

New Jersey. *State v. Einstein*, 46 N. J. L. 479; *State v. Elizabethtown Water Co.*, 83 N. J. Eq. 216, 89 Atl. 1039; *Jacquelin v. Erie R. Co.*, 69 N. J. Eq. 432, 61 Atl. 18.

New York. *People v. New York, L. E. & W. R. Co.*, 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856; *Davidson v. Cannabis Mfg. Co.*, 113 App. Div. 664, 99 N. Y. Supp. 1018; *People v. New York Cent. & H. River R. Co.*, 28 Hun. 543.

mandamus over private corporations is exercised both in England and in America, and is of ancient origin,²³ dating back to the time of Lord Mansfield. Previous to that time the remedy was of little value, being confined exclusively to offices of a public nature and being called a writ of restitution.²⁴ In some cases it is stated broadly that it is one of the well-recognized offices of the remedy of mandamus to enforce the plain rights of stockholders, where there is no other adequate remedy.²⁵

Oklahoma. *Oklahoma Natural Gas Co. v. State*, 150 Pac. 475; *Cummings v. State*, 149 Pac. 864.

Pennsylvania. *Com. v. New York, P. & O. R. Co.*, 138 Pa. St. 58, 20 Atl. 951; *Com. v. Phoenix Iron Co.*, 105 Pa. St. 111, 51 Am. Rep. 184.

Tennessee. *Mobile & O. R. Co. v. Wisdom*, 5 Heisk. 125.

Texas. *San Antonio Traction Co. v. Altgelt* (Tex. Civ. App.), 81 S. W. 106, aff'd 200 U. S. 304, 50 L. Ed. 491.

Vermont. *Bourke v. Olcott Water Co.*, 84 Vt. 121, Ann. Cas. 1912 D 108, 78 Atl. 715.

Washington. *State v. Darwin*, 81 Wash. 1, 142 Pac. 441.

Wisconsin. *State v. Icke*, 136 Wis. 583, 20 L. R. A. (N. S.) 800, 118 N. W. 196; *State v. Milwaukee Medical College*, 128 Wis. 7, 3 L. R. A. (N. S.) 1115, 116 Am. St. Rep. 21, 8 Ann. Cas. 407, 106 N. W. 116.

England. *Rex v. Nottingham Old Water Works Co.*, 6 A. & E. 355; *Norris v. Irish Land Co.*, 8 E. & B. 512.

Mandamus is usually granted for public purposes to compel the performance of public duties imposed by law. *State v. Milwaukee Medical College*, 128 Wis. 7, 3 L. R. A. (N. S.) 1115, 116 Am. St. Rep. 21, 8 Ann. Cas. 407, 106 N. W. 116.

The function of mandamus, generally speaking, is to compel the performance of some act or duty commanded by statute or relating to some public matter or right. *Weidenfeld v. Keppler*, 84 N. Y. App. Div. 235, 82 N. Y. Supp. 634.

Under Illinois Rev. St. 1874, c. 87, § 9 (J. & A. Ann. St. ¶ 7338), mandamus will lie in all cases where it affords a proper and sufficient remedy for the enforcement of a legal right or an obvious duty, the performance of which involves the exercise of no discretion, without regard to whether there may be some other adequate remedy or not. *Ohio & M. R. Co. v. People*, 121 Ill. 483, 13 N. E. 236, aff'g 21 Ill. App. 23.

The publication of a newspaper is a private business, and mandamus does not usually lie to regulate such business in the interests of the public. Accordingly, it was held in one case that the remedy was not available to compel a newspaper corporation to publish legal notices, as such publication was not a duty resulting from an office, trust or station. *Mack v. Costello*, 32 S. D. 511, Ann. Cas. 1916 A 384, 143 N. W. 950. The corporation, in the foregoing case, did not publish a newspaper which had been officially designated as official and accordingly that question was not decided.

²³ *State v. Elizabethtown Water Co.*, 83 N. J. Eq. 216, 89 Atl. 1039.

²⁴ *People v. Steele*, 2 Barb. (N. Y.) 397. See also *People v. Utah Gold & Copper Mines Co.*, 135 N. Y. App. Div. 418, 119 N. Y. Supp. 852.

²⁵ *Miller v. Imperial Water Co. No. 8*, 156 Cal. 27, 24 L. R. A. (N. S.) 372, 103 Pac. 227.

In a large number of cases the writ operates to keep corporations within the limits of their lawful powers and to correct and prevent abuse of their franchises. Accordingly mandamus operates as a means whereby the visitatorial or superintending power of the state over corporations is exercised.²⁶

The proper province of a writ of mandamus is to compel the doing of a particular, specified act, and not to constrain a corporation to regulate its whole course of conduct according to some general principle. The difficulty of overseeing duties such as the latter is obvious and has been spoken of as an impossible function of the courts.²⁷ There are some cases, however, which hold that the remedy is available to compel the performance of a continuous legal duty.²⁸

The writ will not be issued to compel the performance of a duty which the corporation is unable to perform or where the performance of the alleged duty would work a great hardship without compensating benefit.²⁹

Usually the writ will not issue unless the court is satisfied that it is necessary to subserve the ends of justice or to secure some just and useful purpose,³⁰ and the writ will not issue in doubtful cases; the relator must show a clear, legal right to the writ.³¹ If the relator fails

²⁶ *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760.

²⁷ *State v. Einstein*, 46 N. J. L. 479; *State v. Darwin*, 81 Wash. 1, 142 Pac. 441.

²⁸ *State v. Milwaukee Elec. Railway & Light Co.*, 144 Wis. 386, 129 N. W. 623.

²⁹ *State v. Benson*, 108 Miss. 779, 67 So. 214; *People v. Dutchess & C. R. Co.*, 58 N. Y. 152; *Kansas City, M. & O. R. Co. v. State*, 106 Tex. 249, 163 S. W. 582.

³⁰ *Dennett v. Acme Mfg. Co.*, 106 Me. 476, 76 Atl. 922; *Jackson v. Hopkins*, 113 Md. 557, 78 Atl. 4.

The writ of mandamus will not be awarded to settle mere abstract rights, unaccompanied by practical or substantial benefits. *People v. Chicago*, 146 Ill. App. 623; *State v. Bank of Conception*, 174 Mo. App. 589, 163 S. W. 945.

Mandamus will not be granted where it will do an injustice. *Ross Tp. v. Michigan United Rys. Co.*, 165

Mich. 28, Ann. Cas. 1912 C 885, 130 N. W. 358. And the relator must in all cases substantially demonstrate not only the propriety but also the justice of his case. *State v. Bank of Conception*, 174 Mo. App. 589, 163 S. W. 945.

The court is not bound to take the case as the relator presents it, but may consider defendant's rights, the interests of third persons, the importance or unimportance of the case and the applicant's conduct in determining whether the writ shall issue. *State v. Bank of Conception*, 174 Mo. App. 589, 163 S. W. 945.

³¹ **Alabama.** *Michener v. Carroll*, 135 Ala. 409, 33 So. 168.

Delaware. *Bay State Gas Co. v. State*, 4 Pennw. 497, 56 Atl. 1120.

Florida. *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383; *State v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359, 44 So. 213.

Illinois. *People v. Illinois Cent. R.*

to establish a right substantially as extensive as his claim, the writ may be refused.³²

II. ACTS AS TO WHICH REMEDY MAY BE INVOKED

§ 3279. Duties arising out of contracts. It seems to be well settled that duties imposed upon corporations, not by virtue of express law or by the conditions of their charters, but arising out of contract relations, will not be enforced by mandamus. The authorities in England and in this country appear to be quite uniform to this effect.³³ One reason for this is obvious. "The obligations of contracts

Co., 241 Ill. 471, 89 N. E. 744; Illinois Cent. R. Co. v. People, 143 Ill. 434, 19 L. R. A. 119, 33 N. E. 173, rev'd 163 U. S. 142, 41 L. Ed. 107; People v. Chicago & A. R. Co., 55 Ill. 95, 8 Am. Rep. 631; People v. Cleveland, C., C. & St. L. R. Co., 147 Ill. App. 141; People v. Chicago, 146 Ill. App. 623.

Maine. Dennett v. Acme Mfg. Co., 106 Me. 476, 76 Atl. 922; Railroad Com'rs v. Portland & O. C. R. Co., 63 Me. 269, 18 Am. Rep. 208.

Nebraska. State v. Fremont, E. & M. Val. R. Co., 22 Neb. 313, 35 N. W. 118.

Nevada. State v. Jumbo Extension Min. Co., 30 Nev. 192, 133 Am. St. Rep. 715, 16 Ann. Cas. 896, 94 Pac. 74; State v. Wright, 10 Nev. 167.

New Jersey. State v. Paterson, N. & N. Y. R. Co., 43 N. J. L. 505.

³² State v. Einstein, 46 N. J. L. 479.

³³ **California.** Miller v. Imperial Water Co. No. 8, 156 Cal. 27, 24 L. R. A. (N. S.) 372, 103 Pac. 227.

Florida. Florida, C. & P. R. Co. v. State, 31 Fla. 482, 20 L. R. A. 419, 34 Am. St. Rep. 30, 13 So. 103.

Illinois. Chicago v. Chicago Tel. Co., 230 Ill. 157, 13 L. R. A. (N. S.) 1084, 12 Ann. Cas. 109, 82 N. E. 607.

Indiana. State v. Marion Light & Heating Co., 174 Ind. 622, 92 N. E. 731.

Louisiana. State v. Board Managers Presbyterian Hospital of New Orleans, 131 La. 163, 59 So. 108; State

v. New Orleans & C. R. Co., 37 La. Ann. 589. But La. Laws 1888, Act 133, provides for mandamus to compel a corporation to perform its contract with a parish or municipality to pave, grade, repair or care for any street, highway, bridge, etc. See State v. Canal & C. St. R. Co., 44 La. Ann. 526, 10 So. 940, and State v. New Orleans, C. & L. R. Co., 42 La. Ann. 550, 7 So. 606, aff'd 157 U. S. 219, 39 L. Ed. 679 (holding the statute constitutional).

Maine. Robbins v. Bangor R. & Elec. Co., 100 Me. 496, 1 L. R. A. (N. S.) 963, 62 Atl. 136.

Michigan. Booker v. Grand Rapids Medical College, 156 Mich. 95, 24 L. R. A. (N. S.) 447, 120 N. W. 589.

Nevada. State v. Jumbo Extension Min. Co., 30 Nev. 192, 133 Am. St. Rep. 715, 16 Ann. Cas. 896, 94 Pac. 74.

New Jersey. Newark v. North Jersey St. R. Co., 73 N. J. L. 265, 62 Atl. 1003; State v. Einstein, 46 N. J. L. 479; State v. Paterson, N. & N. Y. R. Co., 43 N. J. L. 505. See Borough of Rutherford v. Hudson River Traction Co., 73 N. J. L. 227, 63 Atl. 84.

New York. Weidenfeld v. Keppler, 84 App. Div. 235, 82 N. Y. Supp. 634.

Wisconsin. State v. Icke, 136 Wis. 583, 20 L. R. A. (N. S.) 800, 118 N. W. 196; State v. Milwaukee Medical College, 128 Wis. 7, 3 L. R. A. (N. S.) 1115, 116 Am. St. Rep. 21, 8 Ann. Cas. 407, 106 N. W. 116.

quate remedy. While the Court of Appeals delivered no opinion in this case, it may be said that the decision rested on the notion that the relator had acquired a status, evidence of which in the form of a degree was arbitrarily refused.⁸⁹ Other decisions on this subject deny the right to mandamus and a student who is refused admission or who is denied a diploma, must enforce his contract by an action for damages, or if that is not adequate, he may compel specific performance, a remedy which is considered adequate.⁹⁰ These cases point out that only a contractual obligation is involved, and if the courts enter upon the enforcement of such obligations, there is no rule by which it can be determined in what cases the writ should be refused. And the mere hardship of a particular situation is not a good reason for departing from the general rule against enforcing contracts. Probably the best reasoned case admits, however, that if mere expedition of remedy is the test, there is no other adequate remedy for such students than mandamus.⁹¹

§ 3291. Issuance of certificates of stock. By the weight of authority, mandamus will lie to compel a corporation to issue a proper certificate of stock when it has the power and is under the obligation to do so, and when it wrongfully refuses to issue such certificate.⁹² The existence of other remedies has been held to bar relief by mandamus in one state, however. It was held that the remedy at law by an action to recover damages or in equity to compel the corporation or its officers to issue the certificate was adequate, and attention was called to a statute providing that mandamus should not be issued "in a case where there is a plain and adequate remedy in the ordinary course of the law."⁹³ And in another state it has been held that mandamus will not lie to compel the issuance and delivery of stock unless the stock sought to be recovered has some pecuniary and special value peculiar to itself.⁹⁴

⁸⁹ *People v. Bellevue Hospital Medical College*, 60 Hun. (N. Y.) 107, 14 N. Y. Supp. 490, aff'd 128 N. Y. 621, 28 N. E. 253.

⁹⁰ *State v. Board Managers Presbyterian Hospital of New Orleans*, 131 La. 163, 59 So. 108; *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 24 L. R. A. (N. S.) 447, 120 N. W. 589; *State v. Milwaukee Medical College*, 128 Wis. 7, 3 L. R. A. (N. S.) 1115, 116 Am. St. Rep. 21, 8 Ann. Cas. 407, 106 N. W. 116.

⁹¹ See *Booker v. Grand Rapids Medical College*, 156 Mich. 95, 24 L. R. A. (N. S.) 447, 120 N. W. 589.

⁹² *In re Ballou*, 215 Fed. 810; *State v. New Orleans Gaslight Co.*, 25 La. Ann. 413; *Dennett v. Acme Mfg. Co.*, 106 Me. 476, 76 Atl. 922; *State v. Cheraw & C. R. Co.*, 16 S. C. 524.

⁹³ *State v. Carpenter*, 51 Ohio St. 83, 46 Am. St. Rep. 556, 37 N. E. 261.

⁹⁴ *State v. Jumbo Extension Min. Co.*, 30 Nev. 192, 133 Am. St. Rep. 715, 16 Ann. Cas. 896, 94 Pac. 74.

of creditors to compel officers of corporations to levy calls upon unpaid subscriptions so that debts may be paid.⁴⁰ There are dicta in some cases to the same effect in this country,⁴¹ but the question is doubtful⁴² and it would seem that the object could be effected by the other legal remedies.⁴³

Mandamus will lie to compel a corporation or its officers to perform a statutory duty of making a certificate of calls or instalments paid on stock⁴⁴ and the remedy has been held to lie even though the statute also imposes a penalty when the officers fail to perform this statutory duty.⁴⁵ But when a charter of a corporation provides for the collection of instalments due from subscribers to stock and leaves the amount to be collected and the time of payment to the discretion of the board of directors, mandamus is not available to enforce the collection. This is in accordance with the familiar rule that the remedy is not proper to compel the performance of discretionary acts.⁴⁶

§ 3282. Redemption of stock. Where preferred stock is issued in violation of a statute as being redeemable on notice by a vote of a majority of the common stockholders, whereas the statute specifically requires a certain time of redemption to be specified, mandamus will not lie to compel the redemption of such stock. As the court aptly said, "Judicial action, dependent on compliance with the organic law of the company, cannot be invoked when that law has been disregarded."⁴⁷

§ 3283. Entries in corporate books. In one case a director and secretary of a company invoked the remedy of mandamus to compel a codirector to unite with him in taking an account of the company's property, or, in the alternative, sought to have access to the company's books and papers so that an estimate of the value of such property might be entered therein. The writ was denied, it being held that the relator as a shareholder had no right to make the

⁴⁰ *Rex v. St. Katherine Dock Co.*, 4 B. & Ad. 360; *Reg. v. Ledgard*, 1 Q. B. 616; *Reg. v. Victoria Park Co.*, 1 Q. B. 288.

⁴¹ *Hatch v. Dana*, 101 U. S. 205, on page 215, 25 L. Ed. 885; *Patterson v. Lynde*, 112 Ill. 196.

⁴² *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593; *Hays v. Lycoming Fire Ins. Co.*, 98 Pa. St. 184.

⁴³ As to remedies against subscribers to stock, see §§ 657-687, *supra*.

⁴⁴ *Bay State Gas Co. v. State*, 4 Pennew. (Del.) 497, 56 Atl. 1120.

⁴⁵ *Bay State Gas Co. v. State*, 4 Pennew. (Del.) 497, 56 Atl. 1120.

⁴⁶ *State v. Canal & C. Sts. R. Co.*, 23 La. Ann. 333.

⁴⁷ *Smith v. Ferracute Mach. Co.*, 68 N. J. L. 237, 52 Atl. 231.

entries in the books that he wished to make. Furthermore, the relator as a director was bound to act with the other directors, and the case did not show a prevention of performance of his statutory duties as secretary.⁴⁸

§ 3284. Declaring and paying dividends. The powers of stockholders as to compelling the declaring and payment of dividends are considered in detail in a subsequent chapter.⁴⁹ The duties of corporate officers with respect to dividends are usually discretionary and the remedy of mandamus does not lie to enforce such acts, and it has been held that mandamus is not the proper remedy to compel a corporation to declare a dividend⁵⁰ or to compel the payment of such a dividend after it is declared,⁵¹ though there is a dictum in a New York case, to the effect that mandamus will lie to compel the delivery of checks or money to stockholders where a dividend has not only been declared but where the money has been set apart in a bank for the payments and where checks have been drawn for delivery to the stockholders.⁵²

§ 3285. Calling and holding of meetings. The employment of mandamus as a means of compelling the calling and holding of corporate meetings has been fully discussed heretofore.⁵³ This remedy is not available to compel a president to act, where the corporate charter provides that the directors shall provide for such meetings and the duty involved has not been imposed upon the president by any by-law or resolution.⁵⁴ In a mandamus proceeding to compel the calling of a directors' meeting to consider the question of the removal of a manager of the corporation, the court will not consider whether the board of directors has authority to remove such officer.⁵⁵

§ 3286. Calling and holding of election and determining title to office; reinstatement in office. As has been seen heretofore, mandamus may be invoked to compel the calling and holding of a corporate

⁴⁸ State v. Einstein, 46 N. J. L. 479.

⁴⁹ See Chap. 56, subdiv. xvi, *infra*.

⁵⁰ Rex v. Bank of England, 2 B. & Ald. 620.

⁵¹ People v. Central Car & Manufacturing Co., 41 Mich. 166, 49 N. W. 925.

⁵² Le Roy v. Globe Ins. Co., 2 Edw. (N. Y.) 657.

⁵³ See § 1632, *supra*.

As to meetings of directors, see § 1866, *supra*. See also Cummings v. State, 47 Okla. 627, L. R. A. 1915 E 774, 149 Pac. 864.

⁵⁴ Knoll v. Levert, 136 La. 241, 66 So. 959.

⁵⁵ Cummings v. State, 47 Okla. 627, L. R. A. 1915 E 774, 149 Pac. 864.

election⁵⁶ and the ascertainment of the vote,⁵⁷ but not to try the title to office, though the latter statement is subject to some qualifications.⁵⁸

Mandamus is the appropriate remedy to secure the reinstatement of an officer.⁵⁹ The writ will also lie to restore a minister to his pulpit, even where another minister has been appointed and occupies the place.⁶⁰ Thus the remedy has been held available to compel trustees to allow a relator to preach and occupy a pulpit, although the granting of such relief operated to enforce a trust whereby ministers of a certain denomination were to occupy the pulpit of the church in question.⁶¹

§ 3287. Inspection of corporate books and records. The rule that mandamus is the proper remedy to compel a corporation or its officers to allow a stockholder or member to inspect the corporate books and records, in the absence of statutory provisions excluding the writ, has been discussed at length heretofore, as have the limitations, qualifications and modifications of the rule.⁶² In addition, it has been held that mandamus will lie at the instance of a vestryman to compel an examination of the records of the vestry in an Episcopal church.⁶³ The writ may be denied, however, in the discretion of the

⁵⁶ See §§ 1632 and 1763, *supra*. See also *Walsh v. State*, — Ala.—, 74 So. 45; *Granara v. Italian Catholic Cemetery Ass'n*, 218 Mass. 387, 105 N. E. 1073.

A mandamus proceeding to compel an election of trustees of a religious corporation will be denied where it appears that a question for the jury is presented as to the legality of an election already held. *Smith v. Trustees Bethel African M. E. Church of Jersey City*, 89 N. J. L. 397, 99 Atl. 102.

⁵⁷ See § 1699, *supra*.

⁵⁸ See §§ 1827 and 1699, *supra*. And see *Beard v. Beard*, 66 Ore. 512, 134 Pac. 1196, 133 Pac. 797.

⁵⁹ See § 1822. See also *State v. Board Officers Gegenseitige Unterstuetzungs Gesellschaft Germania*, 144 Wis. 516, 129 N. W. 630.

Officers of a society are entitled to mandamus to compel their reinstatement, even though their financial in-

terest is trifling, since they are carrying out a trust reposed in them. *State v. Board Officers Gegenseitige Unterstuetzungs Gesellschaft Germania*, 144 Wis. 516, 129 N. W. 630.

⁶⁰ *People v. Steele*, 2 Barb. (N. Y.) 397.

⁶¹ *Feizel v. First German Soc. of M. E. Church*, 9 Kan. 592.

⁶² See generally Chap. 45 and particularly §§ 2844-2848 therein. See also *State v. Displayograph Co.*, 135 Minn. 479, 160 N. W. 486; *People v. American Press Ass'n*, 148 N. Y. App. Div. 651, 133 N. Y. Supp. 216; *McClintock v. Young Republicans of Philadelphia*, 210 Pa. 115, 68 L. R. A. 459, 105 Am. St. Rep. 784, 59 Atl. 691; *Dintenfass v. Amber Star Films Corporation*, — R. I. —, 99 Atl. 516; *Roberts v. Munroe*, — Tex. Civ. App. —, 193 S. W. 734.

⁶³ See *Jackson v. Hopkins*, 113 Md. 557, 78 Atl. 4.

court, where it appears, that a dissension exists in the church, where it appears that the petitioner has organized a Sunday school which is conducted in direct opposition to the church and where other facts appear showing that no useful purpose would be subserved by the granting of the writ.⁶⁴

As has been seen in a preceding chapter, mandamus will lie at the instance of a stockholder or member to compel an inspection of the books and records of a foreign corporation which are within the state.⁶⁵

§ 3288. Restoration of membership in corporation. It is well established by an overwhelming weight of authority that mandamus will lie to compel a corporation to restore a member to his privileges and rights, when he has been wrongfully excluded or disfranchised.⁶⁶ And the remedy is also available where a member is wrong-

⁶⁴ Jackson v. Hopkins, 113 Md. 557, 78 Atl. 4.

⁶⁵ See § 2825, supra. See also State v. Lake Torpedo Boat Co., 90 Conn. 638, L. R. A. 1916 F 1033, 98 Atl. 580; Travis v. Knox Terpezone Co., 215 N. Y. 259, L. R. A. 1916 A 542, Ann. Cas. 1917 A 387, 109 N. E. 250.

In a mandamus proceeding to compel inspection of books of a foreign corporation, the fact that relators were not residents of the state did not prevent relief. State v. Lake Torpedo Boat Co., 90 Conn. 638, L. R. A. 1916 F 1033, 98 Atl. 580.

In a mandamus proceeding to compel the inspection of books of a foreign corporation, relief is not precluded by the fact that under the laws of the foreign state the corporation might be compelled to keep its books in that state and relief might be afforded in such state since such remedy is not adequate. State v. Lake Torpedo Boat Co., 90 Conn. 638, L. R. A. 1916 F 1033, 98 Atl. 580.

⁶⁶ Alabama. Medical & Surgical Society v. Weatherly, 75 Ala. 248.

California. Miller v. Imperial Water Co. No. 8, 156 Cal. 27, 24 L. R. A. (N. S.) 372, 103 Pac. 227; Otto v. Journeymen Tailors' Protective &

Benevolent Union, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217.

Georgia. United Bros. v. Williams, 126 Ga. 19, 115 Am. St. Rep. 64, 54 S. E. 907; Savannah Cotton Exch. v. State, 54 Ga. 668; State v. Georgia Medical Society, 38 Ga. 608, 95 Am. Dec. 408.

Illinois. People v. Western Life Indemnity Co., 181 Ill. App. 116; Nelson v. Board of Trade, 58 Ill. App. 399.

Massachusetts. See Longyear v. Hardman, 219 Mass. 405, Ann. Cas. 1916 D 1200, 106 N. E. 1012.

Michigan. Meurer v. Detroit Musicians' Benevolent & Protective Ass'n, 95 Mich. 451, 54 N. W. 954; Erd v. Bavarian Nat. Aid & Relief Ass'n, 67 Mich. 233, 34 N. W. 555; Allnutt v. Subsidiary High Court, 62 Mich. 110, 28 N. W. 802.

Missouri. State v. Adams, 44 Mo. 570.

New Jersey. Sibley v. Board of Management of Carteret Club, 40 N. J. L. 295; Piries v. First Russian Slavonic Greek Catholic Benev. Society, 83 N. J. Eq. 29, 89 Atl. 1036.

New York. People v. Musical Mutual Protective Union, 118 N. Y. 101, 23 N. E. 129; Wilcox v. Supreme

fully expelled without a hearing or without reasonable notice and an opportunity to be heard or without compliance with the provisions of the charter and by-laws, even though the expulsion is for sufficient cause.⁶⁷ The existence of another adequate and complete remedy may prevent mandamus for this purpose,⁶⁸ and it has been held that a member who has recovered damages for the expulsion cannot seek reinstatement by means of mandamus, even though it appears that an appeal has been taken in the action for damages and is not finally disposed of.⁶⁹ Also there are some decisions that hold that a suit in equity may be maintained by a member of a corporation to prevent his expulsion or to compel reinstatement,⁷⁰ but the better opinion is that since the remedy by mandamus is adequate to restore membership, *Council Royal Arcanum*, 123 App. Div. 86, 108 N. Y. Supp. 483; *People v. Independent Order B'rith Abraham of United States of America*, 116 App. Div. 364, 101 N. Y. Supp. 866; *Weidenfeld v. Keppler*, 84 App. Div. 235, 82 N. Y. Supp. 634; *People v. St. Franciscus Ben. Society*, 24 How. Pr. 216.

Ohio. *State v. Lipa*, 28 Ohio St. 665.

Pennsylvania. *Evans v. Philadelphia Club*, 50 Pa. St. 107; *Com. v. German Soc. for Mut. Support & Assistance*, 15 Pa. St. 251; *Com. v. St. Patrick Benev. Society*, 2 Binney 441, 4 Am. Dec. 453; *Black & White Smith's Society v. Vandyke*, 2 Whart. 309, 30 Am. Dec. 263.

Rhode Island. *Lavalle v. Societe St. Jean Baptiste*, 17 R. I. 680, 16 L. R. A. 392, 24 Atl. 467.

Wisconsin. *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760, 20 Wis. 63.

See generally, as to membership in corporations, Chap. 56, subd. xxviii.

Mandamus will lie in favor of an insured to compel an insurance company to accept money tendered in payment of premiums and to restore him to membership when it appears that the petitioner was a member of the company and has complied with its by-laws, rules and regulations.

People v. Western Life Indemnity Co., 181 Ill. App. 116; *Contra*, *Schmidt v. Abraham Lincoln Lodge*, 84 Ky. 490, 2 S. W. 156.

⁶⁷ **Michigan.** *People v. Mechanics' Aid Society*, 22 Mich. 86.

Missouri. *Lysaght v. St. Louis Operative Stonemasons' Ass'n*, 55 Mo. App. 538.

New York. *People v. Musical Mut. Protective Ass'n*, 47 Hun 273, 118 N. Y. 101.

North Carolina. *Delacy v. Neuse River Nav. Co.*, 1 Hawks 274, 9 Am. Dec. 636.

Pennsylvania. *Com. v. German Soc. for Mut. Support & Assistance*, 15 Pa. St. 251.

⁶⁸ *Harrison v. Simonds*, 44 Conn. 318.

⁶⁹ *State v. Lipa*, 28 Ohio St. 665.

⁷⁰ **United States.** *Hall v. Supreme Lodge Knights of Honor*, 24 Fed. 450.

Missouri. *Albers v. Merchants' Exchange of St. Louis*, 39 Mo. App. 583.

New Jersey. *Altmann v. Benz*, 27 N. J. Eq. 331.

New York. *Olery v. Brown*, 51 How. Pr. 92.

Pennsylvania. *Leech v. Harris*, 2 Brewst. 571; *Thomas v. Ellmaker*, 1 Pars. Eq. Cas. 98.

South Carolina. *Smith v. Smith*, 3 Desauss. Eq. 557.

equity will not assume jurisdiction unless there are peculiar circumstances rendering the interference necessary.⁷¹

The discretionary power of the court may be exercised and the writ denied where it appears that the petitioner seeks merely to enforce a technical, naked, legal right, and where demands and claims between the relator and the corporation and other stockholders are involved, so that injustice may result from the granting of the writ.⁷²

Mandamus will not lie to annul a forfeiture of shares for the non-payment of an assessment and to reinstate the petitioner as a stockholder of a foreign company on the ground that the assessment was illegal,⁷³ and the remedy is not available to compel a foreign mutual insurance company to restore a member to his rights under a policy issued to him in the state of the corporation's domicile.⁷⁴

§ 3289. Restoration of membership in association or society.

While mandamus is available to compel restoration to membership in a society or association which is incorporated⁷⁵ or which enjoys a public franchise,⁷⁶ it is usually held that the remedy is not available, in the absence of statute, to restore membership in a voluntary unincorporated association.⁷⁷ The reason for the distinction is based on the nature of the membership in incorporated and unincorporated associations, and rests in the fact that property rights are involved where a member of a corporation is excluded from his rights. As was well said in one case, "Property rights the courts can deal with; rights in an incorporated company are of that character, and the right of membership is ordinarily assignable. Voluntary associations are quite different. The courts can deal with property rights of such associations if there are any, while they cannot, by a mandatory writ, intrude

⁷¹ *Sturges v. Board of Trade of Chicago*, 86 Ill. 441; *Baxter v. Board of Trade of Chicago*, 83 Ill. 146; *Fisher v. Board of Trade of Chicago*, 80 Ill. 85; *Gregg v. Massachusetts Medical Society*, 111 Mass. 185, 15 Am. Rep. 24; *White v. Brownell*, 4 Abb. Pr. N. S. (N. Y.) 162.

⁷² *State v. Bank of Conception*, 174 Mo. App. 589, 163 S. W. 945.

⁷³ *North State Copper & Gold Min. Co. v. Field*, 64 Md. 151, 20 Atl. 1039.

⁷⁴ *Smith v. Mutual Life Ins. Co.*, 14 Allen (Mass.) 336.

⁷⁵ See § 3288, *supra*, and Chap. 56, subd. xxviii, *infra*.

⁷⁶ *State v. Cummins*, 171 Ind. 112, 36 L. R. A. (N. S.) 945, 85 N. E. 359.

⁷⁷ *Wallace v. Grand Lodge of United Brothers of Friendship*, 32 Ky. L. Rep. 1013, 107 S. W. 724; *Frank v. National Alliance of Bill Posters*, 89 N. J. L. 380, 99 Atl. 134; *People v. Brotherhood of Painters, Decorators & Paperhangers of America*, 218 N. Y. 115, 112 N. E. 752; *Weidenfeld v. Keppler*, 84 N. Y. App. Div. 235, 82 N. Y. Supp. 634, citing cases and giving reasons for the distinction; *Doyle v. Burke*, 29 R. I. 123, 16 Ann. Cas. 1245, 69 Atl. 362.

one man's companionship on another. The attempt to do so would be unavailing, as it would lead only to the disintegration of the association." ⁷⁸ The authorities are not entirely harmonious on the question, however, and there are some cases which hold that mandamus is the proper remedy to compel reinstatement in an unincorporated association. ⁷⁹

In accordance with the general rule, it is held that mandamus is not available to compel restoration in a trade union which is not incorporated, ⁸⁰ or in a stock exchange. ⁸¹ The remedy is available, however, to test the validity of the expulsion of a member of a religious corporation, ⁸² and has been held to lie at the instance of an expelled physician to compel reinstatement in a medical society. ⁸³

If expulsion or forfeiture of membership is effected in accordance with valid by-laws which are in force, the courts will usually not interfere, ⁸⁴ and it has also been held that the writ would be denied where there was just cause for refusing admission to the member, and where he would be expelled if admitted. ⁸⁵ Mandamus was held the

⁷⁸ *Frank v. National Alliance of Bill Posters*, 89 N. J. L. 380, 99 Atl. 134.

⁷⁹ *Otto v. Journeymen Tailors' Protective & Benevolent Union*, 75 Cal. 308, 7 Am. St. Rep. 156, 17 Pac. 217.

⁸⁰ *Frank v. National Alliance of Bill Posters*, 89 N. J. L. 380, 99 Atl. 134.

⁸¹ *Weidenfeld v. Keppler*, 84 N. Y. App. Div. 235, 82 N. Y. Supp. 634.

⁸² *Saltman v. Nesson*, 201 Mass. 534, 88 N. E. 3.

⁸³ *State v. Georgia Medical Society*, 38 Ga. 608, 95 Am. Dec. 408.

Mandamus lies, at the instance of a physician, to compel reinstatement in a medical society, it appearing that he had merely violated certain conventional regulations. *People v. Medical Society of Erie County*, 32 N. Y. 187.

⁸⁴ The courts will not interfere to prevent forfeiture of membership in a board of trade, which is a mere voluntary organization, though incorporated, where it appears that the forfeiture in question was made pursuant to by-laws in force at the time of acquisition of membership. *People v.*

Board of Trade of Chicago, 125 Ill. App. 20, aff'd 224 Ill. 370, 79 N. E. 611.

If a relator is duly notified of charges against him, has a fair trial at which such charges are proved, and is expelled under a valid by-law, mandamus will not lie to reinstate him. *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760.

In a mandamus proceeding to compel reinstatement in an association, where it appeared that the disciplinary action of such association was not authorized by the by-laws, the facts were sufficient to justify the court in calling upon the association to show cause why the relator should not be reinstated. *Stahl v. Romanian Young Men's Ass'n*, 77 N. J. L. 380, 71 Atl. 1114.

⁸⁵ In the exercise of its discretion, the court will deny mandamus at the instance of a physician who seeks admission in a medical society, where it appears that he has been guilty of gross misconduct, or ignorance, or both, and would be expelled if admitted. *Ex parte Paine*, 1 Hill (N.

proper remedy in one case where a subordinate lodge sought to compel a grand lodge to reinstate it, since important and tangible rights of property were involved. Also, in that case, the relators could not proceed by injunction, as the wrong had been accomplished, and they could not sue for damages, since the organization had no funds to pay such damages and, in addition, the damages were too indefinite to be ascertained.⁸⁶

Usually the courts will not undertake to restore membership in foreign fraternal beneficial associations because of the reluctance to interfere with the internal affairs of such corporations and because of the questions of jurisdiction which arise.⁸⁷

§ 3290. Compelling admission or restoration as student in educational institution. With respect to the rights of students to compel reinstatement or admission in colleges, universities and similar institutions, there is some conflict of opinion, due probably to the difference in the nature of the membership. In one case, a law-school student was wrongfully deprived of membership in a university, and mandamus was held the proper remedy to compel restoration, the court holding that the question whether the school was organized for profit or not was immaterial. The ground of the decision was that the relator was a member of an incorporated society and had been wrongfully deprived of his privileges.⁸⁸ A somewhat similar case arose in New York in which a student who had complied with the conditions and requirements of a medical college sought to compel its authorities to allow him to present himself for the final examination for a degree, and again mandamus was held the only ade-

Y.) 665. But see § 3288, *supra*, as to the necessity of notice and hearing even where sufficient cause exists for expulsion.

⁸⁶ *Golden Star Lodge No. 1 v. Waterson*, 158 Mich. 696, 133 Am. St. Rep. 404, 123 N. W. 610.

⁸⁷ *People v. Brotherhood of Painters, Decorators & Paperhangers of America*, 218 N. Y. 115, 112 N. E. 752; *People v. National Slavonic Soc. of United States of America*, 144 N. Y. App. Div. 574, 129 N. Y. Supp. 603.

The court should decline jurisdiction of a mandamus proceeding where the relator is a nonresident and the subordinate lodge from which he was

expelled is a foreign corporation. *People v. National Slavonic Society*, 153 N. Y. App. Div. 885, 137 N. Y. Supp. 1057.

Where a foreign corporation has not been authorized to do business in a state and has done no act to subject it to the jurisdiction of the state, its action in reference to its internal affairs may not be controlled by the writ of mandamus. *People v. Brotherhood of Painters, Decorators & Paperhangers of America*, 218 N. Y. 115, 112 N. E. 752.

⁸⁸ *Baltimore University v. Colton*, 98 Md. 623, 64 L. R. A. 108, 57 Atl. 14.

are commutative and reciprocal. The duty of one party to comply with the obligation assumed by him does not depend simply upon the fact of his assumption, but involves the question as to whether the other party has fulfilled his own reciprocal obligations, such fulfillment being a condition precedent to his right to exact performance from his adversary. A duty, thus contingent and dependent, is not, on its face, sufficiently clear and absolute to justify the application of such a remedy'' as mandamus.³⁴ However, a contract may create a relation upon which the law will impose rights and duties enforceable by mandamus.³⁵ Thus, where it appeared that a person purchased a cemetery lot, there being no restrictions on his right of sepulture, and subsequently assigned such lot to a colored person, who sought later to use the lot and the association refused interment, the court held that mandamus was the appropriate remedy.³⁶

§ 3280. Payment of interest and judgments. The duties of officers which are clearly imposed by statutory provisions are enforceable by mandamus if such officers refuse and are unwilling to act. Accordingly, mandamus has been held available to compel trustees of a company to pay interest on stock issued for certain outstanding bonds³⁷ and to compel a treasurer to pay interest coupons on bonds³⁸ or to pay a judgment against the corporation.³⁹

§ 3281. Making and enforcing calls and assessments. In England the remedy of mandamus has been held available at the instance

Mandamus does not lie to enforce rights of a private or personal character or obligations resting entirely upon contract and not involving any question of trust or official duty or growing out of public relations. *Robbins v. Bangor R. & Elec. Co.*, 100 Me. 496, 1 L. R. A. (N. S.) 963, 62 Atl. 136.

³⁴ *State v. New Orleans & C. R. Co.*, 37 La. Ann. 589.

³⁵ *State v. Marion Light & Heating Co.*, 174 Ind. 622, 92 N. E. 731.

³⁶ *Mt. Moriah Cemetery Ass'n v. Com.*, 81 Pa. St. 235, 22 Am. Rep. 743.

³⁷ *State v. Trustees*, 4 Ind. 495.

³⁸ *Hewel v. Hugin*, 3 Cal. App. 248, 84 Pac. 1002.

The liability of a treasurer of an irrigation district to pay interest coupons on bonds as a personal liability in the nature of a penalty or for damages, cannot be enforced through the medium of a writ of mandate. *Hewel v. Hugin*, 3 Cal. App. 248, 84 Pac. 1002.

On mandamus to compel a treasurer of an irrigation district to pay interest coupons on bonds, the defendant has no absolute right to a trial before a jury. *Hewel v. Hugin*, 3 Cal. App. 248, 84 Pac. 1002.

³⁹ *Michener v. Carroll*, 135 Ala. 409, 33 So. 168.

The right to relief in this regard is subject to the usual rule that the petitioner must show a clear, legal right to the writ before it will issue, and accordingly mandamus should be denied where there is a controversy between the parties as to their legal rights under an agreement referred to in the certificate and under which the petitioner claims the right to the stock, the nature of the agreement not appearing.⁹⁵

Further consideration of the remedies of a stockholder to compel the issuance of his certificate is found in a subsequent chapter.⁹⁶

§ 3292. Transfer of stock on corporate books. In a later chapter, there is considered the conflict in the authorities as to whether or not mandamus may be employed to compel the transfer of stock on the corporation's books.⁹⁷

§ 3293. Delivery of books and records to proper officers. It is well established that mandamus is the proper remedy to compel the surrender and delivery of corporate books and records to the officers properly entitled thereto.⁹⁸ It has also been held that, the fact that title to office may be incidentally involved does not prevent the relief.⁹⁹ The remedy by replevin, which is a local action, has been held inadequate in a suit where it appeared that a portion of the property was situated in another jurisdiction.¹

⁹⁵ Townes v. Nichols, 73 Me. 515.

⁹⁶ See Chap. 56, subd. VIII.

⁹⁷ See Chap. 56, subd. XXIII, infra.

⁹⁸ **California.** Potomac Oil Co. v. Dye, 10 Cal. App. 534, 102 Pac. 677. **Louisiana.** State v. Riedy, 50 La. Ann. 258, 23 So. 327.

Maryland. Ward v. Sasscer, 98 Md. 281, 57 Atl. 208.

Minnesota. State v. Guertin, 106 Minn. 248, 130 Am. St. Rep. 610, 119 N. W. 43.

New York. In re Journal Pub. Club, 30 Misc. 326, 63 N. Y. Supp. 465. See In re Semken, — App. Div. —, 163 N. Y. Supp. 193.

Oklahoma. See State v. Cline, 29 Okla. 157, 35 L. R. A. (N. S.) 527, Ann. Cas. 1913 A 481, 116 Pac. 767.

See also § 2807.

Mandamus will lie to compel the delivery of property and records of an incorporated academy to newly-

elected trustees. Ward v. Sasscer, 98 Md. 281, 57 Atl. 208.

But mandamus does not lie at the suit of one claiming to be the lawful holder of a corporate office to recover property appurtenant thereto and in the hands of a person not claiming title to such office. State v. James, 73 W. Va. 753, 81 S. E. 550.

⁹⁹ Potomac Oil Co. v. Dye, 10 Cal. App. 534, 102 Pac. 677.

An officer whose term of office has expired cannot defeat his successor's rights to a writ of mandamus for possession of the indicia of office and the property of the corporation by raising a question as to the validity of the latter's title. Beard v. Beard, 66 Ore. 512, 134 Pac. 1196, 133 Pac. 797.

¹ Beard v. Beard, 66 Ore. 512, 134 Pac. 1196, 133 Pac. 797.

Where a mandamus proceeding is brought to compel the delivery of books and papers, the defendant cannot interpose as a defense the fact that the property is no longer in his custody, and that he has voluntarily turned it over to a stranger.²

§ 3294. Performance of duties as to taxes. Mandamus is among the remedies, which are treated in a subsequent chapter,³ employed to compel a corporation to pay taxes assessed upon its stock, there being no other adequate remedy barring the suit.⁴

III. APPLICATION OF REMEDY TO PARTICULAR CLASSES OF CORPORATIONS

§ 3295. Public service corporations—In general. The law regarding the remedies applicable in enforcing compliance with the regulations governing public utilities is given detailed consideration in a subsequent chapter,⁵ but it may be said here that it is a well-settled rule that corporations may be compelled by mandamus to perform their duties to the public.⁶ Accordingly, mandamus is the proper proceeding to compel public service corporations to perform duties imposed by statutory provisions,⁷ or by the corporate charter⁸ or growing out of the acceptance by such corporations of grants made by municipal-

² *People v. Powers*, 145 N. Y. App. Div. 693, 130 N. Y. Supp. 529.

³ See the chapter on Taxation, *infra*.

⁴ *Barney v. State*, 42 Ind. 480; *Emory v. State*, 41 Md. 38; *Town of St. Albans v. National Car Co.*, 57 Vt. 68.

The statutes imposing taxes sometimes specify plain legal duties which may be enforced by mandamus. Thus, it has been held that the duty of a corporation to furnish a list of stockholders, with their residences, and a statement of the amount of stock owned by each to tax officers may be enforced by mandamus. *Firemen's Ins. Co. v. Baltimore*, 23 Md. 297.

⁵ See the chapter on Governmental Regulations, *infra*.

⁶ *Colorado*. *Seaton Mountain Elec. Light, Heat & Power Co. v. Idaho Springs Inv. Co.*, 49 Colo. 122, 33 L. R. A. (N. S.) 1078, 111 Pac. 834.

Connecticut. *State v. Hartford &*

N. H. R. Co., 29 Conn. 538.

Florida. *Woodbury v. Tampa Water Works Co.*, 57 Fla. 243, 21 L. R. A. (N. S.) 1034, 49 So. 556.

Kansas. *Potwin Place v. Topeka Ry. Co.*, 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 309.

Maine. *Robbins v. Bangor R. & Elec. Co.*, 100 Me. 496, 1 L. R. A. (N. S.) 963, 62 Atl. 136.

Minnesota. *State v. Consumers' Power Co.*, 119 Minn. 225, 41 L. R. A. (N. S.) 1181, Ann. Cas. 1914 B 19, 137 N. W. 1104.

New York. *People v. New York, L. E. & W. R. Co.*, 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856.

And see cases cited *infra*, this section.

⁷ *Board of Railroad Com'rs v. Delaware, L. & W. R. Co.*, 79 N. J. L. 219, 76 Atl. 236.

⁸ *State v. Marion Light & Heating Co.*, 174 Ind. 622, 92 N. E. 731.

ities.⁹ "When a corporation exercises public franchises, and engages in rendering a public service, the duties of the corporation to the public collectively and individually need not be expressed in the charter or in statutes. The duties may arise by implication of law from the relation voluntarily assumed by the corporation towards the members of the public in using the franchises and in undertaking to render public service."¹⁰ Such duties imposed by the acceptance of public franchises may be enforced by mandamus.¹¹

A number of illustrations of the various duties of public service corporations which may be enforced by mandamus are contained in the subsections which follow.

§ 3296. — Canal companies; ditches. Mandamus will lie to compel a canal company to keep its canal in a navigable condition¹² or to compel such a corporation to erect a bridge over the canal,¹³ as when the canal cuts across a highway¹⁴ or when a bridge is ordered erected by a board of supervisors in accordance with a statute.¹⁵

In a mandamus proceeding to compel a corporation to clear out

9 Florida. *State v. Tampa Water Works Co.*, 57 Fla. 533, 22 L. R. A. (N. S.) 680, 48 So. 639.

Illinois. *Chicago v. Chicago Tel. Co.*, 230 Ill. 157, 13 L. R. A. (N. S.) 1084, 12 Ann. Cas. 109, 82 N. E. 607.

Indiana. *State v. Marion Light & Heating Co.*, 174 Ind. 622, 92 N. E. 731; *Greenfield Gas Co. v. Trees*, 165 Ind. 209, 75 N. E. 2; *Seymour Water Co. v. Seymour*, 163 Ind. 120, 70 N. E. 514; *State v. Consumers' Gas Trust Co.*, 157 Ind. 345, 55 L. R. A. 245, 61 N. E. 674; *Portland Natural Gas & Oil Co. v. State*, 135 Ind. 54, 21 L. R. A. 639, 34 N. E. 818.

Iowa. *Independent School Dist. of Le Mars v. Le Mars Water & Light Co.*, 131 Iowa 14, 10 L. R. A. (N. S.) 859, 107 N. W. 944.

Kansas. *Potwin Place v. Topeka Ry. Co.*, 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 309.

Oklahoma. *Bartlesville Water Co. v. Bartlesville*, 150 Pac. 118; *Oklahoma City v. Oklahoma R. Co.*, 20 Okla. 1, 16 L. R. A. (N. S.) 651, 93 Pac. 48.

Texas. *International Water Co. v. El Paso*, 51 Tex. Civ. App. 321, 112 S. W. 816.

10 Woodbury v. Tampa Water Works Co., 57 Fla. 243, 21 L. R. A. (N. S.) 1034, 49 So. 556. See *State v. Marion Light & Heating Co.*, 174 Ind. 622, 92 N. E. 731; *Oklahoma City v. Oklahoma R. Co.*, 20 Okla. 1, 16 L. R. A. (N. S.) 651, 93 Pac. 48.

11 State v. Marion Light & Heating Co., 174 Ind. 622, 92 N. E. 731; *Oklahoma Natural Gas Co. v. State*, — Okla. —, 150 Pac. 475; *Haugen v. Albina Light & Water Co.*, 21 Ore. 411, 14 L. R. A. 424, 28 Pac. 244.

12 Savannah & O. Canal Co. v. Shuman, 91 Ga. 400, 44 Am. St. Rep. 43, 17 S. E. 937.

13 State v. Savannah & O. Canal Co., 26 Ga. 665.

14 In re Trenton Water Power Co., 20 N. J. L. 659.

15 County of Fresno v. Fowler Switch Canal Co., 68 Cal. 359, 9 Pac. 309.

ditches, where it is alleged that such duty is imposed by the charter, it being obligatory to raise money for the purpose from the members, an answer to the company to the effect that it has not the means or credit to perform the required duty, raises several points of controversy, so that an alternative writ will be granted in order that the issues may be determined.¹⁶

§ 3297. — Dams. A water company may be compelled by mandamus to perform its charter duty of keeping a river, road free from obstructions,¹⁷ and mandamus will also issue to compel a corporation which is the owner of a dam, to lower it to the height authorized by law, it appearing by the clear preponderance of evidence that the dam is higher than is authorized.¹⁸

§ 3298. — Electric light companies. Mandamus is the proper remedy to compel an electric light company to perform its duty of supplying the public with light,¹⁹ and the same remedy is available to compel a purchaser of the franchise of such a company to furnish such service.²⁰ In such a proceeding the respondent corporation has the burden of establishing any defense predicated upon the inability to furnish service, whether such inability arises through physical, legal, financial or other obstacles,²¹ and the corporation also has the burden of establishing a custom not to perform the details of connecting its lines with the premises of applicants for service.²² If an applicant whose house is in an established service zone has made proper application and demand for service and has his house properly equipped for service, his right to the writ of mandamus is *prima facie* established.²³

¹⁶ *Lock v. Repaupo Meadow Co.* (N. J. L.), 57 Atl. 423.

¹⁷ *State v. Ousatonie Water Co.*, 51 Conn. 137.

¹⁸ *State v. Kansas Flour Mills Co.*, — Kan. —, 164 Pac. 1170.

¹⁹ *State v. Consumers' Power Co.*, 119 Minn. 225, 41 L. R. A. (N. S.) 1181, Ann. Cas. 1914 B 19, 137 N. W. 1104.

²⁰ *State v. Benson*, 108 Miss. 779, 67 So. 214.

²¹ *State v. Consumers' Power Co.*, 119 Minn. 225, 41 L. R. A. (N. S.) 1181, Ann. Cas. 1914 B 19, 137 N. W. 1104.

²² *State v. Consumers' Power Co.*, 119 Minn. 225, 41 L. R. A. (N. S.) 1181, Ann. Cas. 1914 B 19, 137 N. W. 1104.

In a mandamus proceeding to compel an electric light company to furnish service, it will be presumed that the respondent follows the usual custom and itself performs the details incident to the connection of its lines with the premises of applicants for service. *State v. Consumers' Power Co.*, 119 Minn. 225, 41 L. R. A. (N. S.) 1181, Ann. Cas. 1914 B 19, 137 N. W. 1104.

²³ *State v. Consumers' Power Co.*,

§ 3299. — Express companies. An express company, like other carriers, may be compelled by mandamus to receive and carry property.²⁴

The Interstate Commerce Act provides that it shall be unlawful for a carrier to give an unreasonable preference to any particular description of traffic or to subject such traffic to undue or unreasonable prejudice or disadvantage in any respect, and it has been held that a petition for mandamus to compel an express company to accept and transport intoxicating liquors to customers of the petitioner residing in that portion of the state of Oklahoma commonly known as the Indian Territory, is within such Act, provided that intoxicating liquor is an article of commerce and is not prohibited by law from being introduced into the territory referred to.²⁵

§ 3300. — Ferry companies. When ferry franchises have been granted to a city, mandamus is available to compel such city to operate the ferries.²⁶

§ 3301. — Gas and heating companies. Where a corporation, granted a franchise to supply gas, refuses to do so at reasonable rates, mandamus will lie to compel it to do so²⁷ and if the supply has been commenced, a suit in equity may be maintained to enjoin the corpora-

119 Minn. 225, 41 L. R. A. (N. S.) 1181, Ann. Cas. 1914 B 19, 137 N. W. 1104.

²⁴ Southern Exp. Co. v. Rose, 124 Ga. 581, 5 L. R. A. (N. S.) 619, 53 S. E. 185; Attorney General v. American Exp. Co., 118 Mich. 682, 77 N. W. 317.

²⁵ United States v. United States Exp. Co., 180 Fed. 1006.

²⁶ In re Wheeler, 62 N. Y. Misc. 37, 115 N. Y. Supp. 605.

²⁷ Indiana. Greenfield Gas Co. v. Trees, 165 Ind. 209, 75 N. E. 2; State v. Consumers' Gas Trust Co., 157 Ind. 345, 55 L. R. A. 245, 61 N. E. 674.

Iowa. Phelan v. Boone Gas Co., 147 Iowa 626, 31 L. R. A. (N. S.) 319, 125 N. W. 208.

Massachusetts. Cox v. Malden & M. Gas Light Co., 199 Mass. 324, 17 L. R. A. (N. S.) 1235, 127 Am. St. Rep. 503, 85 N. E. 180.

New Jersey. Public Service Gas Co. v. Newark, 86 N. J. Eq. 384, 98 Atl. 404; Public Service Corporation v. American Lighting Co., 67 N. J. Eq. 122, 57 Atl. 482; Johnson v. Atlantic City Gas & Water Co., 65 N. J. Eq. 129, 56 Atl. 550.

New York. Richman v. Consolidated Gas Co., 114 App. Div. 216, 100 N. Y. Supp. 81; People v. Manhattan Gas Light Co., 45 Barb. 136.

Oregon. Mackin v. Portland Gas Co., 38 Ore. 120, 49 L. R. A. 596, 62 Pac. 20, 61 Pac. 134.

Pennsylvania. Miller v. Wilkes-Barre Gas Co., 206 Pa. 254, 55 Atl. 974.

Mandamus lies to compel delivery of gas in the performance of a quasi public duty under the statute. Cox v. Malden & M. Gas Light Co., 199 Mass. 324, 17 L. R. A. (N. S.) 1235, 127 Am. St. Rep. 503, 85 N. E. 180.

tion from ceasing to supply gas.²⁸ If an unreasonable price is demanded by such corporations for their product, it has been held that a city may offer what it conceives to be a reasonable price, and if the gas is then refused, the remedies heretofore mentioned are available.²⁹ Also, mandamus has been held the only remedy available to give full relief where public utility commissioners refuse to reduce the rates for gas.³⁰ But the writ is not available to compel the laying of gas mains where no imperative and obligatory duty is imposed but the right as conferred is permissive and enabling, and also where it is shown that there is no proof that the gas mains are needed or desired.³¹ Furthermore, mandamus does not lie to compel a gas company to operate as a common carrier and purchaser under a certain statute, when it is shown that such statute prescribes a general course of conduct and a long series of continuous acts which are to be performed and where it also appears that the statute in question provides a plain and adequate remedy for those corporations which prove recalcitrant.³²

A heating company may be compelled by mandamus to furnish heat for a public library in accordance with the terms of its franchise and in accordance with its duty as implied by law. In such a case, where it appears that heat is necessary during certain months of the year, the public is directly interested, and the corporation cannot evade its obligation by showing that the building in question was not erected until after the company accepted its franchise, by the fact that the building as erected was not equipped to receive heat nor by the fact that such building is located two squares from the mains or conduits of the heating company.³³

§ 3302. — Interurban railways. Mandamus is the proper remedy to compel an electric railway to conform to a contract with a township whereby cars are required to be stopped when hailed.³⁴

²⁸ Public Service Gas Co. v. Newark, 86 N. J. Eq. 384, 98 Atl. 404; Public Service Corporation v. American Lighting Co., 67 N. J. Eq. 122, 57 Atl. 482. See State v. Connersville Natural Gas Co., 163 Ind. 563, 71 N. E. 483, as to injunction being the proper remedy to prevent a company from taking up a pipe line on certain premises.

²⁹ Public Service Gas Co. v. Newark, 86 N. J. Eq. 384, 98 Atl. 404.

³⁰ Public Service Gas Co. v. Board

of Public Utility Com'rs, 84 N. J. L. 463, 87 Atl. 651.

³¹ Village of Upper Alton v. Alton Gas & Electric Co., 165 Ill. App. 333.

³² Oklahoma Natural Gas Co. v. State, — Okla. —, 150 Pac. 475.

³³ State v. Marion Light & Heating Co., 174 Ind. 622, 92 N. E. 731, citing cases as to the duty of such companies.

³⁴ Ross Tp. v. Michigan United Rys. Co., 165 Mich. 28, Ann. Cas. 1912 C 885, 130 N. W. 358.

§ 3303. — Railroads. Railroad companies are quasi public corporations, and their rights and powers are not conferred upon them merely for the benefit of such corporations themselves, but also in trust for the benefit of the public, and whenever such corporations neglect or fail to perform any of their corporate duties, they may generally be compelled to perform them by mandamus.³⁵ Accordingly, mandamus is available, in the absence of any other adequate remedy, to compel railroad corporations to perform the duties imposed by law,³⁶ whether prescribed by statute or by the corporate charter³⁷ or by the railroad's franchise,³⁸ and whether such duty is stated in express terms or is raised by implication of law from the nature of the public duty authorized by law to be performed.³⁹

Thus, the remedy is available to compel a railroad company to operate its road as required by law,⁴⁰ but the writ will not issue to compel the performance of a particular act, unless there is a specific legal duty on the railroad's part to do that act and unless there is clear proof of a breach of the duty.⁴¹ In addition, a railroad as a common carrier will not be compelled by mandamus to provide facilities to meet demands that do not and may never exist.⁴²

The decision of a board of railroad commissioners, reached in ac-

³⁵ *State v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359, 44 So. 213.

³⁶ *Missouri Pac. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 53 L. Ed. 352; *State v. Atlantic Coast Line R. Co.*, 53 Fla. 689, 44 So. 223, 53 Fla. 650, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359, 44 So. 213; *Connolly v. Woods*, 13 Idaho 591, 92 Pac. 573.

³⁷ *State v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359, 44 So. 213.

The duties imposed by the charters of railroad companies are ministerial and enforceable by mandamus. *Railroad Com'rs v. Portland & O. C. R. Co.*, 63 Me. 269, 18 Am. Rep. 208; *Board of Railroad Com'rs v. Delaware, L. & W. R. Co.*, 79 N. J. L. 219, 76 Atl. 236.

³⁸ *State v. Ottumwa Railway & Light Co.*, — Iowa —, 160 N. W. 336.

³⁹ *State v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 13 L. R. A. (N. S.)

320, 12 Ann. Cas. 359, 44 So. 213.

The duties of a railroad, which has accepted a franchise to operate a road, of doing so in the manner and for the purposes contemplated by its charter, may be enforced by mandamus. *Rowland v. Saline River R. Co.* (Ark.), 177 S. W. 896.

⁴⁰ *Chicago & N. W. R. Co. v. Crane*, 113 U. S. 424, 28 L. Ed. 1064; *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428; *State v. Hartford & N. H. R. Co.*, 29 Conn. 538. Compare *Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 492, 35 L. Ed. 1092.

⁴¹ *State v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359, 44 So. 213; *People v. Brooklyn Heights R. Co.*, 172 N. Y. 90, 64 N. E. 788; *State v. Northern Pac. R. Co.*, 53 Wash. 370, 102 Pac. 24.

⁴² *People v. Illinois Cent. R. Co.*, 241 Ill. 471, 89 N. E. 744.

cordance with the laws of the state, in regard to the reasonableness of the method under which a railroad is being operated may be enforced by mandamus,⁴³ and it has even been held that the duty involved may be enforced although it is continuing in nature.⁴⁴

A statute providing that the specific performance of orders made may be effected by a suit in equity does not limit the board to such procedure, especially if it appears that such statute in another section provides for the enforcement of orders by "proper proceedings."⁴⁵ But when a mandamus proceeding is brought, it should appear that the order involved is, on its face, within the power and authority of the railroad commissioners.⁴⁶

Mandamus lies to compel a railroad to perform its charter duty of running its trains to a certain terminus⁴⁷ or through a certain town,⁴⁸ provided there is a necessity for such line. The Supreme Court of the United States has held that the charter duty of a railroad to construct its road to a certain point cannot be enforced by mandamus where the maintenance of the road to such point would not be remunerative.⁴⁹ And a writ to compel a railroad to construct its road to a certain village will be denied when it appears that the statutes do not impose such a duty.⁵⁰ Similarly, the writ is available to compel a railroad to

⁴³ *State v. Atlantic Coast Line R. Co.*, 48 Fla. 114, 37 So. 652; *Board of Railroad Com'rs v. Delaware, L. & W. R. Co.*, 79 N. J. L. 236, 76 Atl. 236; *Public Service Commission for First Dist. v. Interborough Rapid Transit Co.*, 219 N. Y. 355, 114 N. E. 387; *People v. Brooklyn Heights R. Co.*, 172 N. Y. 90, 64 N. E. 788.

Under Public Service Commissions Law (Consol. L. c. 48), § 57, mandamus is the proper remedy to have violations or threatened violations of anything required of a common carrier by law or by order of the commission stopped and prevented. *Public Service Commission for First Dist. v. Interborough Rapid Transit Co.*, 219 N. Y. 355, 114 N. E. 387; *Railroad Com'rs v. Atlantic Coast Line R. Co.*, 71 S. C. 130, 50 S. E. 641.

Mandamus is the remedy provided by S. C. Code Laws 1902, § 2119, to enforce a decision of railroad commissioners. *Railroad Com'rs v. Atlantic*

Coast Line R. Co., 71 S. C. 130, 50 S. E. 641.

⁴⁴ *State v. Atlantic Coast Line R. Co.*, 48 Fla. 114, 37 So. 652 (citing various cases where duties of a continuing nature were enforced by mandamus); *Public Service Commission for First Dist. v. Interborough Rapid Transit Co.*, 219 N. Y. 355, 114 N. E. 387.

⁴⁵ *Board of Railroad Com'rs v. Delaware, L. & W. R. Co.*, 79 N. J. L. 219, 76 Atl. 236.

⁴⁶ *State v. Atlantic Coast Line R. Co.*, 51 Fla. 578, 40 So. 875.

⁴⁷ *State v. Hartford & N. H. R. Co.*, 29 Conn. 538.

⁴⁸ *Kansas City, M. & O. R. Co. of Texas v. State*, 106 Tex. 249, 163 S. W. 582.

⁴⁹ *Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 492, 35 L. Ed. 1092.

⁵⁰ *State v. Southern Minnesota R. Co.*, 18 Minn. 40.

maintain its road as a continuous line⁵¹ and to prevent the abandonment of a part of the road after completion.⁵² And if a railroad allows its roadbed to become unsafe and out of repair so that the service given is inadequate and casualties result, mandamus is available to correct such abuses.⁵³

The duty of a railroad to build a fence along its right of way may be enforced by mandamus.⁵⁴ But in one case where the charter of a railroad provided that the corporation should construct its road outside of the grounds of a certain cemetery association and should enter into an agreement to construct a stone wall between its tracks and the cemetery grounds, it was held that mandamus would not lie to compel the railroad to perform its duty. The legislative purpose was to secure a satisfactory location for the railroad and the agreement for the erection of the wall could be enforced, like other contracts, by an action at law or by a suit for specific performance.⁵⁵

After a railroad has laid its tracks, mandamus will lie to compel it to restore a public highway to proper condition.⁵⁶ Thus, the writ has been held proper to compel the reconstruction of a turnpike road which is used as a public highway.⁵⁷ If a highway is completely occupied, the railroad cannot avoid its duty by claiming that an impossible or unlawful act is commanded, in that it cannot obtain the necessary land and in that if it proceeds to construct the road it will be acting unlawfully. In answer to such a contention, the court held in one case that the railroad had the necessary statutory authority to obtain the

⁵¹ Union Pac. R. Co. v. Hall, 91 U. S. 343, 23 L. Ed. 428.

⁵² State v. Sugarland Ry. Co., — Tex. Civ. App. —, 163 S. W. 1047.

⁵³ State v. Atlantic Coast Line R. Co., 53 Fla. 689, 44 So. 223, 53 Fla. 650, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359, 44 So. 213.

The duty of providing a reasonably safe and sufficient roadbed, track, equipment and facilities, of operating the property in proper condition for rendering adequate service and of actually rendering such service without unjust discrimination being imposed upon a railroad, as a common carrier, for the public good, may be enforced by mandamus when no other adequate legal remedy exists. State v. Atlantic Coast Line R. Co., 53 Fla.

689, 44 So. 223, 53 Fla. 650, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359, 44 So. 213.

⁵⁴ Ohio & M. R. Co. v. People, 121 Ill. 483, 13 N. E. 236, aff'g 21 Ill. App. 23.

⁵⁵ State v. Paterson, N. & N. Y. R. Co., 43 N. J. L. 505.

⁵⁶ Cummins v. Evansville & T. H. R. Co., 115 Ind. 417, 18 N. E. 6; State v. Hannibal & St. J. R. Co., 86 Mo. 13; Com. v. New York, P. & O. R. Co., 138 Pa. St. 58, 20 Atl. 951; Town of Mason v. Ohio River R. Co., 51 W. Va. 183, 41 S. E. 418; Moundsville v. Ohio River R. Co., 37 W. Va. 92, 20 L. R. A. 161, 16 S. E. 514.

⁵⁷ Pittsburgh, M. & Y. R. Co. v. Com., 104 Pa. St. 583.

land.⁵⁸ If the railroad has any discretion as to the manner of performance of such a duty, it is a ministerial discretion, and if the mode chosen fails to execute the duty, proper performance may be compelled by another writ which points out how the railroad must act so as not to fail again.⁵⁹ Mandamus is also the appropriate remedy to compel a railroad to make the necessary repairs so as to keep its road free from obstructions when it runs through a city or town.⁶⁰ So the writ will lie to compel a railroad to conform its tracks to a street crossing,⁶¹ but it cannot be compelled to repair a defective street if it appears that the duty involved is imposed by the terms of a contract with a city.⁶² If a city's board of public works changes a street grade or line, mandamus will lie to compel a railroad to change its grade and line of tracks so as to conform to the street.⁶³ It is also the proper remedy to compel a railroad to perform its duty of constructing a crossing,⁶⁴ of restoring steps and stationing a flagman at a crossing⁶⁵ and of in-

⁵⁸ *People v. Dutchess & C. R. Co.*, 58 N. Y. 152.

⁵⁹ *Moundsville v. Ohio River R. Co.*, 37 W. Va. 92, 20 L. R. A. 161, 16 S. E. 514.

Where an alternative writ commands a railroad to restore a highway, and it returns that it has performed such duty, the court, on ascertaining that the action has failed, may properly point out how the railroad must act so as not to fail again. *People v. Dutchess & C. R. Co.*, 58 N. Y. 152.

⁶⁰ *Mayor & Selectmen Town of Homer v. Louisiana & N. W. R. Co.*, 135 La. 14, Ann. Cas. 1916 C 1170, 64 So. 926.

⁶¹ *Houston & T. C. R. Co. v. Dallas* (Tex. Civ. App.), 78 S. W. 525, rev'd 98 Tex. 396, 70 L. R. A. 850, 84 S. W. 648.

Where an ordinance grants to a railroad the right to cross a street on condition that it makes safe crossings, and a statute exists containing substantially the same provision, the ordinance may be enforced by mandamus. *Vandalia R. Co. v. State*, 166 Ind. 219, 117 Am. St. Rep. 370, 76 N. E. 980.

⁶² *State v. New Orleans & C. R. Co.*, 37 La. Ann. 589.

⁶³ *People v. Geneva, W., S. F. & C. L. Traction Co.*, 112 N. Y. App. Div. 581, 98 N. Y. Supp. 719.

⁶⁴ *Illinois. People v. Chicago & A. R. Co.*, 67 Ill. 118.

Indiana. Wabash R. Co. v. Railroad Commission of Indiana, 176 Ind. 428, 95 N. E. 673.

Iowa. Michalek v. Cedar Rapids & I. C. R. & L. Co., 173 Iowa 231, 155 N. W. 606; *Boggs v. Chicago, B. & Q. R. Co.*, 54 Iowa 435, 6 N. W. 744.

Louisiana. State v. Colorado Southern, N. O. & P. R. Co., 120 La. 9, 44 So. 905.

Wisconsin. State v. Wisconsin Cent. R. Co., 123 Wis. 551, 102 N. W. 16.

The duty of a railroad to construct and maintain such farm crossings as the court shall determine to be suitable and convenient is a clear legal duty imposed by express statute and enforceable by mandamus. *State v. Wisconsin Cent. R. Co.*, 123 Wis. 551, 102 N. W. 16.

⁶⁵ *Norfolk & W. R. Co. v. Bristol*, 116 Va. 955, 83 S. E. 421.

stalling cattle guards.⁶⁶ The duty to install cattle guards and crossings is sometimes qualified in that it must appear that they are necessary, and accordingly mandamus does not issue where a question of fact is raised as to the necessity of such crossings or guards.⁶⁷ And in a proceeding where it is contended that some guards are unnecessary but it is admitted that others are necessary, the writ may be made peremptory as to the necessary guards and dismissed as to the remainder, with a reservation of the right to bring another suit.⁶⁸ While a railroad may have a discretion as to the manner of performing the duty of providing a safe and useful crossing, it is a ministerial discretion, and if it appears that there is a failure to perform the duty, mandamus will lie, even though the railroad claims that the duty has been fully performed.⁶⁹ It has been held that the duty to provide a farm crossing is fully performed when such a crossing is provided at a place where it will best serve the interest of all parties concerned.⁷⁰ A statute in Iowa conferring concurrent jurisdiction upon railroad commissioners as to grade and underground crossings has been held not to affect the jurisdiction of the courts to decree an underground crossing, and the jurisdiction to enforce the statute was not curtailed.⁷¹

Mandamus is usually held the appropriate remedy to compel a railroad to perform its duty of constructing a viaduct or bridge over or under city streets⁷² or to perform the duty of constructing and maintaining a drawbridge as required by law.⁷³ In one case, however, a proceeding was brought to compel several railroad companies to construct viaducts, and it was held that the necessary relief could not be obtained by mandamus, but by a suit in equity where the court, having

⁶⁶ *State v. Colorado Southern, N. O. & P. R. Co.*, 120 La. 9, 44 So. 905.

⁶⁷ *State v. Colorado Southern, N. O. & P. R. Co.*, 120 La. 9, 44 So. 905.

Under Rev. St. c. 114, § 62, providing that farm crossings shall be constructed when necessary, to authorize mandamus it must appear that the farming use of the lands renders necessary their connection by a crossing. *People v. Cleveland, C. C. & St. L. R. Co.*, 147 Ill. App. 141.

⁶⁸ *State v. Colorado Southern, N. O. & P. R. Co.*, 120 La. 9, 44 So. 905.

⁶⁹ *Wabash R. Co. v. Railroad Commission of Indiana*, 176 Ind. 428, 95 N. E. 673.

⁷⁰ *People v. Cleveland, C. C. & St. L. Ry. Co.*, 147 Ill. App. 141.

⁷¹ *Michalek v. Cedar Rapids & I. C. R. & L. Co.*, 173 Iowa 231, 155 N. W. 606.

⁷² *State v. Missouri Pac. Ry. Co.*, 33 Kan. 176, 5 Pac. 772; *State v. Minneapolis & St. L. Ry. Co.*, 39 Minn. 219, 39 N. W. 153.

Under Rev. St. 1909, §§ 3049, 3141 and 10626, mandamus will lie to compel a railroad to construct a viaduct over its tracks, there being no option as to whether a street should pass over or under the tracks. *State v. Missouri Pac. R. Co.*, 262 Mo. 720, 174 S. W. 73.

⁷³ *New Orleans, M. & T. R. Co. v. State of Mississippi*, 112 U. S. 12, 28 L. Ed. 619.

all the parties before it, could in a single decree provide what was necessary and adjust rights, duties and expenses.⁷⁴ The fact that a railroad has laid its tracks at the grade of streets does not exempt it from the duty of bridging when the increased use of both railway and streets renders it necessary.⁷⁵ Mandamus is not available when the duty to construct viaducts is vague and indefinite,⁷⁶ and the mandate issued must be specific as to the manner of performing the duty.⁷⁷ A contention that the granting of relief by mandamus to compel the bridging of tracks is improper in that an illegal act is required cannot be sustained. In one case a railroad contended that if it excavated to lower its tracks it would become liable as a trespasser for damages to the abutting property. It was held that the railroad's duty to pay compensation to the adjoining owners would not be a sufficient ground for denying the writ.⁷⁸

The responsibility of determining the number of trains to be run on a line of railroad is usually vested in the directors of railroads and not ordinarily imposed by statute, and their determination on the subject is final. Accordingly, if trains are discontinued and the service offered is reduced, mandamus will not lie to compel the running of the same number of trains as before.⁷⁹ The question of adequate service is to be considered in this connection, but it has been held that where a proceeding is brought to compel a railroad to run more trains, the relators cannot show that they and others fear that if a mine is opened at the place in question, they will not be afforded adequate

⁷⁴ *Burlington & C. R. Co. v. People*, 20 Colo. App. 181, 77 Pac. 1026.

⁷⁵ *State v. Minneapolis & St. L. Ry. Co.*, 39 Minn. 219, 39 N. W. 153; *State v. St. Paul, M. & M. Ry. Co.*, 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3.

⁷⁶ *State v. Missouri Pac. Ry. Co.*, 33 Kan. 176, 5 Pac. 772.

⁷⁷ *State v. Minneapolis & St. L. Ry. Co.*, 39 Minn. 219, 39 N. W. 153.

A writ of mandamus directing a railroad to construct a good and sufficient viaduct across its tracks is uncertain and fatally defective, as the writ should specify the details of the work, material, dimensions, etc. *Burlington & C. R. Co. v. People*, 20 Colo. App. 181, 77 Pac. 1026.

⁷⁸ *State v. St. Paul, M. & M. Ry. Co.*, 35 Minn. 131, 59 Am. Rep. 313, 28 N. W. 3.

⁷⁹ *People v. Brooklyn Heights R. Co.*, 172 N. Y. 90, 64 N. E. 788.

Where a railroad is not required by statute or at common law to do more than maintain one direct through train daily each way on its road, a writ of mandamus will not issue to require it to do more. *State v. Northern Pac. R. Co.*, 53 Wash. 370, 102 Pac. 24.

Where a railroad operates trains on one of its tracks in one direction only, because of the steepness of the grade, it will not be required by mandamus to operate trains in both directions on that track to accommodate people living nearer to the depot on that line of its road than another depot on another of its lines. *People v. Illinois Cent. R. Co.*, 241 Ill. 471, 89 N. E. 744, aff'g 143 Ill. App. 337.

service and will sustain damage.⁸⁰ And it has also been held in such a proceeding that the relators cannot object to the legality of a consolidation of railroads, this being a question to be raised by the state.⁸¹ To return to the original question, it has been held that if a railroad company owns two lines of road, by consolidation, and can substantially accommodate the people by operating one line and can abandon the other line without any serious detriment to any considerable number of people, it should not be compelled by mandamus to operate both lines at a considerable sacrifice of money.⁸²

The question of the number of trains to be operated is one that usually comes within the domain and jurisdiction of railroad commissioners, and it has been held that a rule of such commissioners requiring written application before any regular passenger train may be discontinued imposes a continuing specific duty which may be enforced by mandamus.⁸³

It is sometimes broadly stated that mandamus is the appropriate remedy to compel a railroad to establish and maintain a depot at a certain place⁸⁴ or to compel a railroad to resume a station which has been abandoned.⁸⁵ In so far as the public right to compel a railroad to maintain such a station is a legal right, there is no doubt that the remedy is by mandamus.⁸⁶ But there is a serious conflict in the authorities as to whether the courts can compel a railroad to establish and maintain a depot at a certain place, unless there is a specific legal duty expressly imposed by statute. In some decisions it has been held that this is a common-law duty owed to the public and enforceable by mandamus.⁸⁷ In other decisions it is held that the broad dis-

⁸⁰ *People v. Illinois Cent. R. Co.*, 143 Ill. App. 337, aff'd 241 Ill. 471, 89 N. E. 744.

⁸¹ *People v. Illinois Cent. R. Co.*, 241 Ill. 471, 89 N. E. 744, aff'g 143 Ill. App. 337.

⁸² *People v. Rome, W. & O. R. Co.*, 103 N. Y. 95, 8 N. E. 369.

⁸³ *State v. Atlantic Coast Line R. Co.*, 60 Fla. 465, 54 So. 394.

⁸⁴ *Kansas City, M. & O. R. Co. of Texas v. State*, 106 Tex. 249, 163 S. W. 582.

⁸⁵ *State v. New Haven & N. R. Co.*, 41 Conn. 134.

⁸⁶ *Fritts v. Delaware, L. & W. R. Co.*, 75 N. J. Eq. 384, 73 Atl. 92; *Jacquelin v. Erie R. Co.*, 69 N. J. Eq. 432, 61 Atl. 18.

⁸⁷ *People v. Chicago & A. R. Co.*, 130 Ill. 175, 22 N. E. 857; *McDonald v. Chicago & N. W. R. Co.*, 26 Iowa 124, 95 Am. Dec. 114; *State v. Republican Val. R. Co.*, 17 Neb. 647, 52 Am. Rep. 424, 24 N. W. 329; *Northwestern Pac. R. Co. v. Territory*, 3 Wash. T. 303.

If the common law imposes a duty upon a common carrier to establish and maintain depots or stopping places along its line of railroad, and the right of a plaintiff to compel such carrier to comply with the law is reasonable and free from doubt, the carrier may be compelled by mandamus to discharge such duty. *State v. Ogden Rapid Transit Co.*, 38 Utah. 242, 112 Pac. 120.

cretion vested in these companies by their charters is beyond the reach of judicial interference or control and the courts cannot interfere unless the duty is made a clear one by express legislative enactment.⁸⁸ In one case it appeared that a town was bonded for the construction of a railroad, a condition being included that a permanent station should be maintained at such town. It was held that if the bonding proceedings created a contract between the town and the railroad, mandamus would not issue on behalf of the people to enforce such a contract and that the remedy was by a proceeding by the town.⁸⁹ If the legislature has declared when and under what conditions and circumstances depots and stopping places shall be maintained, the courts may compel carriers to comply with such conditions by mandamus,⁹⁰ and the same remedy is available to enforce the determination of railroad commissioners, who, in pursuance of their statutory authority, declare that a depot or station is necessary at a certain place.⁹¹ Such an order of railroad commissioners is presumptively valid.⁹² Also, if mandamus is available to compel the establishment of a depot, the fact that a receiver has been appointed by the federal courts for the railroad involved does not furnish an obstacle to the granting of the writ. Such fact may, however, be considered in the enforcement of the command.⁹³ It is also held, when mandamus

The discretion of a railroad in the matter of establishing and maintaining stations does not extend so far as to justify disregard of the duties to the public. *People v. Chicago & A. R. Co.*, 130 Ill. 175, 22 N. E. 857.

⁸⁸ *Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 492, 35 L. Ed. 1092, overruling 3 Wash. T. 303; *People v. New York, L. E. & W. R. Co.*, 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856.

Mandamus will not lie to compel a railroad company to erect a new and enlarged building to handle passengers and freight, even though it appears that the present accommodations are inadequate, where the statutes do not impose such duty. *People v. New York, L. E. & W. R. Co.*, 104 N. Y. 58, 58 Am. Rep. 484, 9 N. E. 856.

⁸⁹ *People v. Rome, W. & O. R. Co.*, 103 N. Y. 95, 8 N. E. 369.

⁹⁰ *State v. Ogden Rapid Transit Co.*, 38 Utah 242, 112 Pac. 120.

⁹¹ *Railroad Com'rs v. Portland & O. C. R. Co.*, 63 Me. 269, 18 Am. Rep. 208; *Board of Railroad Com'rs v. Delaware, L. & W. R. Co.*, 79 N. J. L. 219, 76 Atl. 236.

Under the New Jersey Act of May 15, 1907 (Pub. L. 1907, p. 448), mandamus is a proper remedy to enforce an order of the board of railroad commissioners requiring a railroad to reinstate a passenger station. *Board of Railroad Com'rs v. Delaware, L. & W. R. Co.*, 79 N. J. L. 219, 76 Atl. 236.

⁹² *Board of Railroad Com'rs v. Delaware, L. & W. R. Co.*, 79 N. J. L. 219, 76 Atl. 236.

⁹³ *Kansas City, M. & O. R. Co. of Texas v. State*, 106 Tex. 249, 163 S. W. 582.

will issue, that the courts are not authorized in any case so far to control the company's discretion as to dictate the exact spot of the location of the depot, but such location must be left to the company's discretion, limited only by the condition that the public convenience shall be subserved.⁹⁴

The obligation of a railroad or other common carrier to render the same service to all and to treat all alike, may be enforced by mandamus.⁹⁵ Thus the remedy is available to enforce the duty to receive all goods offered for transportation when reasonable regulations adopted for the protection of the carrier and the public have been complied with,⁹⁶ or to prevent discrimination in furnishing cars,⁹⁷ and mandamus will also lie to enforce a railroad's duty to furnish trains for passengers.⁹⁸ The fact that a coal operator and a railroad

⁹⁴ *Florida*, C. & P. R. Co. v. State, 31 Fla. 482, 20 L. R. A. 419, 34 Am. St. Rep. 30, 13 So. 103.

⁹⁵ *Missouri* Pac. R. Co. v. Larabee Flour Mills Co., 211 U. S. 612, 53 L. Ed. 352; *State v. Atlantic Coast Line R. Co.*, 51 Fla. 578, 40 So. 875.

Whenever one engages in the business of common carrier, the obligation of equal service to all arises and that obligation, irrespective of legislative action or special mandate, can be enforced by the courts. *Missouri Pac. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 53 L. Ed. 352.

⁹⁶ *Alabama*. *State v. Mobile & M. R. Co.*, 59 Ala. 321.

Florida. *State v. Atlantic Coast Line R. Co.*, 53 Fla. 689, 44 So. 223, 53 Fla. 650, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359, 44 So. 213.

Georgia. *Southern Exp. Co. v. Rose*, 124 Ga. 581, 5 L. R. A. (N. S.) 619, 53 S. E. 185.

Idaho. *Connolly v. Woods*, 13 Idaho 591, 92 Pac. 573.

Nebraska. *State v. Chicago & N. W. R. Co.*, 83 Neb. 524, 120 N. W. 163.

Pennsylvania. *Loraine v. Pittsburgh, J. E. & E. R. Co.*, 205 Pa. 132, 61 L. R. A. 502, 54 Atl. 580.

West Virginia. *State v. White Oak*

R. Co., 65 W. Va. 15, 28 L. R. A. (N. S.) 1013, 64 S. E. 630.

A railroad which refuses to carry saw logs of others or transport their freight may be compelled to do so. *Connolly v. Woods*, 13 Idaho 591, 92 Pac. 573.

A peremptory writ in favor of a shipper is proper where the relator, who desired to ship hay in carload lots, repeatedly requested cars for such purpose and the railroad failed to furnish such cars, there being no reasonable excuse for the conduct. *State v. Chicago & N. W. R. Co.*, 83 Neb. 524, 120 N. W. 163.

⁹⁷ *West Virginia Northern R. Co. v. United States*, 134 Fed. 198.

A railroad using cars which are engaged in interstate commerce may be compelled to transfer such cars so as to afford equal service to all, where it appears that there has been no action by congress or the Interstate Commerce Commission. *Missouri Pac. R. Co. v. Larabee Flour Mills Co.*, 211 U. S. 612, 53 L. Ed. 352.

⁹⁸ See *Metropolitan West Side El. R. Co. v. Chicago*, 261 Ill. 624, 104 N. E. 216.

Where the duty of a carrier to receive a person at a particular place is clear, the courts may, by writ of

have negotiated a contract whereby coal is to be transported does not preclude relief by mandamus, as a statutory, and not a contractual duty, is involved.⁹⁹ And a proceeding by a coal operator to compel the furnishing of cars cannot be prevented by a contention that the relief is too indefinite to be granted by mandamus.¹ Mandamus will also lie to compel a railroad to construct and maintain a sidetrack and switches for the transportation of goods,² or to resume switching service which is wrongfully discontinued.³

In regard to the delivery of goods, it has been held that mandamus will lie to compel a railroad company to deliver to a particular elevator whatever grain in bulk may be consigned to it,⁴ but the remedy is not available where the elevator is beyond the terminus of the railroad and no right to use a switch track thereto has been acquired.⁵

Mandamus is usually considered the appropriate remedy to compel a railroad to put into effect a schedule of rates fixed by a railroad commission or board of transportation, and which may be charged for hauling freight.⁶ Although it has been held in one state that where

mandate, compel the carrier to discharge such duty. *State v. Ogden Rapid Transit Co.*, 38 Utah 242, 112 Pac. 120.

Mandamus held to lie to compel a railroad to stop trains at a certain station long enough to receive and let off passengers with safety, there being a clear legal duty to do so shown. *Illinois Cent. R. Co. v. People*, 143 Ill. 434, 19 L. R. A. 119, 33 N. E. 173, rev'd 163 U. S. 142, 41 L. Ed. 107.

⁹⁹ *State v. White Oak R. Co.*, 65 W. Va. 15, 28 L. R. A. (N. S.) 1013, 64 S. E. 630.

¹ *Lorraine v. Pittsburg, J., E. & E. R. Co.*, 205 Pa. 132, 61 L. R. A. 502, 54 Atl. 380.

² Where a petitioner signed a contract for putting a track and switches into his gravel pit and the railway company failed to sign it, the remedy was by mandamus. *Gunther v. Chicago, B. & S. R. Co.*, 165 Ill. App. 55.

By mandamus the court may compel a railroad, on terms, to construct and operate a sidetrack and switch connection for the transportation of

coal, it appearing that Code 1906, § 2364, requires such railroads to make reasonable provision for the transportation of coal. *State v. White Oak R. Co.*, 65 W. Va. 15, 28 L. R. A. (N. S.) 1013, 64 S. E. 630. See also *Mystic Milling Co. v. Chicago, M. & St. P. R. Co.*, 131 Iowa 10, 107 N. W. 943.

³ *Larabee Flour Mills Co. v. Missouri Pac. R. Co.*, 74 Kan. 808, 88 Pac. 72.

Mandamus may issue to compel a carrier to resume switching service wrongfully discontinued, notwithstanding the remedy under Laws 1905, p. 557, c. 340, § 4, as to proceedings before the railroad commissioners, as such remedy is sufficiently out of the ordinary course of the law to distinguish it. *Larabee Flour Mills Co. v. Missouri Pac. R. Co.*, 74 Kan. 808, 88 Pac. 72.

⁴ *Chicago & N. W. R. Co. v. People*, 56 Ill. 365, 8 Am. Rep. 690.

⁵ *People v. Chicago & A. R. Co.*, 55 Ill. 95, 8 Am. Rep. 631.

⁶ *State v. Atlantic Coast Line R. Co.*, 48 Fla. 114, 37 So. 652; *Michigan R. Commission v. Michigan Cent.*

a statute imposes a penalty when a railroad discriminates in its charges, a remedy so specific and ample is furnished that mandamus will not lie to compel the railroad to accept freight at a certain rate.⁷

The duty of a railroad to sell commutation tickets may be enforced by mandamus,⁸ and mandamus has also been held the proper remedy to compel a railroad to receive tax receipts given by a tax collector as payment for freight or passage, it appearing that the legal duty to accept such receipts was imposed by statute, and there being no other adequate remedy provided to enforce the statute.⁹

§ 3304. — Street railroads. Mandamus will lie to compel a street railway company to construct, maintain and operate its road for the benefit of the public, if a duty to do these things is imposed by law and there is a violation of such duty, provided performance is not rendered impossible for some reason.¹⁰ It cannot be contended that only the charter obligations of such companies can be enforced by such a remedy, as not all the duties of street railroad companies are contained in their charters,¹¹ and when there is a grant in the nature of a franchise, mandamus will lie to compel the performance of duties to the public imposed on the company.¹² A purchasing company takes the property of the selling company subject to its obligations and may be compelled by proceedings in mandamus to discharge the liabilities of the company purchased.¹³

When a street railway company refuses to extend its lines to a

R. Co., 159 Mich. 580, 124 N. W. 564; State v. Fremont, E. & M. Val. R. Co., 22 Neb. 313, 35 N. W. 118. And see the chapter on Governmental Regulations, *infra*.

An order of a railroad commission fixing a tariff of rates for excess baggage, which is provided by statute to become effective in twenty days after service thereof and which is *prima facie* lawful and reasonable, may be enforced by mandamus. Michigan Railroad Commission v. Michigan Cent. R. Co., 159 Mich. 580, 124 N. W. 564.

⁷ State v. Mobile & M. R. Co., 59 Ala. 321.

⁸ State v. Delaware, L. & W. R. Co., 48 N. J. L. 55, 57 Am. Rep. 543.

⁹ Mobile & O. R. Co. v. Wisdom, 5 Heisk. (Tenn.) 125.

¹⁰ Hamilton Tp. in Mercer County v. Mercer County Traction Co., 88 N. J. L. 485, 97 Atl. 61.

¹¹ Potwin Place v. Topeka Ry. Co., 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 309.

¹² Potwin Place v. Topeka Ry. Co., 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 309.

Where an ordinance granting a street railway the right to construct its roadway in public streets is accepted, mandamus lies to compel the company to operate its road. Potwin Place v. Topeka Ry. Co., 51 Kan. 609, 37 Am. St. Rep. 312, 33 Pac. 309.

¹³ Township of Grosse Pointe v. Detroit & L. St. C. Ry., 130 Mich. 363, 90 N. W. 42.

terminus as prescribed in its franchise, mandamus has been held the proper remedy to compel such extension.¹⁴ In such a case the state might proceed to annul the franchise of the company, but this remedy could not be considered adequate, as it would operate to destroy functions for which the public interest required a continued existence.¹⁵

Mandamus is also the proper remedy to compel the performance of duties in respect to the public highways occupied by street railway companies,¹⁶ and the remedy will lie to compel the construction and maintenance of gates at a crossing,¹⁷ the restoration of track to a condition so that it will not be an obstacle to traffic,¹⁸ the sprinkling of streets¹⁹ and the paving and repair of streets.²⁰

¹⁴ Public Service Commission v. New York R. Co., 77 N. Y. Misc. 487, 136 N. Y. Supp. 720.

¹⁵ Public Service Commission of First Dist. v. New York R. Co., 77 N. Y. Misc. 487, 136 N. Y. Supp. 720.

¹⁶ Borough of Pleasantville v. Atlantic City & S. Traction Co., 75 N. J. L. 279, 68 Atl. 60.

¹⁷ Council Bluffs v. Illinois Cent. R. Co., 158 Iowa 679, 138 N. W. 891.

¹⁸ Emporia v. Emporia Railway & Light Co., 92 Kan. 232, 139 Pac. 1185.

The obligation of a street railway to restore its track to a proper condition devolves upon the company, regardless of its charter or franchise, as one of the common-law duties which it owes to the city and to the public. Emporia v. Emporia Railway & Light Co., 92 Kan. 232, 139 Pac. 1185.

A street railway may be compelled by mandamus to restore its track to a proper condition though the defects are due to a faulty method of paving employed by a paving company pursuant to a contract with the street railway company, and though the city did not object to such method. Emporia v. Emporia Railway & Light Co., 92 Kan. 232, 139 Pac. 1185.

A street railway company may be compelled by mandamus to restore its track to a proper condition though the city has the contract right to make repairs and sue the railway

company therefor and though the paving company and bondsmen may be sued for damages. Emporia v. Emporia Railway & Light Co., 92 Kan. 232, 139 Pac. 1185.

¹⁹ State v. Milwaukee Elec. Railway & Light Co., 144 Wis. 386, 129 N. W. 623.

The fact that the duty of a street railway company to sprinkle its roadbed is a continuing one does not prevent enforcement by mandamus, the legal duty being clear. State v. Milwaukee Elec. Railway & Light Co., 144 Wis. 386, 140 Am. St. Rep. 1025, 129 N. W. 623.

The performance of the duty of a street railway company to sprinkle its roadbed may be compelled by mandamus when the ordinance imposing such duty has been disregarded for five years and the fact that no sprinkling is required between November 1st and April 1st does not prevent relief on the ground that a moot question is presented. State v. Milwaukee Elec. Railway & Light Co., 144 Wis. 386, 140 Am. St. Rep. 1025, 129 N. W. 623.

²⁰ State v. Jacksonville St. R. Co., 29 Fla. 590, 10 So. 590; Borough of Rutherford v. Hudson River Traction Co., 73 N. J. L. 227, 63 Atl. 84.

Where a street railway was required by its franchise to pave the portion of a street occupied by its tracks when the city should pave such street,

The duty to operate cars as required by the street railway company's franchise may be enforced by mandamus,²¹ and an order requiring cars to be operated in both directions will not be interfered with where it does not impose an unwarrantable burden on the company.²² In one case it was held, however, that mandamus was not the proper remedy to compel the operation of a certain number of trains, as a general continuous duty was prescribed and the evidence showed that the company had not the facilities for operating the extra trains required.²³ The duty to operate cars is in some states compelled by proceedings before the railroad commissioners.²⁴

The duty, imposed by franchise, to carry passengers for a certain fare may be enforced by mandamus, a remedy which is preferable to the forfeiture of the franchise,²⁵ and mandamus will lie to enforce such a duty, even when contained in an ordinance which is contractual in nature,²⁶ but the remedy does not lie to enforce the obligations which

and it appeared that the city was paving such street, that the street railway had refused to perform its duty and was not prevented by its financial condition from performing such duty, the evidence was sufficient to warrant the issuance of a writ of mandamus. *Denison & S. Ry. Co. v. Denison* (Tex. Civ. App.), 112 S. W. 780.

Where a street railway was obligated by its franchise to pave the portion of a street occupied by its tracks in the same manner and by using the same material as the city when it paved such street, a contention that the railway was not obliged to begin paving until the city finished paving half of the street and started on the other half was not tenable. Where the pleadings and evidence showed that the city was paving such street with vitrified brick, the street railway was bound to ascertain what kind of material was used and the manner of doing the work. *Denison & S. Ry. Co. v. Denison*, 51 Tex. Civ. App. 321, 112 S. W. 780.

²¹ *State v. Ottumwa Railway & Light Co.*, — Iowa —, 160 N. W. 336.

²² *State v. Ottumwa Railway &*

Light Co., — Iowa —, 160 N. W. 336.

²³ *Public Service Commission for First Dist. v. Interborough Rapid Transit Co.*, 172 N. Y. App. Div. 324, 158 N. Y. Supp. 480.

²⁴ Under sections 1797-2 to 1797-16 of the Wisconsin statutes, the railroad commission is clothed with full authority to act in all controversies as regards the duties of public service corporations, and a court should not issue mandamus to compel a street railway company to operate its lines where service is discontinued because of a strike, but the parties should be left to the remedy prescribed before the railroad commission. *State v. Duluth St. R. Co.*, 153 Wis. 650, 142 N. W. 184.

²⁵ *Public Service Commission v. Westchester St. R. Co.*, 206 N. Y. 209, Ann. Cas. 1914 D 510, 99 N. E. 536. See *People v. Interurban St. R. Co.*, 85 N. Y. App. Div. 407, 83 N. Y. Supp. 622.

²⁶ A street railway may be compelled to transport school children for half fare and to carry mail carriers, policemen or firemen free while in the discharge of their duties, as required by a contract contained in an ordi-

arise wholly from the assent to ordinances having no legislative force and constituting a contract.²⁷

§ 3305. — Telephone companies. Such relations are sustained by a telephone company to the citizens of a district that mandamus will lie to compel such a company to furnish service where a request is properly made for service and the usual charge is tendered.²⁸ And it is no defense that toll stations exist where the applicant may transact his business.²⁹ Nor does the fact that penalties may be recovered for the refusal to furnish service prevent the relief by mandamus, as the right to recover such penalties is a cumulative remedy.³⁰ It has

nance. *Oklahoma City v. Oklahoma R. Co.*, 20 Okla. 1, 16 L. R. A. (N. S.) 651, 93 Pac. 48.

²⁷ *Newark v. North Jersey St. R. Co.*, 73 N. J. L. 265, 62 Atl. 1003.

Mandamus should not issue at the instance of a municipality to compel a street railway to give transfers to its passengers when the obligations of the company to do so arise wholly from its assent to ordinances having no legislative force and constituting a contract. *Mayor, etc., of Newark v. North Jersey St. R. Co.*, 73 N. J. L. 265, 62 Atl. 1003.

²⁸ *United States. Missouri v. Bell Tel. Co.*, 23 Fed. 539.

Indiana. Central U. Tel. Co. v. State, 123 Ind. 113, 24 N. E. 215; *Central U. Tel. Co. v. State*, 118 Ind. 194, 10 Am. St. Rep. 114, 19 N. E. 604.

Iowa. Huffman v. Marcy Mut. Tel. Co., 143 Iowa 590, 23 L. R. A. (N. S.) 1010, 121 N. W. 1033, as to compelling restoration of service.

Kansas. Rea v. Montgomery Home Tel. Co., 87 Kan. 665, 125 Pac. 27; *Crouch v. Arnett*, 71 Kan. 49, 79 Pac. 1086.

Michigan. Mahan v. Michigan Tel. Co., 132 Mich. 242, 93 N. W. 629.

Missouri. State v. Kinloch Tel. Co., 93 Mo. App. 349, 67 S. W. 684.

Nebraska. State v. Nebraska Tel. Co., 17 Neb. 126, 52 Am. Rep. 404, 22 N. W. 237.

New York. People v. Central New York Telephone & Telegraph Co., 41 App. Div. 17, 58 N. Y. Supp. 221.

Pennsylvania. Bell Telephone Co. v. Com., 2 Pa. Cas. 299, 3 Atl. 825.

South Carolina. State v. Citizens' Tel. Co., 61 S. C. 83, 55 L. R. A. 139, 85 Am. St. Rep. 870, 39 S. E. 257.

Virginia. See Ivanhoe Furnace Co. v. Virginia & T. Tel. Co., 109 Va. 130, 63 S. E. 426.

Washington. State v. Sunset Telephone & Telegraph Co., 30 Wash. 676, 71 Pac. 198.

The duty resting upon a telephone company to perform whatever has been legally enjoined upon it by legal and proper authority is a duty resulting from a public trust and station, and may be enforced by mandamus when no other adequate remedy exists. *Rea v. Montgomery Home Tel. Co.*, 87 Kan. 665, 125 Pac. 27.

²⁹ *Central U. Tel. Co. v. State*, 123 Ind. 113, 24 N. E. 215; *Central U. Tel. Co. v. State*, 118 Ind. 194, 10 Am. St. Rep. 114, 19 N. E. 604; *State v. Kinloch Tel. Co.*, 93 Mo. App. 349, 67 S. W. 684.

³⁰ *Central U. Tel. Co. v. State*, 118 Ind. 194, 10 Am. St. Rep. 114, 19 N. E. 604.

been held, however, that mandamus will not lie to compel the installation of a telephone in a house which is used for immoral purposes, especially where it appears that the telephone is used for the furtherance of such purposes.³¹

When a telephone company accepts an ordinance requiring it to furnish service at a reasonable charge, it may be compelled by mandamus to furnish such service in accordance with such ordinance.³² A contract is created where a telephone company accepts a license to use streets under an ordinance requiring it to file a semiannual statement of its gross receipts, but there does not exist a right so clear that mandamus will lie to compel the company to perform its agreement under the theory that the duty to file such statements is a duty owing to the public.³³

§ 3306. — Waterworks and irrigation companies. The duties of water companies are of a public nature³⁴ and mandamus is available to compel such companies to supply water to a municipality³⁵ or its

³¹ *Godwin v. Carolina Telephone & Telegraph Co.*, 136 N. C. 258, 67 L. R. A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203, 48 S. E. 636.

In this case, the court pointed out that no one could be compelled to aid an unlawful undertaking, and just as a telegraph company should refuse to send improper messages, so a telephone company might properly refuse to install an instrument where the party asking therefor admitted that the same was to be used for the transmission of improper messages. *Godwin v. Carolina Telephone & Telegraph Co.*, 136 N. C. 258, 67 L. R. A. 251, 103 Am. St. Rep. 941, 1 Ann. Cas. 203, 48 S. E. 636. To the same effect, see *Cullen v. New York Tel. Co.*, 106 N. Y. App. Div. 250, 94 N. Y. Supp. 290.

³² *People v. Commercial Telephone & Telegraph Co.*, 277 Ill. 265, L. R. A. 1917 D 704, 115 N. E. 379.

³³ *Chicago v. Chicago Tel. Co.*, 230 Ill. 157, 13 L. R. A. (N. S.) 1084, 12 Ann. Cas. 109, 82 N. E. 607.

³⁴ *State v. Joplin Water Works*, 52 Mo. App. 312; *Haugen v. Albina*

Light & Water Co., 21 Ore. 411, 14 L. R. A. 424, 28 Pac. 244.

³⁵ *People v. New Rochelle Water Co.*, 58 N. Y. Misc. 287, 110 N. Y. Supp. 1089.

Mandamus will lie to compel a waterworks company to furnish a proper supply of water as required by its contract with a municipality, when the supply is insufficient. *Troy Water Co. v. Borough of Troy*, 200 Pa. 453, 50 Atl. 259.

It will also lie to compel a waterworks company to erect necessary fire plugs for the purpose of furnishing a sufficient supply of water to extinguish fires. *Borough of Easton v. Lehigh Water Co.*, 97 Pa. St. 554.

If a duty of furnishing water for sewerage purposes is imposed by the charter of a water company or by an ordinance, it is a public duty, and performance may be compelled by mandamus. *Portsmouth, B. & S. Water Co. v. Portsmouth*, 112 Va. 158, 70 S. E. 529.

In a mandamus proceeding brought by a municipality to compel a water

citizens,³⁶ and to prevent discrimination in the service.³⁷ Thus the remedy is available to compel the laying of service pipes,³⁸ and when

company to lay mains in a street and erect fire hydrants, matter pleaded in an amended return to the effect that the location of hydrants should be determined by the street commissioners and that no notice of such determination had been given the company, is not demurrable when pleaded as a partial defense. *People v. New Rochelle Water Co.*, 58 N. Y. Misc. 287, 110 N. Y. Supp. 1089.

36 California. *South Pasadena v. Pasadena Land & Water Co.*, 152 Cal. 579, 93 Pac. 490.

Maine. *Robbins v. Bangor R. & Elec. Co.*, 100 Me. 496, 1 L. R. A. (N. S.) 963, 62 Atl. 136.

Missouri. *State v. Joplin Water Works*, 52 Mo. App. 312.

New Jersey. *Plainfield-Union Water Co. v. Inhabitants of Plainfield*, 83 N. J. L. 332, 85 Atl. 321.

South Carolina. *Poole v. Paris Mountain Water Co.*, 81 S. C. 438, 128 Am. St. Rep. 923, 62 S. E. 874.

West Virginia. *McClagherty v. Bluefield Waterworks & Improvement Co.*, 67 W. Va. 285, 32 L. R. A. (N. S.) 229, 68 S. E. 28.

Contracts between a private water company and municipalities pursuant to statutory authority not only give the municipalities a right to a supply of water, but create a public duty on the part of the company to supply consumers under proper regulations, and this right may be enforced by mandamus by one not supplied. *Plainfield-Union Water Co. v. Inhabitants of Plainfield*, 83 N. J. L. 332, 85 Atl. 321.

Where a water system is established, all persons to whose use the water is appropriated or dedicated are vested with a right to have the supply continued by whomsoever may be in control thereof. *South Pasadena v. Pasadena Land & Water Co.*,

152 Cal. 579, 93 Pac. 490.

If a city acquires a water system of a company, it does so as a corporation engaged in supplying a public use, and the right to mandamus, if the furnishing of water is refused, is adequate, so that an injunction may be denied. *Orcutt v. Pasadena Land & Water Co.*, 152 Cal. 599, 93 Pac. 497.

A petition of mandamus to compel municipal authorities to supply water to an applicant where such supply had been refused, though the public generally was supplied, and the applicant was not in debt to the municipality and had tendered payment for the service desired, is not subject to dismissal on the ground that the plaintiff had a specific legal remedy. *Camilla v. Norris*, 134 Ga. 351, 67 S. E. 940.

37 *Haugen v. Albina Light & Water Co.*, 21 Ore. 411, 14 L. R. A. 424, 28 Pac. 244.

38 *Bartlesville Water Co. v. Bartlesville*, — Okla. —, 150 Pac. 118.

In a mandamus proceeding brought by a municipality to compel a water company to lay mains and establish fire hydrants, the provisions of the original contract or franchise as to additional mains will not be construed to authorize the municipality to command the laying of an additional main in a street that has an adequate main. *People v. New Rochelle Water Co.*, 58 N. Y. Misc. 287, 110 N. Y. Supp. 1089.

A writ of mandamus to compel a water company to make certain tapings and connections between its street mains and the service pipes of a city will not be issued where it appears that, under its contract with the city, meters are to be installed

a consumer is deprived of service because of nonpayment of a bill which he disputes in good faith, the company cannot continue its refusal of water if the consumer is willing to comply with the reasonable rules of the company.³⁹ But mandamus is not available to compel water supply if it appears that the applicant cannot utilize the water if supplied.⁴⁰ And in one case injunction was held the proper remedy, as it appeared that the mandamus proceeding could not be heard by the court until later in the winter and the consumer would in the meantime be deprived of water.⁴¹

Mandamus is the proper remedy to compel irrigation companies to supply water for purposes of irrigation.⁴² Relief of this nature must be immediate to be effective, and the remedy of mandamus is of such a summary character that it is highly appropriate. In addition, it has been held that the courts will be liberal in matters of pleading and practice when the remedy is sought, so that such remedy may be

upon each of the service connections, and the city will not allow such meters. *Portsmouth, B. & S. Water Co. v. Portsmouth*, 112 Va. 158, 70 S. E. 529.

Where a franchise exists requiring a water company to supply a city and its inhabitants with water, the city may compel such supply by mandamus, and it is not required to construct connections with the mains of the company and then look to such company for reimbursement for its expenditures. *International Water Co. v. El Paso*, 51 Tex. Civ. App. 321, 112 S. W. 816.

A city cannot be deprived of its right to mandamus to compel a water company to supply water by the fact that such water company has contracts with consumers whereby they are to defray the cost of connecting pipes, and, since it was the duty of the water company to lay such pipes at its own cost, such contracts are not binding. *International Water Co. v. City of El Paso*, 51 Tex. Civ. App. 321, 112 S. W. 816.

Where a judgment requires a water company to lay connecting pipes from its mains to the property line on the

street, on such streets where it has water mains, it is not erroneous. *International Water Co. v. El Paso*, 51 Tex. Civ. App. 321, 112 S. W. 816.

³⁹ *Poole v. Paris Mountain Water Co.*, 81 S. C. 438, 128 Am. St. Rep. 923, 62 S. E. 874.

⁴⁰ Thus mandamus will not be awarded to compel a city to supply water to a village within its territorial limits, where the village is not in a position to receive such water, has no system of waterworks and cannot utilize the water if supplied. *People v. Chicago*, 146 Ill. App. 623.

⁴¹ *Bourke v. Oleott Water Co.*, 84 Vt. 121, Ann. Cas. 1912 D 108, 78 Atl. 715.

⁴² *Miller v. Imperial Water Co. No. 8*, 156 Cal. 27, 24 L. R. A. (N. S.) 372, 103 Pac. 227; *Merrill v. Southside Irrigation Co.*, 112 Cal. 426, 44 Pac. 720; *Price v. Riverside Land & Irrigating Co.*, 56 Cal. 431; *Combs v. Agricultural Ditch Co.*, 17 Colo. 146, 31 Am. St. Rep. 275, 28 Pac. 966; *Townsend v. Fulton Irrigating Ditch Co.*, 17 Colo. 142, 29 Pac. 453; *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487.

speedily given in cases in which the applicant is entitled thereto.⁴³

The remedy is not available to compel the furnishing of a specified flow of water nor to secure the perpetual right to use water,⁴⁴ and a stockholder who refuses to pay his share of a maintenance fund has been held not entitled to demand and receive water from the irrigation company.⁴⁵

§ 3307. Foreign corporations. A number of the duties of foreign corporations which may be enforced by mandamus have been referred to in the prior sections in connection with the specific duty involved, and will further be discussed in connection with the law of foreign corporations which is hereinafter treated.⁴⁶ In addition it may be mentioned that the remedy of mandamus has been held not available to compel such a company to perform the necessary acts which are prerequisite to its right to do business in a state.⁴⁷

IV. PROCEDURE

§ 3308. In General. A complete and exhaustive treatment of the procedure in mandamus actions is without the scope of this work, but it is thought proper to include some of the general principles and especially the matters of procedure arising in and affecting actions against corporations or their officers.

§ 3309. Preliminary requisites; jurisdiction. Usually an express demand or request must be made on a defendant to perform the act sought to be enforced by the writ, before making application for mandamus.⁴⁸

The district courts of the United States cannot issue a writ of mandamus as an original and independent remedy, in the absence of statutory authority, and they are limited to its use as a process in the

⁴³ *Townsend v. Fulton Irrigating Ditch Co.*, 17 Colo. 142, 29 Pac. 453.

⁴⁴ *Perrine v. San Jacinto Valley Water Co.*, 4 Cal. App. 376, 88 Pac. 293; *Townsend v. Fulton Irrigating Ditch Co.*, 17 Colo. 142, 29 Pac. 453.

Under a contract requiring an irrigation company to supply a continuous flow of 10 inches of water or to deliver the same in cumulated quantities at periods of not less than one month, the delivery of such cumulated

quantities will not be enforced by mandamus. *Perrine v. San Jacinto Valley Water Co.*, 4 Cal. App. 376, 88 Pac. 293.

⁴⁵ *Swanger v. Porter*, 87 Neb. 764, 128 N. W. 516.

⁴⁶ See chapter on Foreign Corporations, *infra*.

⁴⁷ *Secretary of State v. National Salt Co.*, 126 Mich. 644, 86 N. W. 124.

⁴⁸ *Price v. Riverside Land & Irrigating Co.*, 56 Cal. 431.

enforcement of rights in aid of a jurisdiction previously acquired by the court for other purposes.⁴⁹

A mandamus proceeding brought to compel the inspection of corporate books is not affected by the fact that another suit for an injunction is subsequently brought in another court by the corporation, it being alleged in the second suit that the petitioner in the mandamus action had entered into a conspiracy with others to destroy the corporation's business and that this was the reason for his desire to inspect the books.⁵⁰

§ 3310. Parties. In proceedings to compel the performance of public duties, the petition is properly brought in the name of the state, on the relation of its prosecuting attorney.⁵¹ However, a private person may move for a mandamus to enforce a public duty, not due to the government as such, without the intervention of the government law officer,⁵² and the writ will lie at the instance of a private relator to compel the performance of a duty for the benefit of the relator

⁴⁹ *United States v. Nashville, C. & St. L. Ry.*, 217 Fed. 254.

⁵⁰ *Roberts v. Munroe*, — Tex. Civ. App. —, 193 S. W. 734.

⁵¹ *Northern Pac. R. Co. v. Washington Territory*, 142 U. S. 492, 35 L. Ed. 1092; *State v. Kansas Flour Mills Co.*, — Kan. —, 164 Pac. 1170.

Where the object is the enforcement of a public right, the people are regarded as the real party, and the relator need not show that he has any legal interest in the result. *Florida, C. & P. R. Co. v. State*, 31 Fla. 482, 20 L. R. A. 419, 34 Am. St. Rep. 30, 13 So. 103.

Where a writ is applied for by the attorney general on behalf of the people, it must be assumed that it was issued only to subserve a public interest and to protect a public right. *People v. Rome, W. & O. R. Co.*, 103 N. Y. 95, 8 N. E. 369.

Where a common carrier fails to perform its duty to the public by furnishing proper facilities for the transportation of goods offered, the proceedings at common law and under the statute (Act of June 8, 1893)

should be instituted by the commonwealth at the instance of the attorney general. *Lorraine v. Pittsburg, J., E. & E. R. Co.*, 205 Pa. 132, 61 L. R. A. 502, 54 Atl. 580.

A private individual has no right to compel a street railway company to issue transfers and carry passengers over certain connecting lines, by the remedy of mandamus, where there is no allegation that the relator has been refused the right and where the proceeding is brought to enforce a statutory duty, since such proceeding should be brought by the attorney general. *People v. Interurban St. R. Co.*, 85 N. Y. App. Div. 407, 83 N. Y. Supp. 622.

⁵² *Union Pac. R. Co. v. Hall*, 91 U. S. 343, 23 L. Ed. 428.

Citizens and taxpayers are proper parties to bring a mandamus proceeding to compel a railroad to restore a street to as good condition as it was prior to the laying of tracks therein, there being a failure to perform a duty owed to the public. *State v. Wabash R. Co.*, 206 Mo. 251, 103 S. W. 1137.

or the class of individuals to which he belongs,⁵³ but only when he is specially and peculiarly interested in the enforcement of the duty involved.⁵⁴ If private interests only are involved, an application by the attorney general on behalf of the people is not proper.⁵⁵

⁵³ *State v. Paterson*, N. & N. Y. R. Co., 43 N. J. L. 505.

In a proceeding to enforce the inspection of books and papers under Gen. St. § 2672, held that the stockholders representing one-tenth of the stock subscribed were the real parties in interest and the proper relators and they were not interested in having a certificate assigned to a committee of one appointed by them. *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

⁵⁴ *Florida*. *Florida, C. & P. R. Co. v. State*, 31 Fla. 482, 20 L. R. A. 419, 34 Am. St. Rep. 30, 13 So. 103.

Maine. *Robbins v. Bangor R. & Elec. Co.*, 100 Me. 496, 1 L. R. A. (N. S.) 963, 62 Atl. 136.

Pennsylvania. *Loraine v. Pittsburgh, J., E. & E. R. Co.*, 205 Pa. 132, 61 L. R. A. 502, 54 Atl. 580.

Washington. *State v. Darwin*, 81 Wash. 1, 142 Pac. 441.

West Virginia. *McClagherty v. Bluefield Waterworks & Improvement Co.*, 67 W. Va. 285, 32 L. R. A. (N. S.) 229, 68 S. E. 28.

Mandamus does not lie at the suit of an individual for the enforcement of those rights which he holds in common with the public at large, but it does lie when his personal and particular rights have been invaded beyond those that he enjoys as part of the public and that are common to everyone. *Robbins v. Bangor R. & Elec. Co.*, 100 Me. 496, 1 L. R. A. (N. S.) 963, 62 Atl. 136.

It is held in England that "in general, all those who are legally capable of bringing an action are also legally capable of applying to the Court of King's Bench for the writ of mandamus. This is true in all cases, it is

believed, where the defendant owes a duty in the performance of which the prosecutor has a peculiar interest." *Loraine v. Pittsburgh, J., E. & E. R. Co.*, 205 Pa. 132, 61 L. R. A. 502, 54 Atl. 580.

This principle is obvious. It is like the principle applicable to public nuisances whereby an individual living on a road which gives him access to his home or land may maintain a suit for an injunction when he is deprived of access or is in any way peculiarly and individually interested. *McClagherty v. Bluefield Waterworks & Improvement Co.*, 67 W. Va. 285, 32 L. R. A. (N. S.) 229, 68 S. E. 28.

Where a railroad refuses to supply a coal operator with cars unless he will sell his coal to a company controlled by the railroad's president at a price below the market price, the operator can bring mandamus to compel the railroad to supply cars, and it is immaterial that other shippers are treated in the same manner, as in each case the injury is special. *Loraine v. Pittsburgh, J., E. & E. R. Co.*, 205 Pa. 132, 61 L. R. A. 502, 54 Atl. 580.

Mandamus is a common-law remedy to compel action and a person desiring a commodity manufactured and sold by a quasi public corporation may resort to mandamus to compel a supply when the supply has not yet been commenced and in equity when the supply is being furnished to enjoin its stoppage. *Seaton Mountain Elec. Light, Heat & Power Co. v. Idaho Springs Inv. Co.*, 49 Colo. 122, 33 L. R. A. (N. S.) 1078, 111 Pac. 834.

⁵⁵ *People v. Rome, W. & O. R. Co.*, 103 N. Y. 95, 8 N. E. 369.

The writ will lie at the suit of a city to compel the performance of a specific public service by a corporation which has accepted its franchise imposing such service.⁵⁶ The duty of a water company to furnish water may be enforced by a private person⁵⁷ or the writ may be asked by a city as relator.⁵⁸ There is a clearly drawn distinction between cases where mandamus is awarded to compel the corporation to discharge some duty owing to the public and not to a municipality and where a clear right to the relief is thought to exist and cases in which the duty or obligation is owed primarily to the municipality.⁵⁹

In seeking to enforce a public duty, the proceedings will not be quashed because of a technical misjoinder of parties as relators.⁶⁰

The writ may be taken distributively when the action of several is necessary to the accomplishment of the end sought⁶¹ and it is proper to bring in parties who are likely to be injuriously affected by the judgment.⁶² But technically, the only necessary parties are the plaintiff

Where a railroad peremptorily refuses to perform its duty of supplying a coal operator with cars to transport his coal, unless he will agree to sell his coal to another company owned by the president of the railroad at a price much less than what it is worth, the coal operator can institute mandamus, without the intervention of the attorney general, to compel the railroad to supply him with cars. *Lorraine v. Pittsburg, J., E. & E. R. Co.*, 205 Pa. 132, 61 L. R. A. 502, 54 Atl. 580.

⁵⁶ *Bartlesville Water Co. v. Bartlesville*, — Okla. —, 150 Pac. 118.

⁵⁷ A resident of a city may in his own name maintain mandamus against an incorporated water company to compel it to furnish him water as required by its franchise. *McClougherty v. Bluefield Waterworks & Improvement Co.*, 67 W. Va. 285, 32 L. R. A. (N. S.) 229, 68 S. E. 28.

⁵⁸ *International Water Co. v. El Paso*, 51 Tex. Civ. App. 321, 112 S. W. 816.

In a mandamus proceeding to compel a water company to lay mains and erect fire hydrants, brought by a municipality, the right of an individual

consumer cannot be determined. *People v. New Rochelle Water Co.*, 58 N. Y. Misc. 287, 110 N. Y. Supp. 1089.

Where a city granted to a person a franchise to maintain a waterworks system whereby water should be supplied to such city and its inhabitants, the city was properly the plaintiff in a suit to enforce the duties imposed. *International Water Co. v. El Paso*, 51 Tex. Civ. App. 381, 112 S. W. 816.

⁵⁹ *Chicago v. Chicago Tel. Co.*, 230 Ill. 157, 13 L. R. A. (N. S.) 1084, 12 Ann. Cas. 109, 82 N. E. 607.

The city is a proper relator in a mandamus proceeding to compel a street railway to sprinkle its roadbed as required by an ordinance, since the duty is a public one and since the public health is involved. *State v. Milwaukee Elec. Railway & Light Co.*, 144 Wis. 386, 140 Am. St. Rep. 1025, 129 N. W. 623.

⁶⁰ *Florida, C. & P. R. Co. v. State*, 31 Fla. 482, 20 L. R. A. 419, 34 Am. St. Rep. 80, 13 So. 103.

⁶¹ *West Virginia Northern R. Co. v. United States*, 134 Fed. 198.

⁶² The practice is common and commendable in order that they may have an opportunity to be heard in their

who asserts the right to have an act done and the defendant upon whom the public duty rests to perform it.⁶³

§ 3311. Pleading. Petitions in mandamus are governed by the rules controlling pleadings in ordinary actions,⁶⁴ and material facts should be alleged by direct averment and not by inference,⁶⁵ definiteness and certainty being necessary.⁶⁶ Conclusions or matters of argu-

own behalf, and in a proper case the court will suspend proceedings until this is done. *State v. Parsons St. Railroad & Electrical Co.*, 81 Kan. 430, 28 L. R. A. (N. S.) 1082, 105 Pac. 704.

Where a party is improperly joined and a judgment for a peremptory writ goes against the defendants generally, which is good as to the others but erroneously entered against one defendant, the proceedings fail. *Borough of New Brighton v. New Brighton Water Co.*, 247 Pa. 232, 93 Atl. 327.

Even if a court had jurisdiction to require an interchange of connections and business between two telephone companies, it will not undertake to exercise such jurisdiction in a proceeding to which one of them is not a party. *Ivanhoe Furnace Co. v. Virginia & T. Tel. Co.*, 109 Va. 130, 63 S. E. 426.

⁶³ *State v. Parsons St. Railroad & Electrical Co.*, 81 Kan. 430, 28 L. R. A. (N. S.) 1082, 105 Pac. 704.

In mandamus by the state to compel a street railway company to construct a subway beneath the tracks of a railroad the city is not a necessary party. *State v. Parsons St. Railroad & Electrical Co.*, 81 Kan. 430, 28 L. R. A. (N. S.) 1082, 105 Pac. 704.

Where a city desires an inspection of books of a water company (under Act of April 29, 1874, Pub. L. 95, § 34, cl. 7) which is about to purchase, a lessee company may be granted leave to come in as a party defendant in a proper case, but where it is reasonable to assume that the

books of the lessor company contain all the necessary information, the lessee is not a necessary party. *Borough of New Brighton v. New Brighton Water Co.*, 247 Pa. 232, 93 Atl. 327.

In a mandamus proceeding to compel the inspection of books of a foreign corporation, the joinder of the corporation in the alternative writ is not fatal, although the writ should run only against the clerk. *State v. Lake Torpedo Boat Co.*, 90 Conn. 638, L. R. A. 1916 F 1033, 98 Atl. 580.

In a mandamus proceeding to compel the inspection of corporate books, the treasurer of the corporation who is also a director is a proper party. *People v. Weber Co.*, 159 Ill. App. 588.

⁶⁴ *People v. Board of Trade of Chicago*, 125 Ill. App. 20, aff'd 224 Ill. 370, 79 N. E. 611; *State v. Lady Bryan Min. Co.*, 4 Nev. 400.

⁶⁵ *State v. Atlantic Coast Line R. Co.*, 48 Fla. 114, 37 So. 652.

⁶⁶ If the alternative writ states the facts on which the demand is based with sufficient precision to express the right of relator and the duty of the respondent in such a manner that the ordinary mind may easily apprehend them, there is sufficient certainty to defeat a demurrer. *State v. Atlantic Coast Line R. Co.*, 48 Fla. 114, 37 So. 652.

An application for mandamus against the treasurer of a mutual insurance company to compel him to pay a judgment against the company will be denied where it is not averred with definiteness or certainty that a portion of the reserve fund was in the

ment may be stricken, in conformity with the usual practice.⁶⁷

The alternative writ takes the place of the declaration at law or the complaint⁶⁸ to which the return is the answer.⁶⁹

In order to make out a prima facie case, the writ should allege all the essential facts which show the duty and impose the legal obligation on the respondent to perform the acts demanded of him, as well as the facts that entitle the relator to invoke the aid of the court in compelling the performance of such duty or obligation.⁷⁰ A petition for mandamus to compel the performance of a statutory duty, such as the transfer of stock, must allege all the statutory requisites showing the right to the writ.⁷¹ When it is sought to enforce a schedule of rates prescribed by a railroad commission, instances of violations of the order are competent as evidence, but such instances need not be pleaded.⁷² Orders of such commissions or boards are sufficiently pleaded when it is shown that the board had jurisdiction and made the order after notice and opportunity for a hearing.⁷³ A general allega-

hands of such officer when the petition was filed. *Michener v. Carroll*, 135 Ala. 409, 33 So. 168.

Where an alternative writ of mandamus alleges that the respondent railroad has violated an order of railroad commissioners in discontinuing passenger trains without permission, that respondent neglects and refuses to apply for such permission and denies the validity of the rule requiring permission, a present disregard of a specific duty is shown, and the allegations are not too general and uncertain. *State v. Atlantic Coast Line R. Co.*, 60 Fla. 465, 54 So. 394.

⁶⁷ In a mandamus proceeding to compel a railroad to put in an open crossing, allegations in the answer stating that such crossing would increase the hazards of operating the road, that the law does not contemplate the putting in of such a crossing for a private person, etc., were properly stricken as stating mere conclusions or matters of argument. *Boggs v. Chicago, B. & Q. R. Co.*, 54 Iowa 435, 6 N. W. 744.

⁶⁸ *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am.

St. Rep. 603, 17 Pac. 487; *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383; *Illinois Cent. R. Co. v. People*, 143 Ill. 434, 19 L. R. A. 119, 33 N. E. 173, rev'd 163 U. S. 142, 41 L. Ed. 107.

⁶⁹ *Illinois Cent. R. Co. v. People*, 143 Ill. 434, 19 L. R. A. 119, 33 N. E. 173, rev'd 163 U. S. 142, 41 L. Ed. 107.

⁷⁰ *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

⁷¹ The Pennsylvania Act of June 8, 1893 (Pub. L. 345), § 2, requires the petitioner to set forth the facts relied upon, the duty sought, his interest in the result, the name of the person at whose hands performance is sought, demand and refusal of the act and that the petitioner is without other adequate remedy at law. *Deal v. Erie Coal & Coke Co.*, 244 Pa. 622, 90 Atl. 915.

⁷² *State v. Atlantic Coast Line R. Co.*, 48 Fla. 114, 37 So. 652.

⁷³ *Board of Railroad Com'rs v. Delaware, L. & W. R. Co.*, 79 N. J. L. 219, 76 Atl. 236.

An alternative writ requiring a railroad to reinstate a station, as or-

tion of a public duty with statements of the violation of such duty in terms sufficient to enable the court to enforce compliance with the writ has been held sufficient on a motion to quash, when the duty involved was a general one of such nature that some discretion as to performance was vested in the respondent.⁷⁴

In the case of a voluntary appearance and demurrer, the sufficiency of the complaint or petition is determined as in other actions.⁷⁵ If the respondent answers the allegations of the petition, he thereby waives cause for demurrer.⁷⁶ Usually a demurrer will lie to an answer to a petition for mandamus,⁷⁷ and it has even been held that portions of the answer which can be segregated may be demurred to.⁷⁸ If a denial is too general, objection should be taken by a special demurrer and not urged under a general one.⁷⁹ It is sufficient if the answer responds without ambiguity or evasion to the assertions of the alternative

dered by a board of railroad commissioners under Pub. L. 1907, p. 448, which writ showed that the commission had jurisdiction and made its order after notice and hearing, is sufficient to entitle the relator to a peremptory writ commanding obedience to the order. *Board of Railroad Com'rs v. Delaware, L. & W. R. Co.*, 79 N. J. L. 219, 76 Atl. 236.

⁷⁴ *State v. Atlantic Coast Line R. Co.*, 53 Fla. 689, 44 So. 223.

⁷⁵ *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383; *Citizens Nat. Bank v. State*, 179 Ind. 621, 45 L. R. A. (N. S.) 1075, 101 N. E. 620.

If an alternative writ shows a prima facie case it is not demurrable. *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

In a mandamus proceeding to compel the inspection of corporate books, where the relator, instead of asking for an alternative writ, stood upon the moving papers and opposing affidavits, he was in the position of a demurrant. *People v. Consolidated Fire Alarm Co.*, 142 N. Y. App. Div. 753, 127 N. Y. Supp. 348.

On a demurrer to an alternative writ, if it appears that the relators are not entitled to have the order

enforced as a whole, the demurrer should be sustained with leave to amend. *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

Where a petition shows a clear and undoubted right on the part of the public to the establishment of a freight and passenger station on a line of railroad in a certain city, a demurrer thereto should be overruled. *People v. Chicago & A. R. Co.*, 130 Ill. 175, 22 N. E. 857.

⁷⁶ *Illinois Cent. R. Co. v. People*, 143 Ill. 434, 19 L. R. A. 119, 33 N. E. 173, rev'd 163 U. S. 142, 41 L. Ed. 107.

⁷⁷ *Jackson v Hopkins*, 113 Md. 557, 78 Atl. 4; *Barney v. State*, 42 Md. 480.

⁷⁸ So where an answer is divided into paragraphs or is divided in such a way that portions objected to can be segregated from the rest of the answer, there is no objection to a demurrer to parts of the answer, although it would perhaps be better procedure to file a motion to strike out or expunge the objectionable matter. *Jackson v Hopkins*, 113 Md. 557, 78 Atl. 4.

⁷⁹ *People v. Board of Trade of Chicago*, 125 Ill. App. 20, aff'd 224 Ill. 370, 79 N. E. 611.

writ or of the petition which takes its place.⁸⁰ In the enforcement of duties determined by a railroad commission, if discrimination exists, it should be set up by a return and not by a motion to quash or by a demurrer.⁸¹ A demurrer to the return reaches back to the relation.⁸²

The mandatory part of the alternative writ should conform to the allegations⁸³ and should be so definite and specific that performance can readily be enforced by the court.⁸⁴ The writ must be enforced as a whole, if at all⁸⁵ and the order or judgment should be clear and complete in itself,⁸⁶ specifically stating the act to be performed.⁸⁷ It

⁸⁰ The doctrine that "certainty to a certain intent in every particular" is necessary in a return or answer, has been generally relaxed. *People v. Board of Trade of Chicago*, 125 Ill. App. 20, aff'd 224 Ill. 370, 79 N. E. 611.

⁸¹ *State v. Atlantic Coast Line R. Co.*, 59 Fla. 612, 52 So. 4.

⁸² *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760.

This is on the principle that notwithstanding the defect of the pleading demurrer to, the court will give judgment against the party whose pleading was first defective in substance. *State v. Milwaukee Chamber of Commerce*, 47 Wis. 670, 3 N. W. 760.

⁸³ *State v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359, 44 So. 213.

Great care, particularity and certainty is required in the preparation of the mandatory part of an alternative writ and it must not require more to be done than is justified by the recitals. *Florida, C. & P. R. Co. v. State*, 31 Fla. 482, 20 L. R. A. 419, 34 Am. St. Rep. 30, 13 So. 103.

Since an alternative writ stands as the pleading of relators, if they ask too much, the respondents may show this as a sufficient reason for not complying with the writ. *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383.

⁸⁴ *State v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 13 L. R. A. (N. S.)

320, 12 Ann. Cas. 359, 44 So. 213.

When a writ of mandamus issues to enforce the performance by a common carrier of its duty to the public, the mandatory clause of the writ should state with sufficient definiteness the particular duty required to be performed, so as to enable the defendant to perform the duty with the writ as a guide. *State v. Atlantic Coast Line R. Co.*, 53 Fla. 689, 44 So. 223.

⁸⁵ *Merchants Broom Co. v. Butler*, 70 Fla. 397, 70 So. 383; *State v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359, 44 So. 213.

If an order of railroad commissioners contains a material and mandatory provision which does not appear from the terms of the alternative writ to be within their power and such writ commands a compliance forthwith, a demurrer thereto will be sustained. *State v. Atlantic Coast Line R. Co.*, 51 Fla. 578, 40 So. 875.

⁸⁶ *People v. Chicago*, 146 Ill. App. 623.

A judgment which directs a city to supply water to a village when such village shall notify such city in writing that it is ready to receive the water, is bad. *People v. Chicago*, 146 Ill. App. 623.

⁸⁷ *Denison & S. Ry. Co. v. Denison* (Tex. Civ App.), 112 S. W. 780.

Party commanded must be informed of what he is required to do in terms so specific that he can know the precise duty required and the extent of

has been held that an order dealing with the discretion as to the manner of performance of the duty is improper⁸⁸ and usually the manner of performance need not be directed.⁸⁹ The duty of a railroad to cease abandonment of a station may be stated in general terms, and the writ is then sufficient.⁹⁰ A command to trustees to call an election necessarily includes the order to do it in the manner prescribed by law.⁹¹

The peremptory writ should conform to the commands of the alternative writ,⁹² and the facts must be undisputed before such a writ

it. *State v. Mobile & M. R. Co.*, 59 Ala. 321.

The range of action required of the respondent cannot be left to indiscriminate outside ascertainment, nor can he be required to look dehors the writ to ascertain his duty. *Florida, C. & P. R. Co. v. State*, 31 Fla. 482, 20 L. R. A. 419, 34 Am. St. Rep. 30, 13 So. 103.

An order to a railroad to receive and transport bales of cotton without specifying any number is too indefinite. *State v. Mobile & M. R. Co.*, 59 Ala. 321.

Where a street railway company is required by the terms of the franchise under which it is operating, to pave the portion of the street between its track rails and one foot on the outside of each rail in the same manner and at the same time as the streets shall be paved, a judgment ordering that a peremptory writ of mandamus issue directing such street railway to forthwith "pave that portion of Main Street occupied by its tracks and twelve inches on the outside of the rails, in the same manner and with the same kind of material and at the same time that the city does its part of the work," is not objectionable as not specifically stating the act to be done. *Denison & S. Ry. Co. v. Denison* (Tex. Civ. App.), 112 S. W. 780.

⁸⁸ In a mandamus proceeding to require a company maintaining a dam to keep a road free from obstructions, a portion of the writ requir-

ing the obstructions to be prevented by altering the course or bed of the road was improper, as the manner of preventing the mischief should be left to the discretion of the corporation. *State v. Ousatonie Water Co.*, 51 Conn. 137.

⁸⁹ In a mandamus proceeding to compel an electric light company to furnish service, a mandate which merely requires the respondent to furnish service is sufficient. *State v. Consumers' Power Co.*, 119 Minn. 225, 41 L. R. A. (N. S.) 111, Ann. Cas. 1914 B 19, 137 N. W. 1104.

⁹⁰ *State v. New Haven & N. R. Co.*, 41 Conn. 134.

In a mandamus proceeding to compel a railroad to cease abandonment of a station, a portion of the writ requiring a passenger train to stop daily at such station was beyond the jurisdiction of the court. *State v. New Haven & N. R. Co.*, 41 Conn. 134.

⁹¹ *State v. Lady Bryan Min. Co.*, 4 Nev. 400.

⁹² *State v. Ousatonie Water Co.*, 51 Conn. 137; *State v. Bank of Conception*, 174 Mo. App. 589, 163 S. W. 945; *State v. Joplin Water Works*, 52 Mo. App. 312.

Where no amendment is made to an alternative writ, the peremptory writ follows its form. *Borough of New Brighton v. New Brighton Water Co.*, 247 Pa. 232, 93 Atl. 327.

The rule that the peremptory writ must conform strictly to the alternative mandamus, means that the per-

may issue.⁹³ Such a writ which commands the performance of a duty imposed by statute, following the statutory language, is not objectionable.⁹⁴ The only return that can be made to a peremptory writ is a certificate to the effect that the requirements of the writ have been complied with.⁹⁵

Where mandamus issues to enforce a mere private right such as the right to inspect books, it should be based upon facts duly verified by oath, but in the case of applications brought for the enforcement of public rights this is not necessary.⁹⁶ Under a statute prescribing that the writ shall be issued upon affidavit, the petition need not have the verification attached to it.⁹⁷

The rules relating to the amendment of pleadings are applicable to mandamus,⁹⁸ and the alternative writ may be amended, though the substitution of a new and wholly different cause of action will not be permitted.⁹⁹ If an alternative writ is amended after service, it need

empty writ must not materially enlarge the substantial terms of the rule absolute or of the alternative writ nor exceed them beyond adding merely incidental requirements. *People v. Dutchess & C. R. Co.*, 58 N. Y. 152, citing and quoting cases explaining the rule.

Where a peremptory writ differs, in the details of the general command, from the alternative writ, and commands a restoration of a highway by a railroad in a manner less onerous than in the alternative writ, the general command being the same, it will not be superseded by the alternative writ because of the variance. *People v. Dutchess & C. R. Co.*, 58 N. Y. 152.

⁹³ *Hitchcock v. Union Ferry Co. of New York & Brooklyn*, 157 N. Y. App. Div. 328, 142 N. Y. Supp. 247.

⁹⁴ Where a peremptory writ is ordered to issue, and the petition prayed for the corporation "to allow the petitioner to inspect the records and stock book" and "to take copies and minutes therefrom of such parts as concern her interest," it could not be contended that the writ should be modified so as to permit an inspection of the corporate records only and not the records of the directors' meet-

ings, the writ following the language of the statute. *White v. Manter*, 109 Me. 408, 42 L. R. A. (N. S.) 332, 84 Atl. 890.

⁹⁵ *Public Service Commission for First Dist. v. Interborough Rapid Transit Co.*, 172 N. Y. App. Div. 324, 158 N. Y. Supp. 480.

⁹⁶ *State v. Lake Torpedo Boat Co.*, 90 Conn. 638, L. R. A. 1916F 1033, 98 Atl. 580.

⁹⁷ *State v. Wright*, 10 Nev. 167.

⁹⁸ *State v. White Oak R. Co.*, 65 W. Va. 15, 28 L. R. A. (N. S.) 1013, 64 S. E. 630.

Rev. St 1909, § 1864, makes special provision for amendments in mandamus. *State v. Doe Run Lead Co.*, — Mo. App. —, 178 S. W. 298.

Where request in some form is made therefor, it is clearly proper to amend an alternative writ in order that it may not in terms go beyond the relief warranted and so that the peremptory writ may properly follow it. *State v. Doe Run Lead Co.*, — Mo. App. —, 178 S. W. 298.

⁹⁹ *Wheeler v. Northern Colorado Irrigation Co.*, 10 Colo. 582, 3 Am. St. Rep. 603, 17 Pac. 487.

The alternative writ may be amended, where the substantive mat-

not be then served in its amended form,¹ in some jurisdictions.

An application for intervention, in a proceeding to compel an election of trustees, will be denied where the applicant's rights are not prejudicially affected.²

§ 3312. Trial. Under some statutes the court is required to inquire into the facts and grant final judgment either dismissing the action or directing a writ of mandate to issue, even where there is no appearance by the corporation.³

In a proceeding to reinstate officers where it appears that they were removed arbitrarily and without jurisdiction, the costs will be taxed against the defendants.⁴

§ 3313. Appeal and error. An appeal will be entertained when it appears that the court had no jurisdiction of the controversy.⁵ A judgment based on questions of fact will not be reversed if there is substantial evidence supporting it,⁶ and objections to a writ as not including necessary parties will not be considered when urged for the first time on appeal.⁷

ter is sufficient to justify a part but not all that is commanded by the writ, so as to make it conform to the mandate of the peremptory writ awarded. *State v. White Oak R. Co.*, 65 W. Va. 15, 28 L. R. A. (N. S.) 1013, 64 S. E. 630.

An alternative writ may be amended. *West Virginia Northern R. Co. v. United States*, 134 Fed. 198; *State v. Atlantic Coast Line R. Co.*, 53 Fla. 650, 13 L. R. A. (N. S.) 320, 12 Ann. Cas. 359, 44 So. 213.

Thus an amendment whereby an alternative writ to compel inspection of books is brought within the terms of the statute, is proper. *State v. Doe Run Lead Co.*, — Mo. App. —, 178 S. W. 298.

¹ *State v. White Oak R. Co.*, 65 W. Va. 15, 28 L. R. A. (N. S.) 1013, 64 S. E. 630.

² *State v. Wright*, 10 Nev. 167.

³ *Public Service Commission for First Dist. v. Interborough Rapid Transit Co.*, 172 N. Y. App. Div. 324, 158 N. Y. Supp. 480.

⁴ *State v. Board Officers of Gegen-*

seitige Unterstuetzungs Gesellschaft Germania, 144 Wis. 516, 129 N. W. 630.

⁵ *People v. National Slavonic Soc. of United States of America*, 144 N. Y. App. Div. 574, 129 N. Y. Supp. 603.

⁶ The judgment in a mandamus proceeding to compel inspection of corporate books on questions of fact may not be set aside on appeal if it appears that such judgment is supported by substantial evidence. *State v. German Mut. Life Ins. Co. of St. Louis*, 169 Mo. App. 354, 152 S. W. 618.

Where mandamus proceedings were brought by a subscriber to compel a telephone company to replace a telephone instrument in his residence, and there was a disputed question of fact as to whether discrimination had been practiced on the subscriber, the appellate court refused to disturb a general finding and judgment of the lower court in favor of the company. *Crouch v. Arnett*, 71 Kan. 49, 79 Pac. 1986.

⁷ *Pease v. Chicago Crayon Co.*, 167 Ill. App. 31.

CHAPTER 51

INJUNCTIONS

- § 3314. Scope of chapter.
- § 3315. Character of remedy; balance of convenience, etc.
- § 3316. Character of damage, irreparable injury, etc.
- § 3317. Preliminary and interlocutory injunctions.
- § 3318. Mandatory injunction—Power to issue, etc.
- § 3319. — Issuance before final hearing.
- § 3320. Ultra vires acts—Right of state to enjoin.
- § 3321. — Right of third person to enjoin.
- § 3322. Internal affairs of corporation.
- § 3323. Holding or postponing of election.
- § 3324. Voting stock.
- § 3325. Title to corporate office.
- § 3326. Right to inspect corporate books and records.
- § 3327. Protection of corporate name.
- § 3328. Right to exercise power of eminent domain.
- § 3329. Violation of corporate franchise.
- § 3330. Failure of corporation to discharge franchise obligations.
- § 3331. Acts criminal or against public policy.
- § 3332. Monopolies and unlawful combinations.
- § 3333. Libels and boycotts.
- § 3334. Parties defendant.
- § 3335. Persons bound.

§ 3314. Scope of chapter. The availability, in proper circumstances, of the injunctive process to and against corporations has, in recent years at any rate, been assumed without question rather than adjudicated. For the purpose of obtaining an injunction or of being made subject to one, a corporation ordinarily stands on the same footing as a natural person.¹ In a New York case, decided a number of years ago, the court said: "It is not denied that an injunction may issue against a corporation. It is every day's practice to issue process of that character. A corporation is an actual existence, in a legal sense, as much as a natural person. It is an artificial being, it is true,

¹ "Whenever either individual or corporation become related to any other individual or corporation, so that equitable jurisdiction arises to remedy some wrong or secure some right, it matters not whether both parties are individuals or both corporations, or that one is a natural and the other an artificial person." *Stockton v. American Tobacco Co.*, 55 N. J. Eq. 352, 36 Atl. 971.

but it can act, and frequently with great, and it may be, with ruinous effect. It is conceded it may, by the courts, in a proper case, be restrained from acting—that is, be ordered not to act in a given way.”² And not only may an injunction issue against a corporation, but a corporation which violates an injunctive order directed to it may be proceeded against for contempt. Were it otherwise, such an order would, perhaps, rarely be productive of the beneficial results intended to be achieved by it, and the power to issue it would be practically of no value. But the subject of contempt, as it relates to corporations, is dealt with at length elsewhere in this work,³ and will not be directly considered in this chapter. Moreover in view of the fact that the law of injunctions against nuisances, trespasses, etc., generally, is the same whether the parties are corporations or natural persons, it will not here be necessary, regardless of any space limitation on this chapter, to treat of such law.⁴ All that will here be done will be the setting out of certain fundamental principles recognized, with more or less uniformity in all injunction suits, and the discussing of certain phases of the law of injunctions peculiarly applicable to corporations.

§ 3315. Character of remedy; balance of convenience, etc. Certain principles relating to the law of injunctions are so generally recognized that it is hardly necessary to do more than merely state them. This, of course, does not mean that these principles are without their qualifications and exceptions any more than are the general principles relating to the law of any other subject, but only that as general principles they are not open to question.

Injunction is an extraordinary remedy⁵ and one which is frequently referred to as the strong arm of a court of equity.⁶ While an action

² *People v. Albany & V. R. Co.*, 12 Abb. Pr. (N. Y.) 171, 172. See also *Mayor, etc., City of New York v. New York & S. I. Ferry Co.*, 64 N. Y. 622, 624.

³ See Chap. 55.

⁴ For a masterly treatment of the law of injunctions, generally, see *High on Injunctions* (4th Ed.).

⁵ *Zander v. Phillips*, 213 Fed. 29, 30; *Ferry-Leary Land Co. v. Holt & Jeffery*, 53 Wash. 584, 102 Pac. 445.

⁶ “There is no power the exercise of which is more delicate, which requires greater caution, deliberation and sound discretion, or more dangerous

in a doubtful case than the issuing of an injunction. It is the strong arm of equity, that never ought to be extended unless to cases of great injury, where courts of law cannot afford an adequate and commensurate remedy in damages. The right must be clear, the injury impending and threatened, so as to be averted only by the protecting preventive process of injunction.” *Bonaparte v. Camden & A. R. Co.*, Fed. Cas. No. 1,617, Baldw. 205, quoted, as a whole, in *Truly v. Wanzer*, 5 How. (U. S.) 141, 12 L. Ed. 88 which, in turn, is quoted in *St. Louis St. Flushing Mach. Co. v. Sanitary St.*

is a matter of right, an injunction is a matter of grace,⁷ not granted as of course⁸ and ex debito justitiæ,⁹ but only in the sound discretion¹⁰ of the chancellor to whose conscience the appeal is

Flushing Mach. Co., 161 Fed. 725, and also quoted, in part, by Judge Cooley in *Edwards v. Allouez Min. Co.*, 38 Mich. 46, 50, 31 Am. Rep. 301.

"Nor ought the process of injunction to be applied, but with the utmost caution. It is the strong arm of the court; and to render its operation benign and useful, it must be exercised with great discretion, and when necessity requires it." *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371, 378, per Chancellor Kent.

⁷ *Johnson v. United Rys. Co. of St. Louis*, 227 Mo. 423, 127 S. W. 63.

"Whenever one keeps within the limits of lawful action, he is certainly entitled to the protection of the law, whether his motives are commendable or not; but if he demands more than the strict rules of law can give him, his motives may become important. In general it must be assumed that the rules of the common law will give adequate redress for any injury; and when the litigant avers that under the circumstances of his particular case they do not, and that therefore the gracious ear of equity should incline to hear his complaint, it may not be amiss to inquire how he came to be placed in such circumstances. If a man invites an injury, he may still have his redress in the courts of law, but his prayer for the special interposition of equity on the ground that what he invited and expected was about irreparably to injure, would not be likely to trouble the judicial conscience very much if it were wholly ignored." *Edwards v. Allouez Min. Co.*, 38 Mich. 46, 52, 31 Am. Rep. 301.

"An injunction, and especially one pendente lite, is always of grace and

not of right." *Marconi Wireless Tel. Co. of America v. Simon*, 227 Fed. 906, 907.

"When a contract is broken and any party thereto sustains an injury by reason of such breach, the injured party has an absolute right to maintain an action at law for the recovery of such damages as can be shown to have been sustained by him. But a suit in equity either to enjoin the continuance of such a breach or to enforce the specific performance of the contract appeals to the sound discretion of the chancellor—to his conscience—and the relief so sought will be granted or withheld according to the real equity of the case, in view of all of its facts and circumstances." *North Fork Water Co. v. Medland*, 187 Fed. 163, 169.

⁸ *Parker v. Winnipiseogee Lake Cotton & Woolen Co.*, 2 Black (U. S.) 545, 17 L. Ed. 333.

⁹ *North Fork Water Co. v. Medland*, 187 Fed. 163, 169; *Williams v. Baltimore*, 128 Md. 140, 97 Atl. 140; *Smith v. Rowland*, 243 Pa. 306, 90 Atl. 183.

An injunction "does not follow as of right, even when a case of wrongful act is made out on one side and consequent injury on the other." *Ferry-Leary Land Co. v. Holt & Jeffery*, 53 Wash. 584, 102 Pac. 445.

¹⁰ *United States. Bliss v. Anaconda Copper Min. Co.*, 167 Fed. 342, 365.

Connecticut. Fisk v. Hartford, 70 Conn. 720, 66 Am. St. Rep. 147, 40 Atl. 906.

Michigan. Campau v. National Film Co., 159 Mich. 169, 123 N. W. 606.

New Hampshire. Town of Bow v. Farrand, 77 N. H. 451, 92 Atl. 926.

New Jersey. Grey v. Mayor, etc.,

made.¹¹ "Conscience," as used in this connection, does not mean, however, arbitrary whim or caprice. Equity, the frequently-made assertion to the contrary notwithstanding, is not measured out by the varying "length of the chancellor's foot," but is administered according to fixed principles. "It is a precept," says the Missouri court, "that legal conscience is founded upon the law and never contravenes it."¹² Equally certain it is that a bill without equity will not support an injunction of any character in any circumstances.¹³ The equities must rest with the petitioner in order for him to be entitled to the writ.¹⁴ An injunction, even though it be merely a preliminary one, should not

City of Paterson (N. J. Eq.), 45 Atl. 995.

"As to whether connivance, acquiescence or laches shall affect the issuance of an injunction rests in the sound discretion of the chancellor to whom the application is made, and it is to be determined upon a full consideration of every fact adduced bearing upon that question." Kirby v. Union Pac. R. Co., 51 Colo. 509, Ann. Cas. 1913 B 461, 119 Pac. 1042.

Where the court has not departed from the established principles, rules and practice of equity jurisprudence its injunctive orders may not be reversed except upon clear proof of an abuse of its discretion. Kryptok Co. v. Stead Lens Co., 190 Fed. 767, 769, 39 L. R. A. (N. S.) 1. See also McCarthy v. Bunker Hill & Sullivan Mining & Concentrating Co., 164 Fed. 927, 940.

¹¹ Williams v. Baltimore, 128 Md. 140, 97 Atl. 140; Ardmore v. Appollos, — Okla. —, 162 Pac. 211.

"An injunction is of grace, and not of right. It is the conscience of the chancellor which is to be aroused or quieted; and he to enlighten his conscience as to whether he should put forth his hand or withhold it, will look into those facts which aggravate or mitigate the alleged wrongdoing" even though the actual determination of such facts should be at law. Pennsylvania Co. v. Ohio River Junct.

R. Co., 204 Pa. 356, 54 Atl. 259.

¹² Johnson v. United Rys. Co. of St. Louis, 227 Mo. 423, 127 S. W. 63.

"The grant of a preliminary injunction rests in the discretion of the trial court, not in its arbitrary, whimsical will, but in its sound judicial discretion, informed and guided by the established principles, rules, and practice of equity jurisprudence." Kryptok Co. v. Stead Lens Co., 190 Fed. 767, 769, 39 L. R. A. (N. S.) 1.

¹³ McCarthy v. Bunker Hill & Sullivan Mining & Concentrating Co., 164 Fed. 927, 940; Pearson v. Duncan & Son, — Ala. —, 73 So. 406; Drew Lumber Co. v. Union Inv. Co., 66 Fla. 382, 63 So. 836. See also Bliss v. Anaconda Copper Min. Co., 167 Fed. 342, 367.

"Injunction is not of right but of grace, and to move an upright chancellor to interpose this strongest arm of the law he must have not a sham case, but a well-grounded complaint, the bona fides of which is unquestioned, or capable of indication, if questioned." Kenton v. Union Passenger Ry. Co., 54 Pa. St. 401, 454.

¹⁴ Campau v. National Film Co., 159 Mich. 169, 123 N. W. 606.

An injunction should not issue at the suit of a person who has invited, encouraged or contributed to, the doing of the act sought to be enjoined, or has acted wrongfully and illegally in respect to it. Freeman v. Scherer, 97 Kan. 184, 154 Pac. 1019.

issue unless the right alleged to be invaded or threatened is clear.¹⁵ "To issue an injunction is the exercise of a delicate power, requiring great caution and sound discretion and rarely, if ever, should be exercised in a doubtful case."¹⁶

An injunction may be refused if its issuance would probably cause greater injury than that complained of,¹⁷ provided the wrong done was not so wanton and unprovoked as to deprive the defendant of the right to any consideration.¹⁸ Equity, it has been said, makes it incumbent upon the chancellor to "balance the inconveniences likely to be incurred by the respective parties, by means of the action of the court, and to grant the injunction, or withhold it, according to a sound discretion,"¹⁹ which, if there are public interests that will be ma-

¹⁵ *St. Louis St. Flushing Mach. Co. v. Sanitary St. Flushing Mach. Co.*, 161 Fed. 725, 728.

¹⁶ *Willis v. Lauridson*, 161 Cal. 106, 118 Pac. 530.

¹⁷ *Campau v. National Film Co.*, 159 Mich. 169, 123 N. W. 606.

"A court of equity is not bound to issue an injunction, when it will produce great public or private mischief, merely for the purpose of protecting a technical or unsubstantial right." *Whalen v. Union Bag & Paper Co.*, 145 N. Y. App. Div. 1, 129 N. Y. Supp. 391.

It is a good defense to an application for an injunction that the injury which the opponent of the application will likely sustain as a result of the issuance of the injunction will in all probability be greater than that which the applicant is likely to suffer as a result of its denial. *Kryptok Co. v. Stead Lens Co.*, 190 Fed. 767, 39 L. R. A. (N. S.) 1.

¹⁸ "An injunction ought not to be granted where the benefit secured by it to the party applying therefor is comparatively small, while it will operate oppressively and to the great annoyance and injury of the other party and to the public, unless the wrong complained of was so wanton and unprovoked as to properly deprive the wrongdoer of all considera-

tion for its injurious consequence." *Herr v. Central Kentucky Lunatic Asylum*, 110 Ky. 282, 61 S. W. 283 (citing *Jones v. Mayor, etc.*, of Newark, 11 N. J. Eq. 452) quoted in *Louisville & N. R. Co. v. Smith*, 25 Ky. L. Rep. 1459, 78 S. W. 160, which, in turn, is quoted (but incorrectly) in *Devou v. Pence*, 32 Ky. L. Rep. 697, 106 S. W. 874. Quære, whether the wantonness and lack of provocation of the defendant is to be taken as also depriving the public of consideration. See *infra* this section.

¹⁹ *Johnson v. United Rys. Co. of St. Louis*, 227 Mo. 423, 127 S. W. 63, quoting *Grey v. Ohio & P. R. Co.*, 1 Grant (Pa.) 412, 413. As bearing out this view, see also:

United States. *Kryptok Co. v. Stead Lens Co.*, 190 Fed. 767, 39 L. R. A. (N. S.) 1.

Connecticut. *Robinson v. Clapp*, 67 Conn. 538, 52 Am. St. Rep. 298, 35 Atl. 504.

Georgia. *Everett v. Tabor*, 119 Ga. 128, 46 S. E. 72.

Illinois. *Lloyd v. Catlin Coal Co.*, 210 Ill. 460, 470, 71 N. E. 335 (in connection with which see *Cleveland v. Martin*, 218 Ill. 73, 3 L. R. A. (N. S.) 629, 75 N. E. 772).

Maryland. *McDowell v. Biddison*, 120 Md. 118, 87 Atl. 752.

Michigan. *Edwards v. Allouez Min.*

terially affected by the result of the suit, should be exercised with due consideration therefor.²⁰

Co., 38 Mich. 46, 50, 31 Am. Rep. 301.

Missouri. Schopp v. Schopp, 162 Mo. App. 558, 142 S. W. 740.

New Jersey. Sternberg v. O'Brien, 48 N. J. Eq. 370, 22 Atl. 348, quoted in Marvel v. Jonah, 81 N. J. Eq. 369, 86 Atl. 968.

Texas. Jeff Chaison Townsite Co. v. McFaddin, Wiess & Kyle Land Co., 56 Tex. Civ. App. 611, 121 S. W. 716.

Washington. Ferry-Leary Land Co. v. Holt & Jeffery, 53 Wash. 584, 102 Pac. 445.

"Where there is presented a conflict of rights, it is the duty of a court of equity, in protecting those of the complainant, to consider those of the defendant, and in doing so it may consider also the injuries that may result to others by issuing the writ of injunction." Bliss v. Anaconda Copper Min. Co., 167 Fed. 342, 365.

"Injunctions are not matters of right, and while they are issued, not in the arbitrary or whimsical will, but in the judicial discretion of the court, guided by the established principles, rules, and practice in equity, regard must be had for the comparative injury which will be sustained if the injunction were granted or refused. If it appears that the granting of the injunction, although plaintiff may be ordinarily entitled to it, would inflict such great damage on the defendants or the public that that suffered by the plaintiff, if the injunction is refused, will be relatively insignificant, an injunction must be refused." Cubbins v. Mississippi River Commission, 204 Fed. 299, 307.

"Even where the technical right to injunctive relief is otherwise clearly established, it will be denied where the issuance of the writ may occasion inconvenience to the public and serious loss to the defendant, while

the injury to the plaintiff can readily be compensated in damages." Beidenkopf v. Des Moines Life Ins. Co., 160 Iowa 629, 46 L. R. A. (N. S.) 290, 142 N. W. 434.

"The chancellor is not bound to make a decree which will do far more mischief and work greater injury than the wrong he is asked to redress." Smith v. Rowland, 243 Pa. 306, 90 Atl. 183.

Rule held to apply where mandatory injunction is sought. Hill v. Kimball, 269 Ill. 398, 110 N. E. 18.

"It has been held * * * that damage to others, not parties to the suit, may be considered in a doubtful case." Jeff Chaison Townsite Co. v. McFaddin, Wiess & Kyle Land Co., 56 Tex. Civ. App. 611, 121 S. W. 716.

²⁰ Grey v. Mayor, etc., City of Paterson (N. J. Eq.), 45 Atl. 995; Booth-Kelly Lumber Co. v. Eugene, 67 Ore. 381, 136 Pac. 29.

"Sometimes a court of equity will decline to raise its restraining arm and refuse to issue an injunction, leaving the injured party to his remedy at law, even though an admitted legal right has been violated, when it appears that the intervening rights of the public should be taken into consideration, and the issuance of an injunction would cause serious public inconvenience or loss without a correspondingly great advantage to the complainant." Fraser v. Portland, 81 Ore. 92, 158 Pac. 514.

"It has been repeatedly held by this and other courts that the construction or use of public utilities will not be enjoined at the suit of private individuals, unless the damage is both serious in amount and irreparable in character. It is against public policy to restrain industries, public im-

While this rule, although sometimes denied in particular classes of cases,²¹ is one that is frequently recognized, it is true that its applica-

provements, and enterprises prosecuted for the public good, and that tend to develop the country and its resources. * * * Private rights must sometimes yield to the public good, certainly upon compensation." Jones v. Lassiter, 169 N. C. 750, 86 S. E. 710. See also Fisk v. Hartford, 70 Conn. 720, 66 Am. St. Rep. 147, 40 Atl. 906; Johnson v. United Rys. Co. of St. Louis, 227 Mo. 423, 127 S. W. 63; Becker v. Lebanon & M. St. Ry. Co., 188 Pa. St. 484, 41 Atl. 612.

"A complainant, however meritorious, may be * * * left to his accounting rather than awarded a permanent injunction, for reasons [e. g. "injury to an arm of the government of the greatest immediate importance"] which bear little, if any, relation to the merits of the controversy as between parties plaintiff and defendant." Marconi Wireless Tel. Co. of America v. Simon, 227 Fed. 906, 907.

²¹ See Whalen v. Union Bag & Paper Co., 208 N. Y. 1, 101 N. E. 805, wherein the court quotes approvingly Mr. Pomeroy's statement in the chapter of his work dealing with injunctions in the case of nuisances (5 Pomeroy's Eq. Jur. § 530, that "the weight of authority is against allowing a balancing of injury [between private parties] as a means of determining the propriety of issuing an injunction," and also quotes as being "to the same effect." Weston Paper Co. v. Pope, 155 Ind. 394, 56 L. R. A. 899, 57 N. E. 719. See also Hard v. Blue Points Co., 170 N. Y. App. Div. 524, 156 N. Y. Supp. 465. Compare Andrews v. Cohen, 163 N. Y. App. Div. 580, 148 N. Y. Supp. 1028, a suit for an injunction to compel the removal of a

structure interfering with plaintiff's easement of way, in which it was declared that "the court cannot legalize a wrong." It cannot relocate this easement or direct plaintiff to accept any substitute. But, before sustaining a mandatory injunction, it has to weigh the 'balance of injury'—the disproportion between the hardship of destroying defendant's structure and the harm to plaintiff by the changed right of way," to which proposition the court cited 2 Pomeroy's Eq. Rem. (6 Pomeroy's Eq. Jur.) § 552. In this section of his work Mr. Pomeroy, dealing with the question of the balance of injury in the case of injunctions for the protection of easements, says, inter alia, "It is probable that the apparent discrepancies between the cases on this point may, to some extent at least, be explained by the fact that the courts tend to give effect to the considerations which, in the particular case before them, outweigh on one side or the other, without a full discussion of the limits of the doctrine. Hence, it is not strange that as fairly typical cases as are to be found on both sides of the question come from the same jurisdiction. * * * None of these cases [antecedently considered by the author] makes a full statement of the conditions under which the balance of injury shall be considered. They all agree in one particular, however, viz., that the defendant who would claim its consideration in his favor must have committed the tort innocently; a wilful wrongdoer is entitled to claim no favor. Doubtless all courts will agree, too, in holding that it shall not have any weight against an injury to the plaintiff of an irreparable character; and probably it will be held that the disproportion of in-

bility may depend, somewhat at least, upon the character of the parties to the suit. Thus the United States Supreme Court has held that where a state sues to enjoin certain corporations from injuring it in its quasi sovereign capacity by discharging noxious gas from their works in a foreign state over the plaintiff's territory, "this court has not quite the same freedom to balance the harm that will be done by an injunction against that of which the plaintiff complains, that it would have in deciding between two subjects of a single political power."²² But, in any event, it would seem that each case in which an injunction is sought must in large degree be made to depend upon the particular facts and circumstances appearing, "in the consideration and determination of which the general rules governing courts of equity are to be borne in mind and applied."²³ In this connection, it is held that the fact that the application of the injunctive process which is sought is a novel one, not directly sanctioned by precedent, does not of itself preclude the exercise of the injunctive power and the issuance of an injunction.²⁴ Argument to the contrary "carried

jury to be done by granting the injunction or by refusing it must be very strong in favor of the defendant, to bar granting it. For in cases in which the legal remedy is admittedly inadequate courts of equity will not readily permit a 'wrongdoer to compel innocent persons to sell their right at a valuation.'"

In *Langton v. Stedman*, 182 Mich. 405, 148 N. W. 738, a suit for an injunction to compel the removal of a building which obstructed complainants' easement of way created by deed, the court addressing itself to the argument that "complainants are not entitled to recovery, by reason of the great expense and inconvenience such recovery would entail [upon defendants] * * * and the comparatively small injury to the complainants," said: "The fact that it would be of great expense to the defendants compared with the injury to complainants * * * does not appear and is of no consequence, if it were true."

²² *State of Georgia v. Tennessee Copper Co.*, 206 U. S. 230, 51 L. Ed. 1038, 11 Ann. Cas. 488.

²³ *McCarthy v. Bunker Hill & Sullivan Mining & Concentrating Co.*, 164 Fed. 927, 940. See also *Bliss v. Anaconda Copper Min. Co.*, 167 Fed. 342, 367.

²⁴ *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 Fed. 65, 75.

"It is said the orders issued in this case are without precedent. Every just order or rule known to equity courts was born of some emergency, to meet some new conditions, and was, therefore, in its time, without a precedent. If based on sound principles, and beneficent results follow their enforcement, affording necessary relief to the one party without imposing illegal burdens on the other, new remedies and unprecedented orders are not unwelcome aids to the chancellor to meet the constantly varying demands for equitable relief. Mr. Justice Brewer, sitting in the circuit court for Nebraska, said: 'I believe most thoroughly that the powers of a court of equity are as vast, and its processes and procedure as elastic, as all the changing emergencies of increasingly complex business relations

to its full logical result, would have prevented the enunciation of the first equitable principle and the establishment of the first equitable precedent for the preventive remedy. It is, indeed, an age-worn argument. It has been employed from the beginning of equity jurisprudence as a part of the objection to the extension of the equitable remedy to new conditions and new cases. This is the well-known history of the subject. Of course, this contention has been overruled, and precedent after precedent established from time to time to meet new conditions and to do full justice, until the argument has long since lost most of its force, although it is still maintained in form. It has been in answer to arguments like this that the great chancellors have stated time and again that they decline to lay down any definite rules as to when a court of equity will interpose by injunction. In fact, to do so would at once put a limit to all progress in equitable jurisprudence. The most that has been said is that in the use of the writ of injunction the court exercises sound discretion regulated by analogy; by what would be manifestly just in view of all the existing conditions, and requiring as a condition that there is no adequate remedy at law. Beyond this the courts have not gone, in the way of placing a limit on their power. It must be recognized that jurisprudence, both legal and equitable, both in respect of the right and the remedy, is progressive, that it is expansive, and that while its great principles remain good for one time as well as another, these principles must be extended to new conditions, and this involves an extension of the remedy, and often a change in the form of the remedy. Making the injunction mandatory as well as preventive is an example of such a change. Any system of jurisprudence coming short of this would fail to meet the demands of civilization.”²⁵ But, notwithstanding all of this, it must be remembered that “a court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law, or even without the authority of law. It acts upon established principles not only, but through established channels.”²⁶

§ 3316. Character of damage, irreparable injury, etc. While it has been said that equity will not interpose by injunction where the

and the protection of rights can demand.’ ’’ Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 746, 751, 19 L. R. A. 395, quoted in State v. Ohio Oil Co., 150 Ind. 21, 47 L. R. A. 627, 49 N. E. 809.

²⁵ Nashville, C. & St. L. Ry. Co. v.

McConnell, 82 Fed. 65, 76, quoted in State v. Ohio Oil Co., 150 Ind. 21, 47 L. R. A. 627, 49 N. E. 809.

²⁶ Rees v. Watertown, 19 Wall. (U. S.) 107, 22 L. Ed. 72, quoted in Thompson v. Allen County, 115 U. S. 550, 29 L. Ed. 472.

injury complained of is merely theoretical, technical or nominal²⁷ or the amount involved is very trivial,²⁸ and that a substantial injury only will arouse into activity equity's restraining power,²⁹ one of the New York courts has taken a less emphatic view of the matter and has held that whether an injunction will issue where the damages are not substantial will depend upon the circumstances of the case.³⁰ But, however this may be, an injunction will not issue, as a general rule,

27 Connecticut. *Hunting v. Hartford St. Ry. Co.*, 73 Conn. 179, 46 Atl. 824.

Illinois. See *Dunn v. Youmans*, 224 Ill. 34, 79 N. E. 321. Compare, however, *Espenscheid v. Bauer*, 235 Ill. 172, 176, 85 N. E. 230, quoting *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176.

Kentucky. *Devou v. Pence*, 32 Ky. L. Rep. 697, 106 S. W. 874.

South Dakota. *State v. Thorson*, 9 S. D. 149, 33 L. R. A. 582, 68 N. W. 202.

Texas. *Gillespie County v. Fredericksburg Land Co.*, — Tex. Civ. App. —, 168 S. W. 9.

Washington. *Rand, McNally & Co. v. Hartranft*, 29 Wash. 591, 70 Pac. 77.

An injunction will not lie to determine an academic question. *Bellarts v. Cleeton*, 65 Ore. 269, 132 Pac. 961.

28 Schopp v. Schopp, 162 Mo. App. 558, 142 S. W. 740.

"It is a familiar principle," says the Supreme Court of South Dakota, "that substantial and positive injury must always be made to appear to the satisfaction of a court before it will grant an injunction, and acts which, however irregular and unauthorized, can have no injurious results, constitute no ground for relief." *State v. Thorson*, 9 S. D. 149, 33 L. R. A. 582, 68 N. W. 202, cited with other authorities in *Galveston, H. & S. A. R. Co. v. United States*, 222 Fed. 175, 176, wherein it is said that "though there are some injurious consequences, if they are merely

trifling, the relief is not to be granted."

29 Cleveland v. Martin, 218 Ill. 73, 3 L. R. A. (N. S.) 629, 75 N. E. 772; *Stauffer v. Cincinnati, R. & M. R. R.*, 33 Ind. App. 356, 70 N. E. 543.

Compare *Inhabitants of Melrose v. Cutter*, 159 Mass. 461, 34 N. E. 695.

"The complainant, in order to get a preliminary injunction, must sustain the burden of satisfying the court that there is a substantial question to be tried." *Rhodes Bros. Co. v. Musicians' Protective Union Local No. 198 A. F. of M., of Providence, R. I.*, 37 R. I. 281, L. R. A. 1915 E 1037, 92 Atl. 641.

Before a party will be entitled to a mandatory injunction it must appear that he will suffer material and substantial injury if the writ is refused. *Simon v. Nance*, — Tex. Civ. App. —, 142 S. W. 661.

30 Whalen v. Union Bag & Paper Co., 145 N. Y. App. Div. 1, 129 N. Y. Supp. 391.

Compare *Andrews v. Cohen*, 163 N. Y. App. Div. 580, 148 N. Y. Supp. 1028, in which the court, citing *Wormser v. Brown*, 149 N. Y. 163, 43 N. E. 524, and *Gray v. Manhattan Ry. Co.*, 128 N. Y. 499, 28 N. E. 498 declares that "it is settled in New York that mandatory injunctions will only be granted on proof of substantial injury, and not for damages that are merely nominal." See also *Johnstown Min. Co. v. Butte & B. Consol. Min. Co.*, 60 N. Y. App. Div. 344, 70 N. Y. Supp. 257.

unless the injury complained of is one of an irreparable character,³¹ and one for which the law cannot offer an adequate remedy.³²

31 *Gorham v. New Haven*, 82 Conn. 153, 72 Atl. 1012; *Bogni v. Perotti*, 224 Mass. 152, L. R. A. 1916 F 831, 112 N. E. 853.

"Where irreparable injury is threatened, or the damage is of such a nature that it cannot be adequately compensated by an action at law, or is such as, from its continuance, to occasion a constantly recurring grievance, the party is not ousted of his remedy by injunction." *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341.

32 *Arizona*. *Santa Cruz County v. Burgoon*, 12 Ariz. 295, 100 Pac. 792.

Arkansas. *Burnside v. Union Sawmill Co.*, 92 Ark. 118, 122 S. W. 98.

Connecticut. *Gorham v. New Haven*, 82 Conn. 153, 72 Atl. 1012.

Iowa. *Hall v. Henninger*, 145 Iowa 230, 139 Am. St. Rep. 412, 121 N. W. 6.

Kentucky. *Herr v. Central Kentucky Lunatic Asylum*, 110 Ky. 282, 61 S. W. 283, quoted in *Louisville & N. R. Co. v. Smith*, 117 Ky. 364, 78 S. W. 160.

Nebraska. *Powers v. Flansburg*, 90 Neb. 467, 133 N. W. 844.

North Dakota. *Continental Hose Co. No. 1 v. Mitchell*, 15 N. D. 144, 105 N. W. 1108.

Oklahoma. *Turner v. Ardmore*, 41 Okla. 660, 130 Pac. 1156.

Washington. *Davies v. Seattle*, 67 Wash. 532, 121 Pac. 987.

When there is a plain, complete and adequate remedy at law, equity will not take jurisdiction. *W. M. Ritter Lumber Co. v. Lowe*, 75 W. Va. 714, L. R. A. 1916 E 718, 84 S. E. 566.

"It is an elementary principle of the law, which should be closely adhered to, that, where there is an adequate remedy at law, the extraordinary remedy by injunction cannot be resorted to." *Bailey v. Board*

Com'rs Sullivan Co., 57 Ind. App. 285, 107 N. E. 38.

"Where it clearly appears that the remedy at law is adequate, and no equitable ground for relief is shown, an injunction is not the proper remedy." *Louisville & N. R. Co. v. Railroad Com'rs*, 63 Fla. 491, 44 L. R. A. (N. S.) 189, 58 So. 543.

"A court of equity will not interfere to give relief against an alleged nuisance where the complaining party has an adequate remedy at law, as where redress can be obtained by an action for damages." *Central of Georgia R. Co. v. Americus Const. Co.*, 133 Ga. 392, 65 S. E. 855.

"This doctrine," says the Supreme Court of Oklahoma, "is founded upon the very sound principle that the legislature has authority to define the rights of citizens and prescribe the rules by which such rights are to be determined; and, where it has done so, then litigants have the right to demand that their grievances be determined by the rules prescribed." *Turner v. Ardmore*, 41 Okla. 660, 130 Pac. 1156.

Under the Texas statutes a person whose property rights are threatened with irreparable injury is none the less entitled to an injunction because of the fact that he has a full, complete and adequate remedy at law. *Brownwood v. Brown Telegraph & Telephone Co.*, — Tex. Civ. App. —, 152 S. W. 709. See also *Birchfield v. Bourland*, — Tex. Civ. App. —, 187 S. W. 422; *Lane v. Kempner*, — Tex. Civ. App. —, 184 S. W. 1090 (quoting *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994). For a similar holding under the Idaho statutes, see *Price v. Grice*, 10 Idaho 443, 79 Pac. 387, following *Staples v. Rossi*, 7 Idaho 618, 65 Pac. 67.

While undoubtedly equity will, in proper circumstances, interfere to prevent a multiplicity of suits or vexatious litigation³³ and will be influenced to extend its restraining arm by the fact of the insolvency of the wrongdoer,³⁴ it is not, however, at all clear but that multiplicity

³³ The prevention of vexatious litigation and of a multiplicity of suits constitutes a favorite ground for the exercise by a court of equity of its injunctive power. *Sylvester Coal Co. v. St. Louis*, 130 Mo. 323, 51 Am. St. Rep. 566, 32 S. W. 649, quoting *High on Injunctions* (3rd Ed.), p. 12. See also *Lonsdale Co. v. Woonsocket*, 21 R. I. 498, 44 Atl. 929.

"Authorities to show that equity will interfere to restrain irreparable mischief, or to suppress oppressive and interminable litigation, or to prevent multiplicity of suits, is unnecessary, as that proposition is universally admitted." *Phoenix Mut. Life Ins. Co. v. Bailey*, 13 Wall. (U. S.) 616, 20 L. Ed. 501.

A bill for injunction which alleges repeated, wilful and continuous wrongs committed and threatened will be good as against demurrer. "The jurisdiction of equity in such case cannot be doubted. It is said that the prevention of vexatious litigation, and of a multiplicity of suits, constitutes a favorite ground for the exercise of the jurisdiction of equity; and it may be laid down as a general rule that wherever the rights of a party aggrieved cannot be protected or enforced in the ordinary course of proceedings at law, except by numerous and expensive suits, equity may properly interpose, and afford relief by injunction." *Warren Mills v. New Orleans Seed Co.*, 65 Miss. 391, 7 Am. St. Rep. 671, 4 So. 298. See also *Central of Georgia R. Co. v. Americus Const. Co.*, 133 Ga. 392, 65 S. E. 855.

Equitable jurisdiction may be invoked in view of the inadequacy of the legal remedy when the injury is destructive or of a continuous charac-

ter or irreparable in its nature. *Chicago & W. I. R. Co. v. General Elec. Ry. Co.*, 79 Ill. App. 569.

Where numerous trespasses are being committed, and their continuance threatened, under a claim of right, and the injury resulting from each trespass is or would be trifling in amount as compared with the expense of prosecuting actions at law to recover damages therefor, the person injured may resort to equity in the first instance for appropriate relief. *Lembeck v. Nye*, 47 Ohio St. 336, 8 L. R. A. 578, 21 Am. St. Rep. 828, 24 N. E. 686. See also *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 Fed. 65.

"Where there is a legal remedy, equity will frequently grant injunctive relief to prevent multiplicity of suits." *Royer v. State*, — Ind. App. —, 112 N. E. 122, petition for rehearing overruled, — Ind. App. —, 113 N. E. 312.

"It is real and not imaginary suits, it is probable and not possible danger of multiplicity of suits, that will warrant the assumption of jurisdiction on that ground." *Pacific Exp. Co. v. Seibert*, 44 Fed. 310.

³⁴ When the damages arising from the breach of a contract are incomputable even approximately, they are irreparable and equity will interfere, and when with the difficulty of computation there is joined insolvency—perhaps in some cases where the insolvency exists without the uncertainty—a court of chancery may decree relief to prevent a failure of justice. *Bour v. Illinois Cent. R. Co.*, 176 Ill. App. 185, 199.

Insolvency of the wrongdoer may render irreparable an injury which would otherwise be remediable at law,

ity,³⁵ vexatiousness³⁶ and insolvency³⁷ go merely to the irreparability of the injury and the inadequacy of the remedy at law and

Stephenson & Coon v. Burdett, 56 W. Va. 109, 10 L. R. A. (N. S.) 748, 48 S. E. 846.

³⁵ Irreparable injury may be predicated on the fact that even the multitude of suits which the complainant would be required to bring were it to attempt to obtain redress at law would not procure for it substantial justice. *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 Fed. 65, 69. See also *Lembeck v. Nye*, 47 Ohio St. 336, 8 L. R. A. 578, 21 Am. St. Rep. 828, 24 N. E. 686; *Sullivan v. Jones & Laughlin Steel Co.*, 208 Pa. 540, 66 L. R. A. 712, 57 Atl. 1065.

"Where acts may cause irreparable injury, where a multiplicity of suits will be avoided, or where acts of trespass are constantly repeated, but the injury resulting from each act is trifling, relief in equity will be granted, because of the inadequacy of the legal remedy." *Dumont v. Peet*, 152 Iowa 524, 132 N. W. 955.

³⁶ "Where trespass to property is a single act, and is temporary in its nature and effects, so that the legal remedy of an action at law for damages is adequate, equity will not interfere; but if the trespass is continuous in its nature, and repeated acts of trespass are done or threatened, although each of such acts, taken by itself, may not be destructive, or inflict irreparable injury, and the legal remedy may therefore be adequate for each single act if it stood alone, the entire wrong may be prevented or stopped by injunction.

* * * The separate remedy at law for each of such trespasses would not be adequate to relieve the injured party from the expense, vexation, and oppression of numerous suits against same wrong-doer in regard to the same subject-matter. The ends

of justice require, in such case, that the whole wrong shall be arrested and concluded by a single proceeding, and such relief equity affords, and thereby fulfills its appropriate mission of supplying the deficiencies of legal remedies." *Warren Mills v. New Orleans Seed Co.*, 65 Miss. 391, 7 Am. St. Rep. 671, 4 So. 298.

³⁷ Inadequacy cannot be predicated merely of insolvency (*Strong v. Richmond, P. & C. R. Co.*, 93 Fed. 71, 74. See, however, *Amoskeag Mfg. Co. v. Shirley*, 69 N. H. 269, 39 Atl. 976), but some other equitable ground must be combined therewith. *Godwin v. Phifer*, 51 Fla. 441, 41 So. 597.

In *Thompson v. Allen County*, 115 U. S. 550, 29 L. Ed. 472, Mr. Justice Miller, who delivered the opinion of the court, declares, in one of his headnotes to the case, that "the inadequacy of the remedy at law, which sometimes justifies the interference of a court of equity, does not consist merely in its failure to produce the money, a misfortune often attendant upon all remedies, but that in its nature or character it is not fitted or adapted to the end in view; for, in this sense, the remedy at law is adequate, as much so, at least, as any remedy which chancery can give." Compare, however, *Devou v. Pence*, 32 Ky. L. Rep. 697, 106 S. W. 874, in which it was held that inadequacy of remedy at law may result from the nature of the right or property injured, the nature of the injury or the insolvency or want of responsibility of the person inflicting the injury; and *Gause v. Perkins*, 56 N. C. 177, 69 Am. Dec. 728, 730, in which the court declared that "the result of the cases fixes this to be the rule: the injury must be of a peculiar nature, so that compensa-

not to the establishment of separate and distinct grounds of equitable jurisdiction.³⁸

In theory, said Judge Cooley, speaking for the Supreme Court of Michigan, the purpose of an injunction "is to prevent irreparable mischief; it stays an evil the consequences of which could not adequately be compensated if it were suffered to go on."³⁹ As far as suits for injunctions in the federal courts are concerned, it is expressly provided by the Federal Judicial Code of 1911⁴⁰ that "suits in equity shall not be sustained in any court of the United States in any case where a plain, adequate, and complete remedy may be had at law."⁴¹

On the question of what constitutes irreparable injury, a number of the courts have adopted either literally or in substance the statement made by Mr. Wood in his work on the law of nuisances⁴² to the effect that "by irreparable injury is not meant such injury as is beyond the possibility of repair, or beyond possible compensation in damages, nor necessarily great injury, or great damage; but that species of injury, whether great or small, that ought not to be submitted to on the one hand, or inflicted on the other, and which, because it is so large on the one hand, or so small on the other, is of such constant and frequent recurrence that no fair or reasonable redress can be had therefor in a court of law."⁴³ Mr. High says, in his valuable treatise on injunc-

tion in money cannot atone for it; where from its nature it may be thus atoned for, if in the particular case the party be insolvent, and on that account unable to atone for it, it will be considered irreparable."

³⁸ See cases cited in notes 31 and 32, *supra*.

³⁹ *Edwards v. Allouez Min. Co.*, 38 Mich. 46, 49, 31 Am. Rep. 301. See also *Campau v. National Film Co.*, 159 Mich. 169, 123 N. W. 606.

⁴⁰ Section 267 of the Federal Judicial Code of 1911 (1 Fed. St. Ann. 1912 Supp. p. 243). This section differs from the earlier statute dealing with the subject (section 723, U. S. Rev. St., 4 Fed. St. Ann. p. 530) only in the use of the words "any court" instead of the words "either of the courts."

⁴¹ This provision, it has been said, "is no more than a legislative ex-

pression of pre-existing familiar law." *Continental Trust Co. v. Tallassee Falls Mfg. Co.*, 222 Fed. 694, 702.

⁴² *Wood's Law of Nuisances* (2nd Ed.), p. 892, § 778.

⁴³ See, as citing Wood either alone or in connection with other authorities and either directly or indirectly by quoting or citing a case which does cite such author: *Donovan v. Pennsylvania Co.*, 199 U. S. 279, 50 L. Ed. 192; *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 Fed. 65, 69; *Central of Georgia R. Co. v. Americus Const. Co.*, 133 Ga. 392, 65 S. E. 855; *Chicago General Ry. Co. v. Chicago, B. & Q. R. Co.*, 181 Ill. 605, 54 N. E. 1026; *Bartels Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N. W. 576.

Where a person purchases lower riparian land at a time when a stamp mill is located on upper riparian land

tions,⁴⁴ that "by irreparable injury it is not meant that the injury is beyond the possibility of repair by money compensation but it must be of such a nature that no fair and reasonable redress may be had in a court of law and that to refuse the injunction would be a denial of justice."⁴⁵ And, in this connection, it should be recognized that the quantum of the damage is not always, at least, determinative of the question of its irreparable character.⁴⁶

and when, as a result of the operation of such mill, sand is being deposited on the land purchased, the continued deposit of sand upon his land is not, considering the fact that he purchased such land with the apparent motive of forcing the stamp mill company to buy it from him at a price greatly in excess of that which he paid, an irreparable injury for which the law does not furnish an adequate remedy and against which he is entitled to an injunction. *Edwards v. Allouez Min. Co.*, 38 Mich. 46, 31 Am. Rep. 301.

⁴⁴ 1 High on Injunctions (4th Ed.), § 22.

⁴⁵ See *Eau Claire Water Co. v. Eau Claire*, 127 Wis. 154, 106 N. W. 679, citing *Wilson v. Mineral Point*, 39 Wis. 160, which in turn cites High.

For further definitions, see the following decisions:

Illinois. *Espenscheid v. Bauer*, 235 Ill. 172, 176, 85 N. E. 230, quoting *Newell v. Sass*, 142 Ill. 104, 31 N. E. 176.

Nebraska. *Eidemiller Ice Co. v. Guthrie*, 42 Neb. 238, 28 L. R. A. 581, 60 N. W. 717, quoting *Gause v. Perkins*, 56 N. C. 177, 69 Am. Dec. 728, and cited in *Cole v. Manners*, 76 Neb. 454, 107 N. W. 777.

Oregon. *Phipps v. Rogue River Valley Canal Co.*, 80 Ore. 175, 156 Pac. 794.

Texas. *Birchfield v. Bourland*, — Tex. Civ. App. —, 187 S. W. 422.

Virginia. *Callaway v. Webster*, 98 Va. 790, 37 S. E. 276.

Washington. *Columbia College of*

Music and School of Dramatic Art v. Tunberg, 64 Wash. 19, 116 Pac. 280, citing *Com. v. Pittsburgh & C. R. Co.*, quoted note 46, *infra*.

West Virginia. *Summer v. Parkersburg Mill Co.*, 88 S. E. 1020.

See also *Dunker v. Field & Tule Club*, 6 Cal. App. 524, 92 Pac. 502.

In *Oliphant v. Richman*, 67 N. J. Eq. 280, 59 Atl. 241, the court, in granting a preliminary injunction restraining defendant from cutting ice on complainants' mill pond and removing it therefrom, said: "Irreparable damage does not mean that the complainant must show that all his financial transactions will be ruined unless the relief sought is granted. It means that, with reference to the particular right or property referred to in the bill of complaint, the complainant will be irreparably deprived of it unless the relief sought is granted."

⁴⁶ *Lead v. Inch*, 116 Minn. 467, 39 L. R. A. (N. S.) 234, Ann. Cas. 1913 B 891, 134 N. W. 218; *Com. v. Pittsburgh & C. R. Co.*, 24 Pa. St. 159, 62 Am. Dec. 372. In this latter case, the court declared that "the boldness of this act [the partial filling up of one of the locks of the state canal at its Pittsburgh outlet and the erection of an arch over the canal so as completely to obstruct its use] seems almost like a studied test of the vigilance of the canal commissioners, and of the efficiency of the remedies which the state has provided for the prevention of injuries. It is hoped that the equity remedy, being somewhat

As to the necessity of there being the want of an adequate remedy at law in order for equity jurisdiction to attach, it is generally held that a person aggrieved will not be precluded from resorting to equity by the fact that he has a remedy at law, unless such remedy is as practical and efficient to the ends of justice and its prompt administration as the remedy in equity.⁴⁷ Furthermore, it has been said that

unusual and peremptory in its character, will not be applied to an act which does so little real injury," and continuing said: "The argument that there is no 'irreparable damage' would not be so often used by wrongdoers, if they would take the trouble to observe that the word 'irreparable' is a very unhappily chosen one used in expressing the rule that an injunction may issue to prevent wrongs of a repeated and continuing character, or which occasion damages which are estimable only by conjecture, and not by any accurate standard. * * * As this argument is generally presented, it seems to be supposed that injunctions can apply only to very great injuries; and it would follow that he who has not much property to be injured cannot have this protection for the little he has. Besides this, when the right invaded is secured by statute or by contract, there is generally no question of the amount of damage, but simply of the right. * * * And so it is when public rights are invaded. In the case of Attorney General v. Cohoes Co., 6 Paige [N. Y.] 133, [29 Am. Dec. 755] there was an offer to tap the state canal for a mill purpose, and it was stopped by injunction, without any regard to evidence tending to disprove damage. And in Downing v. McFadden, 18 Pa. 334, we justified the keepers of the public works in abating a house that encroached upon the embankment, though a jury had found that it did no injury. And when railway companies or individuals exceed their statutory powers in

dealing with other people's property, no question of damage is raised when an injunction is applied for; but simply one of an invasion of a right * * *. Railway companies must stand upon a strict construction of their chartered privileges * * *. If they step one inch beyond their chartered privileges to the prejudice of others, or of the stockholders, or offer to do any act without the prescribed preliminary steps, they are liable to be enjoined, irrespective of the amount of damage. * * * Damage or no damage to others, they must obey their charter, and that was our decision in the * * * case of Manderson v. Commercial Bank, 28 Pa. 379."

47 United States. Walla Walla v. Walla Walla Water Co., 172 U. S. 1, 43 L. Ed. 341; St. Louis Southwestern Ry. Co. v. Stuttgart & R. B. R. Co., 188 Fed. 374, 376.

Indiana. Royer v. State, — Ind. App. —, 112 N. E. 122, petition for rehearing overruled, — Ind. App. —, 113 N. E. 312.

Kansas. Mendenhall v. School Dist. No. 83 of Jewell County, 76 Kan. 173, 90 Pac. 773.

Kentucky. H. Friedberg, Inc. v. McClary, 173 Ky. 579, 191 S. W. 300.

Nebraska. Keplinger v. Woolsey, 93 N. W. 1008.

Texas. Sumner v. Crawford, 91 Tex. 129, 41 S. W. 994, quoted in Lane v. Kempner, — Tex. Civ. App. —, 184 S. W. 1090.

Vermont. Bourke v. Olcott Water Co., 84 Vt. 121, 33 L. R. A. (N. S.) 1015, Ann. Cas. 1912 D, 108, 78 Atl. 715.

“the legal remedy that closes the door of a court of equity is a common-law remedy. Where equity had jurisdiction because the common law affords no adequate remedy, that jurisdiction is not affected by a statute providing a legal remedy,”⁴⁸ at least where such statute does not expressly provide to the contrary,⁴⁹ and that an adequate remedy at law does not exist merely by reason of the fact that the act complained of may be made the subject of a criminal prosecution.⁵⁰ Nor will a remedy at law be deemed adequate when the complainant will be compelled to go into a foreign jurisdiction to avail himself thereof. To be adequate the legal remedy must be available in domestic courts.⁵¹ A legal remedy “may be inadequate because the procedure at law is too inflexible to suit the exigencies of the case, or because the relief which a common-law judgment can afford is not adaptable to the peculiar facts,”⁵² but an injury is not irreparable when money damages will be adequate compensation therefor.⁵³ Notwithstanding all

Washington. *Davies v. Seattle*, 67 Wash. 532, 121 Pac. 987.

West Virginia. *Buskirk v. Sanders*, 70 W. Va. 363, 73 S. E. 937.

“To be adequate, the remedy by action must reach and correct the threatened mischief in an equally efficacious manner.” *Summers v. Parkersburg Mill Co.*, — W. Va. —, 88 S. E. 1020.

⁴⁸ *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106. See also *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 Fed. 65, 82.

The remedy at law contemplated by the federal statute relating to the equitable jurisdiction of federal courts (see *supra* this section) “is that which existed when the Judiciary Act of 1789 was adopted, unless subsequently changed by act of Congress” *McConihay v. Wright*, 121 U. S. 201, 30 L. Ed. 932. See also *Richardson v. Pennsylvania Coal Co.*, 203 Fed. 743, 746), in other words, the remedy at common law and not statutory remedies available in state courts. *Peck v. Ayers & Lord Tie Co.*, 116 Fed. 273, 275.

⁴⁹ *Woodward v. Woodward*, 148 Mo. 241, 49 S. W. 1001.

⁵⁰ *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106. See also *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 Fed. 65, 82.

⁵¹ *Stanton v. Embry*, 46 Conn. 595.

⁵² *Miller v. Steele*, 153 Fed. 714, 719.

Remedies at law which cannot be invoked until a part of the mischief is done, and which, even should they be resorted to, will not remedy the whole mischief, are not such as will defeat the preventive jurisdiction of equity. *Attorney General v. Jamaica Pond Aqueduct Corporation*, 133 Mass. 361, 363.

The Supreme Court of Connecticut has said that “an injury is irreparable when there is no legal remedy furnishing full compensation or adequate redress because of the ineffectiveness of such legal remedy or when, owing to the delay incident to the prosecution of an action at law to final judgment and obtaining execution thereon, such judgment and process would be fruitless of beneficial results.” *Gorham v. New Haven*, 82 Conn. 153, 72 Atl. 1012.

⁵³ *Devou v. Pence*, 32 Ky. L. Rep. 697, 106 S. W. 874.

of this the matter of existence or absence of an adequate remedy at law would, in the final analysis, seem not to be as important where the same court has jurisdiction of both actions at law and proceedings in equity as where the law and equity forums are separate and distinct courts.⁵⁴

Regarding multiplicity of suits, it has been said that a multitude of suits is not necessarily the equivalent thereof;⁵⁵ and that "the multiplicity of suits which confers jurisdiction in equity is a multiplicity of suits to which the complainant will be a party. A multiplicity of suits against the defendants to which he will not be

"It is * * * a well-recognized rule in this jurisdiction, as elsewhere, that where damages would fully compensate for the injury, and the defendant is solvent and able to respond, no injunction should issue. In such case the plaintiff must resort to an action at law for the damages sustained." *Campbell v. Irvine Toll Bridge Co.*, 173 Ky. 313, 190 S. W. 1098.

Difficulty in, as distinguished from impossibility of, computing damages arising from breach of contract will not alone warrant injunctive relief. *Bour v. Illinois Cent. R. Co.*, 176 Ill. App. 185.

⁵⁴*Bartles Northern Oil Co. v. Jackman*, 29 N. D. 236, 150 N. W. 576. Said the court: "When courts of law and equity were separate and distinct courts, there was very strong reason for a close distinction between actions at law and suits in equity. Neither court had jurisdiction over the other subject. But since the abrogation in most states of forms of action, and jurisdiction being granted in both classes of cases to the same court, it is not necessary to as clearly and completely distinguish between the two as formerly, although care must, of course, still be taken not to invade the right to trial by jury. It is universally coming to be recognized in other subjects that 'an ounce of prevention is worth a pound of cure.'

Why should not this apply with equal force to the law? And, unless required by constitutional or statutory provisions to adopt and follow a specified course of action, such proceedings as will prevent the evil should be favored, rather than to permit the damage to be done and then seek a subsequent remedy by action for damages or some corresponding course." See also *Sumner v. Crawford*, 91 Tex. 129, 41 S. W. 994 (quoted in *Lane v. Kempner*, — Tex. Civ. App. —, 184 S. W. 1090); *El Campo Light, Ice & Water Co. v. Water & Light Co. of El Campo*, 63 Tex. Civ. App. 393, 132 S. W. 868.

⁵⁵"To warrant interference upon the ground of a multiplicity of suits, there must be different persons assailing the same rights, and not a mere repetition of the same trespass by the same person, the case being susceptible of compensation in damages. It is well settled that if the right is disputed between two persons only, not for themselves and all others in interest, but for themselves alone, the bill will be dismissed." *Chicago Gen. Ry. Co. v. Chicago, B. & Q. R. Co.*, 181 Ill. 605, 54 N. E. 1026. See also *Murphy v. Mayor, etc., of Wilmington*, 6 *Houst. (Del.)* 108, 22 *Am. St. Rep.* 345, 355; *Illinois Steel Co. v. Schroeder*, 133 *Wis.* 561, 14 *L. R. A. (N. S.)* 239, 126 *Am. St. Rep.* 977, 113 *N. W.* 51.

subjected, and in which he has no interest, furnishes no ground for his resort to equity.”⁵⁶ Equitable jurisdiction does not attach on the ground of preventing a multiplicity of suits merely because each of several persons jointly and severally liable may be independently sued. It may be invoked on such ground, however, where one person may be sued several times in relation to the same subject-matter either in its entirety or in respect to some element or elements thereof.⁵⁷

§ 3317. Preliminary and interlocutory injunctions. Applying the general rule⁵⁸ in the case of a preliminary or an interlocutory injunction, the granting of such an injunction rests in the sound discretion of the court of original jurisdiction.⁵⁹

When the injury is not irreparable⁶⁰ or when the complainant's right is not free from doubt, an interlocutory injunction will not issue.⁶¹ But where, in granting such an injunction, the court has not departed from established equitable principles, its order may not be

⁵⁶ *Thomas v. Council Bluffs Canning Co.*, 92 Fed. 422, 423. See also *Turner v. Mobile*, 135 Ala. 73, 33 So. 132.

“The cases where equity will enjoin to prevent a multiplicity of suits between two persons, only, are where the whole controversy arises out of the same matter and has been settled at law, and further litigation, which seems purely vexatious, is persisted in.” *Lloyd v. Catlin Coal Co.*, 210 Ill. 460, 463, 71 N. E. 335.

⁵⁷ *Johnson v. Swanke*, 128 Wis. 68, 5 L. R. A. (N. S.) 1048, 8 Ann. Cas. 544, 107 N. W. 481.

⁵⁸ § 3315, *supra*.

⁵⁹ *Love v. Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, 331.

⁶⁰ *Lehigh Valley R. Co. v. New York & N. J. Water Co.*, 76 N. J. Eq. 504, 74 Atl. 970.

“A preliminary injunction is properly refused where there exists no reasonable ground for apprehending that the injury against which it is sought will be attempted.” *Odlin v. Bingham Copper & Gold Min. Co.*, 64 N. J. Eq. 363, 51 Atl. 925.

The issuance of a temporary injunc-

tion without notice to the defendants who are readily accessible to notice will be improper where the complainants do not set up verified facts from which the court may conclude that irreparable injury may result from giving notice of the application. *Wallach v. Billings*, 161 Ill. App. 317.

“A complainant, however meritorious, may be sent over to final hearing, * * * for reasons [e. g., “injury to an arm of the government of the greatest immediate importance”] which bear little, if any, relation to the merits of the controversy as between parties plaintiff and defendant.” *Marconi Wireless Telegraph Co. of America v. Simon*, 227 Fed. 906, 907.

⁶¹ *Lehigh Valley R. Co. v. New York & N. J. Water Co.*, 76 N. J. Eq. 504, 74 Atl. 970.

A corporation is not entitled to a preliminary injunction to enforce a covenant running in its favor when the validity of the covenant is in doubt and the defendants are solvent. *American Preservers' Co. v. Norris*, 43 Fed. 711.

reversed by an appellate court without clear proof of an abuse by the lower court of its discretion in the matter.⁶²

The purpose of a preliminary injunction is to prevent action and thus to maintain matters in statu quo until a hearing can be had,⁶³ and it should not disturb existing conditions further than the effectual prevention of the apprehended injury requires.⁶⁴ According to one of the federal courts, "the controlling reason for the existence of the judicial power to issue a temporary injunction is that the court may thereby prevent such a change in the relations and conditions of persons and property as may result in irremediable injury to some of the parties before their claims can be investigated and adjudicated. It is a familiar rule of equity jurisprudence that if the questions presented in a suit for an injunction are grave and difficult, and the injury to the moving party will be certain, great, and irreparable if the motion for the interlocutory injunction is denied and the final decision is in his favor, while if the decision is otherwise, and the injunction is granted, the inconvenience and loss to the opposing party will be inconsiderable, or probably may be indemnified by a bond, the injunction usually should be granted."⁶⁵ So it has been held that where the refusal to grant a preliminary injunction against a breach of contract may, and probably will, inflict upon the plaintiff great damage which is likely to be irreparable, and where, by a bond or otherwise, the defendant may be saved from loss or injury should such an injunction be granted, the injunction should issue.⁶⁶ But as a general proposition, a preliminary injunction cannot divest rights in,⁶⁷ nor transfer the possession of, property,⁶⁸ and if it attempts so

⁶² *Love v. Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, 331. Said the court: "An appeal from an order granting or refusing an interlocutory injunction does not invoke the judicial discretion of the appellate court. The question is not whether or not that court in the exercise of its discretion would make or would have made the order. It was to the discretion of the trial court, not to that of the appellate court, that the law intrusted the granting or refusing of these injunctions, and the only question here is: Does the proof clearly establish an abuse of that discretion?"

⁶³ *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 741,

19 L. R. A. 387; *Calvert v. State*, 34 Neb. 616, 52 N. W. 687.

⁶⁴ *Stockton v. Central R. Co. of New Jersey*, 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964.

⁶⁵ *Love v. Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321, 331.

⁶⁶ *Cincinnati Exhibition Co. v. Mar-saus*, 216 Fed. 269.

⁶⁷ *Calvert v. State*, 34 Neb. 616, 52 N. W. 687.

⁶⁸ *Calvert v. State*, 34 Neb. 616, 52 N. W. 687; *Jeff Chaison Townsite Co. v. McFaddin, Wiess & Kyle Land Co.*, 56 Tex. Civ. App. 611, 121 S. W. 716.

"The court of chancery has no more power than any other to condemn a man unheard, and to dispossess him

to do, it is void.⁶⁹ Thus it has been held that such an injunction cannot issue to prevent a railroad company from interfering with the crossing of its tracks by an electric street car line,⁷⁰ nor to prevent one railroad company from interfering with the making of a crossing under its tracks by another such company which claims to have secured the right thus to cross by condemnation proceedings.⁷¹

This rule, however, cannot be invoked to defeat the issuance of a preliminary injunction, the effect of which will be merely to restore a possession forcibly invaded and to preserve the status until the question of complainant's right to possession can be determined. Thus it has been held that, notwithstanding the rule, interference with an irrigating canal by the owner of land through which such canal runs may be met by a preliminary prohibitive injunction.⁷²

§ 3318. Mandatory injunctions—Power to issue, etc. A court of equity, in the language of the Supreme Court of the United States, "is not always limited to the restraint of a contemplated or threatened action, but may even require affirmative action, where the circum-

of property *prima facie* his, and hand over its enjoyment to another on an *ex parte* claim to it. In several cases it has been decided that possession of lands is not to be disturbed by means of a preliminary injunction." Arnold v. Bright, 41 Mich. 207, 2 N. W. 16 (per Cooley, J.).

⁶⁹Tawas & Bay County R. Co. v. Iasco Circuit Judge, 44 Mich. 479, 482, 7 N. W. 65; Calvert v. State, 34 Neb. 616, 52 N. W. 687.

Where, after a railway company had built its road across land belonging to the United States, and while it was operating such road as a part of its railway system, a mining claim is located on its right of way, and it is made to appear by the complaint and an affidavit filed on behalf of the company that the owners of the mining claim are working it in a manner that interferes with the operation of the railroad, and it appears from the answer and cross-complaint of the defendants that they claim that the railway company acquired no rights to its right of way

by reason of its being on land within a forest reserve, and the court grants an injunction *pendente lite*, ousting the mining claimants from the possession of the land and enjoining them from in any manner interfering with the railway company in its possession thereof, such injunction, on appeal, will be modified to an extent and in a manner that will permit the mining claimants to retain such possession of their claim, until the final determination of the action, as will in no manner interfere with the railway company's possession and occupation of the land and the conduct and operation of its business. Chicago, M. & P. S. R. Co. v. Ferrell, 20 Idaho 680, 119 Pac. 703.

⁷⁰Calvert v. State, 34 Neb. 616, 52 N. W. 687.

⁷¹Toledo, A. A. & N. M. Ry. Co. v. Detroit, L. & N. R. Co., 61 Mich. 9, 27 N. W. 715.

⁷²Jeff Chaison Townsite Co. v. McFaddin, Wiess & Kyle Land Co., 56 Tex. Civ. App. 611, 121 S. W. 716.

stances of the case demand it.”⁷³ In other words, mandatory injunctions are within the power of equity,⁷⁴ and, although not regarded with favor⁷⁵ and issued cautiously,⁷⁶ only in the case of irreparable injury⁷⁷ and plainly inadequate remedy at law,⁷⁸ they are nevertheless permissible in certain special cases.⁷⁹ “A mandatory injunction,” says the Supreme Court of Pennsylvania, “is a proper remedy in a proper case, and may lie to compel the abatement of a nuisance in some instances. No one questions the power of a court of equity

⁷³ *Ex parte Lennon*, 166 U. S. 548, 41 L. Ed. 1110.

⁷⁴ *Compton Hill Improvement Co. v. Strauch*, 162 Mo. App. 76, 141 S. W. 1159.

“Many of the restrictions upon the use of mandatory injunctions have, in modern times, given way to a more liberal construction of the powers of a court of equity in the use of such form of injunctions.” *Jeff Chaison Townsite Co. v. McFaddin, Wiess & Kyle Land Co.*, 56 Tex. Civ. App. 611, 121 S. W. 716.

⁷⁵ *Magpie Gold Min. Co. v. Sherman*, 23 S. D. 232, 20 Ann. Cas. 595, 121 N. W. 770.

⁷⁶ *Pennsylvania R. Co. v. Kelley*, 77 N. J. Eq. 129, 140 Am. St. Rep. 541, 75 Atl. 758.

⁷⁷ The injury must “amount to irreparable damage, incapable of being fully compensated by an action at law; a substantial, not an unimportant or trivial injury, not disproportionate to the relief sought, nor when, if the relief prayed for were granted, and the mandatory injunction should issue, the effect would be to inflict serious damage upon the defendants without doing the plaintiffs any material or practical good, nor where the decree would operate oppressively or contrary to the real justice of the case. * * * Courts of equity are guided by a wise and wholesome discretion in granting or refusing an injunction, and will do no act and make no order which

savors of oppression, or the arbitrary use of its great power, and will always reflect, before acting, whether the exercise of that power is an appropriate method of redress under all the circumstances of the case, and will attentively consider the comparative convenience or inconvenience which the granting or the refusal of the injunction will cause to the parties.” *Bailey v. Culver*, 84 Mo. 531, 540. See also *Tanner v. Lindell R. Co.*, 180 Mo. 1, 103 Am. St. Rep. 534, 540, 79 S. W. 155.

⁷⁸ *Pennsylvania R. Co. v. Kelley*, 77 N. J. Eq. 129, 140 Am. St. Rep. 541, 75 Atl. 758.

A mandatory injunction will not ordinarily be granted when mandamus affords a complete remedy. *Ettenson v. Wabash R. Co.*, 248 Mo. 395, 154 S. W. 785. But whether mandamus can be regarded as an adequate remedy so as to preclude the issuance of such an injunction will depend upon the circumstances of the particular case. *Bourke v. Olcott Water Co.*,⁸⁴ Vt. 121, 33 L. R. A. (N. S.) 1015, Ann. Cas. 1912 D 108, 78 Atl. 715.

⁷⁹ *Magpie Gold Min. Co. v. Sherman*, 23 S. D. 232, 20 Ann. Cas. 595, 121 N. W. 770.

A court of equity has plenary power to issue a mandatory injunction to restore and maintain a condition that has been wrongfully changed or disturbed. *Love v. Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321.

to afford the relief intended to be secured by the interposition of this strong arm of the law if the facts warrant the application of such a remedy. It is an extreme remedy, and should only be applied when legal rights are unlawfully invaded or legal duties are wilfully or wantonly neglected. This should be the controlling thought in the mind of a chancellor in the consideration of the respective rights and duties of the parties in a proceeding where a bill is filed praying for such relief."⁸⁰ To warrant the granting of a mandatory injunction, it must, it has been said, clearly appear that the legal rights of the complainant are being invaded or that the legal duties of the defendant have been wilfully and wantonly disregarded to the complainant's prejudice.⁸¹ Where the state constitution requires that a railroad, passing within three miles of a county seat, also pass through the same and establish and maintain a depot therein, compliance with such requirement may be enforced, in a case of wilful disregard thereof, by mandatory injunction.⁸² But a mandatory injunction should not be granted when its enforcement will require too great an amount of supervision by the court.⁸³

Even in jurisdictions in which the courts hold that they have no

⁸⁰ McCabe v. Watt, 224 Pa. 253, 24 L. R. A. (N. S.) 274, 73 Atl. 453.

⁸¹ McCabe v. Watt, 224 Pa. 253, 24 L. R. A. (N. S.) 274, 73 Atl. 453.

"Mandatory injunctions are often granted where the defendant is guilty of a continuing wrong upon the plaintiff, from the further perpetration of which he ought to be enjoined, and where the termination of the wrongful conduct involves a restoration of conditions existing before the wrongful conduct began. They are not granted where the only ground of equitable relief is a failure of the defendant to perform an independent public duty which he owes to the plaintiff individually, as well as to others." Cox v. Malden & M. Gas Light Co., 199 Mass. 324, 17 L. R. A. (N. S.) 1235, 127 Am. St. Rep. 503, 85 N. E. 180.

⁸² Kansas City, M. & O. Ry. Co. of Texas v. State, — Tex. Civ. App. —, 155 S. W. 561.

⁸³ McCabe v. Watt, 224 Pa. 253,

24 L. R. A. (N. S.) 274, 73 Atl. 453.

Where a burning coal mine has passed the point where it was merely a public nuisance and has reached the place where it has become a public enemy; where the company owning and operating the mine has not failed in its duty but has actually become insolvent in fighting the fire; where the enforcement of a mandatory injunction compelling the company to put out the fire would require too great an amount of supervision on the part of the court, and where neither the officers nor stockholders of the company can be subjected to any individual liability, and, at most, the company could only be compelled to use its corporate assets and funds in an effort to extinguish the fire and, as a matter of fact, it has exhausted such assets and funds in its attempt so to do, a mandatory injunction directed to the company should not issue. McCabe v. Watt, supra.

power to grant injunctions mandatory in form, it is undoubtedly true that there may issue injunctions more or less mandatory in effect, provided only they are prohibitive in form.⁸⁴ So while under the Georgia Code a purely mandatory injunction cannot be granted, a Georgia court may issue an order in yielding obedience to which the defendant may incidentally be compelled to perform some act where the essential nature of such order is to restrain.⁸⁵

§ 3319. — Issuance before final hearing. Ordinarily, it is true, a mandatory injunction will not be granted before final hearing,⁸⁶ but a preliminary mandatory injunction is not beyond the power of a court of equity.⁸⁷ Generally the office of a preliminary injunction can be fulfilled "by an injunction prohibitory in form, but it sometimes happens that the status quo is a condition not of rest, but of action, and the condition of rest is exactly what will inflict the irreparable injury upon complainant, which he appeals to a court of equity to protect him from. In such a case courts of equity issue mandatory writs before the case is heard on its merits."⁸⁸

While the court will be very reluctant to issue such an injunction on an interlocutory application,⁸⁹ it will nevertheless grant one in a

⁸⁴ See 1 High on Injunctions (4th Ed.), § 2.

⁸⁵ Merchants' & Miners' Transp. Co. v. Granger & Lewis, 132 Ga. 167, 63 S. E. 700.

⁸⁶ American Lead Pencil Co. v. Schneegass, 178 Fed. 735, 738; Ocala v. Anderson, 58 Fla. 415, 50 So. 572.

A mandatory injunction is not ordinarily granted before final hearing or before the parties have had full opportunity to present all of the facts in such manner as will enable the court to determine the truth of the matter. Pennsylvania R. Co. v. Kelley, 77 N. J. Eq. 129, 140 Am. St. Rep. 541, 75 Atl. 758.

"A mandatory injunction rarely issues as a provisional remedy." Lehigh Valley R. Co. v. New York & N. J. Water Co., 76 N. J. Eq. 504, 74 Atl. 970.

As a general rule a mandatory injunction which requires the destruction of property will not be granted

prior to a hearing and determination of the case on its merits. Ryan v. Weiser Valley Land & Water Co., 20 Idaho 288, 118 Pac. 769.

⁸⁷ American Lead Pencil Co. v. Schneegass, 178 Fed. 735, 738.

"The right of a court of equity generally to issue a mandatory injunction before hearing and without notice, in a proper case, is as unquestioned as the right to issue a merely prohibitive injunction, the only limitation upon such power being, as sometimes stated, that the complainant must show 'a strong and mischievous case of pressing necessity.'" Jeff Chaison Townsite Co. v. McFaddin, Wiess & Kyle Land Co., 56 Tex. Civ. App. 611, 121 S. W. 716.

⁸⁸ Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 730, 741, 19 L. R. A. 387.

⁸⁹ Pennsylvania R. Co. v. Kelley, 77 N. J. Eq. 129, 140 Am. St. Rep. 541, 75 Atl. 758.

case of extreme urgency⁹⁰ or very serious damage,⁹¹ where the right is clear⁹² and the balance of convenience rests with the complainant.⁹³ So "an obstruction to the flow of interstate freight must be preliminarily enjoined, even though it requires a mandatory injunction. The quasi public nature of the duty to be performed by the common carriers and the irreparable character of the injury likely to result are ample grounds for this."⁹⁴ Accordingly, a preliminary mandatory injunction will issue against a railroad company, its officers, agents, employees and servants to compel the handling of interstate freight delivered by or destined to another road as required by the Interstate Commerce Act.⁹⁵ Again a preliminary mandatory injunction may issue without notice and a perpetual injunction may be granted on final hearing to restrain the managing agent of a corporation, who has been legally removed from his position, from continuing to act as such agent, from refusing to surrender corporate property of which he has possession, and from incurring debts in the name of the corporation, and, in connection with the preliminary injunction, the court may appoint a custodian for the property which such agent is thereby required to deliver up.⁹⁶ In a New Jersey case, it was held that where the condition of a building adjacent to a railroad track is such that the vibration caused by a passing train is liable to cause its collapse to the injury of passengers on the train, a mandatory injunc-

⁹⁰ *American Lead Pencil Co. v. Schneegass*, 178 Fed. 735, 738; *Pennsylvania R. Co. v. Kelley*, 77 N. J. Eq. 129, 140 Am. St. Rep. 541, 75 Atl. 758.

⁹¹ *Pennsylvania R. Co. v. Kelley*, 77 N. J. Eq. 129, 140 Am. St. Rep. 541, 75 Atl. 758.

⁹² *American Lead Pencil Co. v. Schneegass*, 178 Fed. 735, 738.

"Except in rare cases, where the right is clear and free from reasonable doubt, a mandatory injunction, commanding the defendant to do some positive act, will not be ordered until after final hearing, and then only to execute the judgment or decree of the court." *Florida East Coast R. Co. v. Taylor*, 56 Fla. 788, 47 So. 345.

A preliminary mandatory injunction will not issue to enforce an executory contract, the terms and scope of which are disputed and un-

determined, notwithstanding the fact that by reason of the time element in the contract a refusal of such injunction will amount to a denial of relief in case the facts should ultimately appear to be as averred. *Winton Motor Carriage Co. v. Curtis Pub. Co.*, 196 Fed. 906.

⁹³ *American Lead Pencil Co. v. Schneegass*, 178 Fed. 735, 738.

⁹⁴ *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 741, 19 L. R. A. 387.

⁹⁵ *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 741, 19 L. R. A. 387. See also *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 746, 19 L. R. A. 395.

⁹⁶ *Magpie Gold Min. Co. v. Sherman*, 23 S. D. 232, 20 Ann. Cas. 595, 121 N. W. 770.

tion to compel the owner to remove the danger will issue on the interlocutory application of the railroad company, upon its executing a bond to indemnify the owner if it shall be ascertained on final hearing or on appeal that it was not entitled to the writ.⁹⁷

§ 3320. Ultra vires acts—Right of state to enjoin. The doctrine of ultra vires is critically examined and exhaustively treated in an earlier chapter of this work wherein are discussed the general rules, their exceptions and their qualifications, as well as the distinctions to be observed in considering the authorities. The same inaccurate use of the term "ultra vires" which is adverted to in that chapter is noted to have occurred in some instances in the authorities which are the subject of this.⁹⁸ It seems that in a proper case the injunctive process may be invoked against its ultra vires act or acts,⁹⁹ and that quo

⁹⁷ *Pennsylvania R. Co. v. Kelley*, 77 N. J. Eq. 129, 140 Am. St. Rep. 541, 75 Atl. 758.

⁹⁸ See Chap. 37, §§ 1507-1609, *supra*.

⁹⁹ "Our conclusion * * * both from reason and a decided weight of authority, is that the state, in her sovereign capacity, can appeal to the courts for relief by injunction, whenever either her property is involved, or public interests are threatened and jeopardized by any corporation—especially one of a public nature, like a railroad company—seeking to transcend its powers and to violate the public policy of the state. * * * We are equally well satisfied of the correctness of the proposition that, if the state has no interest in the matter in controversy, she will not be heard to ask for such extraordinary relief, and she can have no interest unless her property rights or the public interests are involved." *Trust Co. of Georgia v. State*, 109 Ga. 736, 48 L. R. A. 520, 35 S. E. 323, explaining *Attorney General v. Tudor Ice Co.*, 104 Mass. 239, 6 Am. Rep. 227, and *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371.

"A court of equity has jurisdiction and may in an action by the state

enjoin a corporation from exceeding its chartered powers or doing acts otherwise illegal and injurious to the public." *Louisville & N. R. Co. v. Com.*, 97 Ky. 675, 31 S. W. 476, *aff'd* 161 U. S. 677, 40 L. Ed. 849.

Especially will a corporation be enjoined from exceeding its charter powers, when in so doing it creates a public nuisance. "It may be regarded as settled that, where a quasi public corporation exceeds its corporate powers, and its acts involve a nuisance or otherwise tends [tend] to public injury, a bill may be exhibited against such corporation in the court of chancery." *Stockton v. American Tobacco Co.*, 55 N. J. Eq. 352, 36 Atl. 971. "It is well settled that, where a corporate excess of power tends to the public injury, or to defeat public policy, it may be restrained in equity" at the suit of the attorney general. *Stockton v. Central R. Co. of New Jersey*, 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964. So when a corporation is doing acts which are ultra vires and an abuse of the power granted it by the legislature and the necessary effect of such acts will be to create a public nuisance, an injunction will lie

warranto is not in every instance the only remedy available against a corporation guilty of abusing or exceeding its corporate powers,¹

on an information by the attorney general. *Attorney General v. Jamaica Pond Aqueduct Corporation*, 133 Mass. 361, 363.

Where a corporation exceeds, abuses or misapplies its powers, a court of equity will interfere, but it will not give its aid where the powers granted are exercised in good faith or where they are discretionary, or where the right is doubtful. *Scudder v. Trenton Delaware Falls Co.*, 1 Saxt. Ch. (N. J.) 694, 23 Am. Dec. 756, 763. In an Indiana case, it was held that the wasting of natural gas by the producing company constituted a public nuisance against which an injunction would be at the suit of the state. *State v. Ohio Oil Co.*, 150 Ind. 21, 47 L. R. A. 627, 49 N. E. 809.

¹ See Chap. 49, *supra*; see also the chapter on Forfeiture, Dissolution and Winding Up, *infra*.

"While the state may elect to bring an action to forfeit the franchise of a corporation created by it because of an ultra vires act that tends to the prejudice of the public, yet it is not bound to do so, but may invoke the powers of its courts having general chancery jurisdiction to keep the corporation within the path marked out for it by statute." *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 60 L. R. A. 822, 66 N. E. 436.

"It should * * * be borne in mind that acts ultra vires may justify interference on part of the state by injunction to prohibit a continuance of the excess of powers which would not be sufficient ground for a forfeiture in proceedings in quo warranto." *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020.

Quo warranto is not the only rem-

edy available against a race track corporation which exceeds its corporate powers by permitting the operation of bookmakers on its premises, but the attorney general at his option may proceed by injunction. *Chicago Fair Grounds Ass'n v. People*, 60 Ill. App. 488.

"It may frequently better serve the public interest to restrain a corporation from exceeding its powers in an unlawful direction, than to punish it by penal remedies, or to forfeit its charter, and the attorney general may elect which course he will take." *Chicago Fair Grounds Ass'n v. People*, 60 Ill. App. 488, 496.

In *Trust Co. of Georgia v. State*, 109 Ga. 73, 48 L. R. A. 520, 35 S. E. 323, the court observed that "among the several grounds of demurrer, the main one that seems to be relied upon by counsel for plaintiffs in error is that the suit was improperly brought in the name of the state for injunction but that quo warranto was the proper remedy for the wrongs complained of [violation of a provision of the state constitution] and the proceeding should be on the relation of the attorney general," and had stated that "upon this point neither the authorities in England nor in this country are entirely reconcilable; some holding that the remedy by injunction in favor of the state will not be to restrain a corporation from the exercise of powers ultra vires, and others holding that this is the proper remedy. We have reached the conclusion that the sounder reasoning is in favor of allowing to the state relief by injunction whenever it is proceeding in the interest of the public to prevent a threatened injury. As harsh as the remedy by injunction is generally considered, it is certainly

particularly when such remedy is not as adequate as the remedy by injunction.² What is a proper case in which to employ remedy by injunction is altogether another question. In an early New York case which is often referred to, Chancellor Kent held that a court of equity did not have jurisdiction of an information filed by the attorney general of the state to enjoin the usurpation by an insurance company of the banking franchise, the unauthorized exercise of which constituted a violation of the state banking statute.³

not as severe as would be a proceeding in the nature of quo warranto, instituted for the purpose of forfeiting the charter of a corporation. The one is instituted, not for the purpose of causing a destruction of the corporation, but to prevent it from entering into transactions violative of the public policy of the state, and to protect the interest of the public against a threatened wrong. The other remedy, if enforced, would cause the death of the corporation,—thus forever preventing it from serving the public interests or meeting the public demands upon its business,—and often result in a wreckage of the property of its owners. We can therefore see no reason why, if the remedy for the wrongs threatened can be as well prevented by injunction, it would not be the more readily and properly applied, than the harsher one of forfeiture or confiscation.”

“It appears that the attorney general has the election in his discretion whether, in case of excess of corporate powers, he will proceed at law to forfeit the charter and franchises, or apply in equity for a restraint of the excess. Both tribunals are open to him. The right of appeal to equity does not depend upon the inadequacy of the legal remedy.” *Stockton v. Central R. Co. of New Jersey*, 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964.

But it has been held that one corporation is not entitled to an injunction against another on grounds which are merely such as would be sufficient

if the suit had been brought by the state before another tribunal to deprive the defendant of corporate life and power. *Elizabethtown Gas-Light Co. v. Green*, 46 N. J. Eq. 118, 18 Atl. 844.

² *State v. Louisiana, B. G. & A. Gravel Road Co.*, 116 Mo. App. 175, 92 S. W. 153.

³ *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371, followed in *Attorney General v. Bank of Niagara*, Hopk. Ch. (N. Y.) 354, holding that “the exercise of banking privileges * * * without authority, though contrary to law, is not a nuisance, within the established sense in which that term is used in the books. It is not necessarily injurious to the public health, convenience or morals. It is therefore unnecessary to decide whether the court would, or would not, interfere, by injunction in the case of a public nuisance.” Compare *Attorney General v. Cohoes Co.*, 6 Paige (N. Y.) 133, 29 Am. Dec. 755. Each of these three New York cases is considered in *Attorney General v. Chicago & N. W. Ry. Co.*, 35 Wis. 425, as quoted in note 9, *infra*, this section.

Referring to *Attorney General v. Utica Ins. Co.*, *supra*, the court in *State v. Crawford*, 28 Kan. 726, 736, says: “Chancellor Kent seems to express an opinion * * * that courts of equity do not have jurisdiction to restrain the commission of nuisances or other acts which are at the same time criminal offenses. Now

A number of years after the great New York chancellor had so held, the Supreme Court of Wisconsin had occasion to examine the question whether an injunction would lie against ultra vires acts, and, in a scholarly opinion, Chief Justice Ryan, speaking for the court, sustained the jurisdiction. In the case in which the question arose⁴ certain railroad companies were enjoined from charging rates in excess of those fixed by statute. The Chief Justice declared that the question of the jurisdiction of courts of equity to enjoin, at the suit of the attorney general, the usurpation or abuse of corporate franchises "was argued very ably and at large, and has been carefully considered, although we have had no difficulty in coming to the conclusion that courts of equity have such jurisdiction, and that it is a very beneficial jurisdiction, almost essential to public order and welfare." In view of the masterly treatment of the subject by the Chief

with all due deference to the vast learning and the eminent ability of the great chancellor, and with all proper veneration for his memory and his name, we cannot follow this decision to its full and entire extent; for, unquestionably, the great weight of authority as well as of reason, is against the doctrine seemingly enunciated therein. We think that courts of equity certainly have jurisdiction to enjoin public nuisances, although such nuisances and all their constituent facts may at the same time be public offenses. Indeed, the fact that public nuisances with all their constituent facts, are public offenses, is a very strong reason why courts of equity should take jurisdiction of such nuisances, and suppress and enjoin them; provided, of course, that no other adequate remedy exists. Indeed, at common law, all public nuisances were public offenses; and if the proposition is sound that no nuisances can be enjoined, except such as are not public offenses, then, where the common law has full force, no public nuisance could ever be enjoined. This we think will not be insisted upon in its entirety, even by the defendants in error."

But in *Attorney General v. Tudor Ice Co.*, 104 Mass. 239, 6 Am. Rep. 227, an information by the attorney general to restrain certain ultra vires acts on the part of the defendant corporation, the court considering *Attorney General v. Utica Ins. Co.*, supra; declared that "if there are any other cases to which this form of remedy is appropriate, that of a private trading corporation, whose proceedings are not shown to have injured or endangered any public or private rights, and are objected to solely upon the ground that they are not authorized by its act of incorporation and are therefore against public policy, is not one of them," and dismissed the information. (This, however, is not the law of Massachusetts to-day, the matter now being regulated by statute. See *infra* this section.)

In Illinois it has been held that the state may have an injunction against a state bank's exceeding its corporate powers by doing business in a part of a certain city other than the one in which it was chartered to operate. *People v. Metropolitan State Bank*, 272 Ill. 311, 111 N. E. 992.

⁴ *Attorney General v. Chicago & N. W. Ry. Co.*, 35 Wis. 425, 523.

Justice, it probably will not be amiss here to quote from his opinion at length. Said he: "It was hardly denied that the English court of chancery entertains jurisdiction in such cases; and indeed the English books leave little room for such a denial. But it was said that, in England, the attorney general has a right to elect his forum, legal or equitable. And it is so said in some of the cases.⁵ But it appears to us that this logically follows, everywhere, upon equitable jurisdiction to restrain corporate violations of charters or other public law. In such cases there is always a remedy at law. The attorney general may proceed at law by quo warranto to forfeit the charter of the offending corporation; and, if there be a penalty, as often happens, he may sue for it at law. And the concurrent remedy by injunction inevitably gives the election imputed to the attorney general. And we see no reason why the attorney general here has not the same election. To deny him such an election is only another way of denying the jurisdiction. The equitable jurisdiction precludes the objection that there is an adequate remedy at law. It admits the remedy at law, but administers its own remedy in preference, when the state seeks it in preference. It seems to proceed on the presumption that it may better serve the public interest to restrain a corporation, than to punish it by penal remedies or to forfeit its charter; and that, in that view, the proper officers of the state should have an election of remedies. And we may as well say in this connection, that the jurisdiction to entertain these informations is wholly independent of an adequate remedy at law; and that, were that otherwise, we could not consider the informations in the nature of quo warranto, pending in this court against these defendants, as an adequate remedy at law, which could be a substitute for or bar to the injunctions asked. Judgments of ouster on those informations might not only be of far more grave consequence to the defendants, but might be far less beneficial to the state, and less accordant with its policy, and altogether less equitable and proper, than the injunctions sought to restrain the defendants from doing what is alleged to work a forfeiture of their charters. Doubtless the court has power, in granting injunctions, to prescribe conditions controlling the action of the attorney general in the quo warranto cases. But if this court can enjoin, it can do so without regard to any remedy at law; and the attorney general has a right of election to resort to the more lenient remedy of injunction, in preference to the harsher and more dangerous experiment of forfeiture." Adverting to the

⁵ Citing *Attorney General v. Mayor, etc., of Galway*, 1 Molloy (Ire.) 103.

argument "against the authority of the English cases, that the jurisdiction of the English chancery in such cases, rests largely on recent acts of parliament," the Chief Justice was "unable to find any English statute enlarging the jurisdiction of the court of chancery in such cases; and we find all the English cases proceeding without reference to statutory jurisdiction. We find no room for doubt that this jurisdiction of English courts of equity is independent of all authority by statute, and has long been as well recognized as any ground of equitable jurisdiction whatever." Proceeding, Chief Justice Ryan approved Mr. Brice's statement of the rule⁶ which is to the effect that "under many circumstances, the court of chancery has, on public grounds, jurisdiction to prevent corporations acting in various ways, or contrary to the intent for which they have been created. The public, however, must be represented in all applications relating to such matters, and this is done by the intervention of the attorney general. No single person, whether a member of the corporation in question or not, is able on his own account, and of his own motion, to call upon the court to interfere for his special protection. The wrong he complains of is not confined to himself; no right or privilege peculiar to himself is violated; the wrongs inflicted and the rights invaded affect the public, and the public, consequently, must be a party to the proceedings. The occasions upon which the court will exercise jurisdiction to restrain the doing of acts of this kind, seem to fall into the three following heads: 1st. When a corporation is abusing powers given for public purposes; 2d, or is committing a breach of trust; 3d, or is acting adversely to public policy. * * * The above being the grounds of the jurisdiction of the court of chancery in this behalf, the next point is, when can the attorney general direct proceedings on behalf of the public? He may do so whenever public interests have been damnified, or will manifestly be damnified, in the result, by transactions which are now taking place. And it would seem from the judgment in *Ware v. Regent's Canal Company*⁷ * * * that he may do so when a corporation is going beyond its special powers, even though no definite injury has been done or is likely to be done to the public. Where there has been an excess of the powers given by an act of parliament, but no injury has been occasioned to any individual, or is imminent and of irreparable consequences, I apprehend that no one but the attorney general, on behalf of the public, has a right to apply to this court to check the exorbitance of the party in the exercise of the powers confided to him by the legis-

⁶ Brice's *Ultra Vires* 506-509.

⁷ 3 De Gex & J. 212, 228.

lature." After quoting the language of Mr. Brice, in part set out above, the Chief Justice continued: "It would have been a mockery of justice to have left corporations, counting their capital by millions—their lines of railroad by hundreds, and even, sometimes, by thousands of miles—their servants by multitudes—their customers by the active members of society—subject only to the common-law liabilities and remedies which were adequate protection against turnpike and bridge and ferry companies, in one view of their relations to the public; and, in another view, to the same liabilities and remedies which were found sufficient for common carriers who carried passengers by a daily line of stages, and goods by a weekly wagon, or both by a few coasting or inland craft; with capital and influence often less than those of a prosperous village shopkeeper. The common-law remedies, sufficient against these were, in a great degree, impotent against the great railway companies—always too powerful for private right, often too powerful for their own good. It was in these circumstances that the English courts of equity applied their restraining jurisdiction at public or private suit, and laid on these great companies the strong hand of equitable control. And all England had occasion to bless the courage and integrity of her great judges, who used so ably and so freely and so beneficially the equity writ, and held great corporations to strict regard to public and private right. Every person suffering or about to suffer their oppression, by a disregard of corporate duty, may have his injunction. When their oppression becomes public, it is the duty of the attorney general to apply for the writ on behalf of the public. And in this country, where the judicial tone is less certain, it is refreshing to read the bold and true words of which English equity judges do not spare the utterance. * * * The remedy by injunction, at the suit of private parties, for private wrong, is recognized and enforced in a great number of American cases.⁸ There are

⁸See also the following decisions:

United States. *Osborn v. Bank of United States*, 9 Wheat. 738, 6 L. Ed. 204; *Bonaparte v. Camden & A. R. Co.*, Baldwin 205, Fed. Cas. No. 1,617.

Connecticut. *O'Brien v. Norwich & W. R. Co.*, 17 Conn. 372; *Bigelow v. Hartford Bridge Co.*, 14 Conn. 565, 36 Am. Dec. 502.

Illinois. *Newhall v. Galena & C. U. R. Co.*, 14 Ill. 273.

Maryland. *Delaware & M. R. Co. v. Stump*, 8 Gill & J. 479, 29 Am. Dec. 561.

Massachusetts. *Boston & L. R. Corporation v. Salem & L. R. Co.*, 2 Gray 1; *Newburyport Turnpike Corporation v. Eastern R. Co.*, 23 Pick. 326; *Rowe v. Granite Bridge Corporation*, 21 Pick. 344.

New Jersey. *Water Com'rs v. Hudson*, 13 N. J. Eq. 420; *Browning v. Camden & W. R. & Transp. Co.*, 4 N. J. Eq. 47; *Kean v. Central R. Co.*, 1 Stockton 401.

New York. *Jerome v. Ross*, 7 Johns. Ch. 315, 11 Am. Dec. 484; *Couch v. Ulster & O. B. Turnpike Co.*,

more cases to the same effect; an unbroken line of decisions, of the most respectable authority, covering some half a century; most of them going on excess or abuse of corporate franchise, and all fully sustaining equitable jurisdiction in case of private wrong. They seem to establish the jurisdiction of courts of equity in this country, as conclusively as it is established in England, of private suits to restrain private wrong arising from excess or abuse of power by corporations. In such cases, public wrong may be considered only as an aggregation of private wrongs. And, the jurisdiction once established to enjoin private wrong, in each case, at the suit of the person wronged, it is almost a logical necessity to admit the other branch of the jurisdiction, to enjoin, at the suit of the state, such a general wrong, common to the whole public, as interests the state, and could be remedied by private persons by a vast multitude of suits only, burthensome to each and impracticable for very number; more conveniently, effectively and properly represented by the attorney general as *parens patriae*. But, jurisdiction of informations of this nature has sometimes been denied here, courts of equity in this country, singularly enough, being sometimes more timid to control corporate power, and less willing to protect the public against corporate abuse, than the English chancery. In both branches of the jurisdiction, it proceeds as for quasi nuisance; and it is difficult to understand why the jurisdiction should be asserted as to private nuisance and denied as to public nuisance; why, for the same cause, individuals should have a remedy denied to the aggregate of individuals, called the public. But, as we remarked before, the judicial voice in America is less certain in tone than in England. We should be willing to follow the English rule, in this state, unless there were a preponderance of American authority against it. But fortunately we find this wholesome jurisdiction sustained here by the great weight of authority, and, with modern experience, we deem it only a question of time when it must be universally asserted and exercised. * * * It is hardly necessary to add that we sustain the jurisdiction to enjoin a corporation from abuse or excess of franchise, or other violation of public law to public detri-

4 Johns. Ch. 26; *Belknap v. Belknap*, 2 Johns. Ch. 463, 7 Am. Dec. 548; *Gardner v. Newburgh*, 2 Johns. Ch. 162, 7 Am. Dec. 526; *Mohawk Bridge Co. v. Utica & S. R. R. Co.*, 6 Paige 554.

Ohio. *Moorhead v. Little Miami R. Co.*, 17 Ohio 340; *Ross v. Page*, 6

Ohio 166; *McArthur v. Kelly*, 5 Ohio 139.

Pennsylvania. *Bell v. Ohio & P. R. Co.*, 25 Pa. St. 161, 64 Am. Dec. 687; *Sandford v. Catawissa, W. & E. R. Co.*, 24 Pa. St. 378, 64 Am. Dec. 667; *Jordan v. Philadelphia*, 29 Pa. Super. Ct. 502.

ment, on information in equity, filed ex officio by the attorney general. * * * The jurisdiction which we claim for this court puts the writ of injunction to a prerogative use. And we are strongly inclined to think that our views of our jurisdiction of these informations, follow almost logically from our views of our jurisdiction of the writ as a quasi prerogative writ. And we have illy expressed ourselves, and illy applied the authorities quoted, if we have not already made it apparent that we consider this jurisdiction, in this court, a necessary and most salutary one for the preservation of public right and public authority."⁹

⁹ With regard to Attorney General v. Utica Ins. Co., note 3, supra, this section, Chief Justice Ryan adopted "the view of Chancellor Vroom [Attorney General v. New Jersey R. & Transp. Co., 3 N. J. Eq. 136, 139] * * * that Chancellor Kent only 'appears rather to question the jurisdiction.' Be that as it may, it doubtless misled many, as V. C. McConn, in Verplanck v. Mercantile Ins. Co. [1 Edw. Ch. (N. Y.) 88], to think that the decision was against the jurisdiction under any circumstances. And with all our admiration of his learning and deference for his authority and veneration for his judicial qualities, we cannot help feeling that, as in the case of the exercise of the right of eminent domain, the great chancellor misled the courts of New York into error on this question also. In the one case, it took them some quarter of a century to return to sound principles. In the other, they have not yet done so. So mischievous is the sanction of a great name to error." Prior to this, the Chief Justice had noted the fact that "in 1836, notwithstanding the cases presently noticed in 2 Johns. Ch. [Attorney General v. Utica Ins. Co., decided in 1817] and Hopkins [Attorney General v. Bank of Niagara, Hopkins, 354, decided in 1825], Chancellor Walworth asserted and enforced the jurisdiction in New York.

The attorney general filed an information to restrain the defendant corporation, claiming a right so to do, from tapping a canal. The chancellor sustained the jurisdiction and the injunction, saying: 'This court has jurisdiction to restrain any pourprespature, or unauthorized appropriation of public property to private use, which may amount to a public nuisance, or may injuriously affect or endanger the public interest. And when the officers entrusted with the protection of such public interests, acting under the sanction of their official oaths, believe the intended encroachment will prove injurious to the navigation of the canals, private persons should not be permitted to interfere with the waters or embankments of the canals, contrary to law, upon a mere opinion, although under the sanction of an oath, that the intended trespass upon the public rights would not be an injury to the public.' Attorney General v. The Cohoes Co., 6 Paige 133. In emergency, the New York chancery overlooked Chancellor Kent's coy doubts and nice subtleties, and assumed the jurisdiction which he had involved in such learned obscurity." Reference to Attorney General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371, and Attorney General v. Bank of Niagara, Hopk. Ch. (N. Y.) 354 cannot do other than raise the question whether

In Massachusetts, it is now expressly provided by statute that "upon an information in equity in the name of the attorney general,

the position taken by Chancellor Kent in *Attorney General v. Utica Ins. Co.* (subsequently adopted by Chancellor Sandford in *Attorney General v. Bank of Niagara*) actually conflicts with the views of Chief Justice Ryan to the extent that the Chief Justice believed. In *Attorney General v. Utica Ins. Co.*, it was sought to enjoin the defendant company from exercising banking powers without having been authorized so to do as required by statute. Chancellor Kent denied an injunction (see *supra* this section), but in the course of his opinion said: "If the defendants are carrying on banking operations, contrary to law, they ought, undoubtedly, to be restrained; but I cannot be of opinion that the operation is such a mischief or public nuisance, as to require the immediate and extraordinary process of this court to abate it. I know that the court is in the practice of restraining private nuisances to property [there is no conflict here in the opinions of Chancellor Kent and Chief Justice Ryan; see the text, *supra*, this section], and of quieting persons in the enjoyment of private right; but it is an extremely rare case ["extremely rare," however, does not absolutely deny the jurisdiction!], and may be considered, if it ever happened, as an anomaly ["out of the ordinary," perhaps, but not an impossibility!], for a court of equity to interfere at all, and much less preliminarily, by injunction, to put down a public nuisance which did not violate the rights of property, but only contravened the general policy. There are no particular individuals affected or disturbed in the enjoyment of their private rights, by the banking power assumed in this case. There is no such allegation made. * * * Here

is no encroachment on the property of the state, nor is the mischief of a similar nature. The objection to the exercise of the banking power in this case is, that it is unlawful, and not warranted by law. It would be quite extravagant to hold it to be a public nuisance, or that 'kind of annoyance and mischief which a nuisance implies. The information is founded on the charge, that the banking power exercised by the defendants is not given by their charter, and that it is an offense against the statute. There is no case in which an information has been sustained in this court, on such grounds." In *Attorney General v. Bank of Niagara* (quoted in the note *supra*, this section), wherein it was sought to restrain the defendant bank from exercising banking powers pending the trial on an information in the nature of a quo warranto which had been filed against it, Chancellor Sandford followed the decision in *Attorney General v. Utica Ins. Co.*; denied the motion for an injunction; declared that the unauthorized exercise of banking powers "is not a nuisance, within the established sense in which that term is used in the books," and made the very significant statement that "it is * * * unnecessary to decide whether the court would, or would not, interfere by injunction in the case of a public nuisance." Thus it would seem that these two New York cases cannot be regarded as authority for the proposition that equity cannot enjoin a corporation from transcending its corporate powers, in the doing of which it violates a public statute, even though its offense constitutes a public nuisance affecting rights of property.

at the relation of the commissioner of corporations, the Supreme Judicial Court shall have the power to restrain by injunction, any corporation from assuming or exercising any franchise or privilege, or transacting any kind of business not authorized by the charter of such corporation and the laws of this commonwealth." This statute, declares the Supreme Court of Massachusetts, precludes the attorney general from maintaining "an information at law in the nature of 'quo warranto, to prevent the exercise by a corporation, of powers ultra vires, where he does not desire any other judgment against it," and, hence, when it is merely sought to put an end to the acts of one corporation in taking and holding the stock and bonds, and in guaranteeing the bonds and dividends of certain other corporations without authority of law and in violation of the statute, injunction and not quo warranto is the proper proceeding.¹⁰ A different rule, however, ob-

¹⁰ Attorney General v. New York, N. H. & H. R. Co., 197 Mass. 194, 83 N. E. 408. See also Attorney General v. New York, N. H. & H. R. Co., 198 Mass. 413, 84 N. E. 737.

Dealing with the Minnesota statute which provides that when a corporation which has the power to make loans on pledges becomes insolvent and unable to pay its debts or violates any of the provisions of its act of incorporation or any other law binding on it, the district court may, by injunction issued on the complaint of the attorney general, restrain it and its officers from exercising any of its corporate rights, the Supreme Court of Minnesota, in *State v. American Savings & Loan Ass'n*, 64 Minn. 349, 67 N. W. 1, 3, said: "It is not every violation of the law applicable to a corporation which will justify a court, by virtue of this statute, in restraining it from exercising its franchises. It is impracticable to lay down a rule applicable to all cases as to what violations of law by a corporation will authorize the court in enjoining it, and taking possession of its property. But it is certain that when its acts, in violation of law, concern the essence of the contract between it and

the state, are 'so substantial and continued as to amount to a clear violation of the condition upon which the franchise was granted, and so damage or destroy the business of the corporation that it no longer fulfills the end for which it was created,' the court must, when called on by the state, restrain it from exercising its franchises. *State v. Minnesota Thresher Manuf'g Co.*, 40 Minn. 213, 41 N. W. 1020. One of the implied provisions of the defendant's act of incorporation (it is immaterial that it was organized under a general, and not a special, act) was that the franchises conferred upon it should not be misused so as to defeat the ends for which it was organized, and that, when so used, the further exercise of them might be restrained, or they might be wholly forfeited to the state. This important and fundamental provision is necessarily implied in every grant of corporate existence. *State v. Minnesota Cent. Ry. Co.*, 36 Minn. 246, 30 N. W. 816; *Insurance Co. v. Needles*, 113 U. S. 574, 5 Sup. Ct. 681. It may be suggested that a violation of this implied provision of the defendant's act of incorporation is not fairly within

tains in Michigan. In that state, quo warranto and injunction are both provided for by statute, and quo warranto will not fail, even though an ample and adequate remedy is found in equity and notwithstanding the facts do not warrant the depriving of the corporation of its charter, forfeiture not being the only relief which can be awarded in a quo warranto proceeding. Hence, where a corporation was chartered to conduct a charitable hospital but, as is alleged, it was organized for such purpose in order to enable it to secure the exemption of its property from taxation, and it is actually conducting its business for profit, an information in the nature of quo warranto will lie notwithstanding the fact that the state might have proceeded

the purview of [the statute referred to.] * * * We are of the opinion that it is. This statute must be construed with reference to the common law upon the subject to which it relates. It is true, a court of equity had no jurisdiction, under the old chancery practice, to decree the dissolution of a corporation by a forfeiture of its franchises, either at the suit of an individual or the state; but it is also true that such court had jurisdiction at the suit of the attorney general to enjoin the abuse or misuse of corporate franchises when the misuser was productive of public mischief. 2 Mor. Priv. Corp. § 1043. The authorities on this proposition are collected and analyzed in a masterful opinion by Ryan, C. J., in the case of Attorney General v. Railroad Companies, 35 Wis. 523 [quoted supra, this section], and the conclusion reached 'that courts of equity have such jurisdiction, and that it is a very beneficial jurisdiction, almost essential to public order and welfare.' The end and purpose for which the state granted corporate franchises to the defendant were, as declared in its articles of incorporation, to assist its members in saving and investing money, and in buying and improving real estate, and in procuring money for other purposes, by loaning or advancing, under the mutual building society plan.

Now, the allegations of the complaint show that this beneficent purpose for which the defendant received its franchises has been defeated by its unlawful acts, that its violations of this provision of its act of incorporation and other laws binding on it have been so substantial and continued as to amount to a clear violation of the condition upon which the franchises were granted, and that the defendant can no longer fulfill the end for which it was created. Assuming, as we must for the purposes of this appeal, the truth of the allegations in the complaint, the defendant has been and is guilty of a gross misuser of its franchises, and of a violation of the laws binding upon it. * * * It is true that some of its more flagrant violations were years ago, but it has not earned a condonation by subsequent good conduct. * * * If the allegations of the complaint are established on the trial, it would seem that the court would be justified in enjoining the defendant from further exercising its franchises and in distributing its property to its creditors and members. Indeed, under such circumstances, to longer permit the defendant to misuse its franchises for the purpose of defrauding its present and future members would be a reproach to the state and to the administration of justice.'

by injunction.¹¹ While recognizing that there has been some contrariety of opinion among the courts as to whether an injunction will issue at the suit of the attorney general to restrain an excess of corporate power merely because it is such, or whether before it will issue "actual threatened injury must be manifest,"¹² the New Jersey court has held that in the case of a preliminary injunction, at least, the better reason is on the side of the authorities which take the view that an injunction should not issue upon a mere legal intendment but that the court should be satisfied that there is a real, substantial injury which demands the issuance of the writ in the due protection of the public.¹³

Where it is sought to protect public rights and to prevent the creation of a public nuisance which are threatened by acts in excess of corporate powers, it is not necessary that the suit be brought through the medium of a private relator.¹⁴

¹¹ *People v. Michigan Sanitarium & Benevolent Ass'n*, 151 Mich. 452, 115 N. W. 423.

¹² Citing, as best exhibiting this contrariety of opinion, *Green's Brice's Ultra Vires* (2nd Ed.), 708; *Attorney General v. Chicago & N. W. Ry. Co.*, 35 Wis. 425; *Attorney General v. Shrewsbury Bridge Co.*, 21 Ch. Div. 752; *Attorney General v. Great Eastern Ry. Co.*, 11 Ch. Div. 449; *Attorney General v. Great Northern Ry. Co.*, 1 Drew. & S. 154, 6 Jur. N. S. 1006; *Attorney General v. Cockermouth Local Board*, L. R. 18 Eq. Cas. 172.

¹³ *Stockton v. Central R. Co. of New Jersey*, 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964.

¹⁴ "The rule, both in England and the United States, except as changed by statute, is that it is the Attorney General, as the representative of the public, who sues for invasions of the public right, whether by way of purpresture or nuisance, or because of corporate excess." *Muncie Natural Gas Co. v. Muncie*, 160 Ind. 97, 60 L. R. A. 822, 66 N. E. 436.

In a New Jersey case, based on an information filed by the attorney gen-

eral for the purpose of restraining a railroad company from completing a bridge which it was constructing across the Delaware River, and of abating the piers and abutments which it had already erected, which bridge, piers and abutments were and would be, it was claimed, a purpresture and public nuisance, it was urged by the defendant that the information was, "at least, irregular for want of a relator, and should not be permitted to stand, unless amended by the insertion of the name of a proper person as such. But," said the court, "this objection must not prevail. In equity, as in the law court, the Attorney-General has the right, in cases where the property of the sovereign or the interests of the public are directly concerned, to institute suit, by what may be called civil information, for their protection. The state is not left without redress in its own courts because no private citizen chooses to encounter the difficulty of defending it, but has appointed this high public officer, on whom it has cast the responsibility and to whom, therefore, it has given the right of appearing in its behalf and

§ 3321. — Right of third person to enjoin. Regardless of whether an abuse or transcending of corporate powers can be reached by the state by injunction or only by *quo warranto*,¹⁵ it is undoubtedly true that the mere fact, without more, that a corporation has been guilty of, or is doing, an *ultra vires* act or *ultra vires* acts does not give a private person not specially injured thereby, the right to proceed, on his own initiative and in his own name, against such corporation by injunction.¹⁶ When, however, such a person has sustained injury, peculiar to himself, as a result of the *ultra vires* act or acts complained of, the rule would seem to be otherwise.¹⁷ But in such a case, it is

invoking the judgment of the courts on such questions of public moment. The same point was lately raised in the Supreme Court, (*Attorney-General v. Del. & B. B. R. Co.*, 9 Vroom 282,) and there decided in accordance with the views of the Chancellor and this court in the present case." *Attorney-General v. Delaware & B. B. R. Co.*, 27 N. J. Eq. 631, 632. See also *Stockton v. Central R. Co. of New Jersey*, 50 N. J. Eq. 52, 17 L. R. A. 97, 24 Atl. 964.

The intervention of a private relator is not necessary in an action to restrain a corporation from violating the rights of the people of the state and creating a public nuisance by polluting the waters of a stream, but the attorney general may maintain the action on his own information. *People v. Truckee Lumber Co.*, 116 Cal. 397, 39 L. R. A. 581, 58 Am. St. Rep. 183, 48 Pac. 374.

¹⁵ See the next preceding section and § 1524, *supra*.

¹⁶ A person owning or occupying property in a town has no right, by reason of such fact, to enjoin a railroad company, the road of which runs near his property, from allowing a house to be built and occupied by its licensee for the storage of cotton seed to be forwarded over its line, on the ground that such action is *ultra vires* of the company. *Richmond Cotton Oil Co. v. Castellaw*, 134 Ga. 472, 67 S. E. 1126.

If a street railroad company "violates its charter, or fails to perform the conditions under which it exercises its franchises, or if, in the management of its trains or business, it unlawfully occupies or obstructs the public highway, the remedy in the former case is by a proceeding in behalf of the people by the attorney general to annul or forfeit its franchise, and in the latter by indictment or proceedings under the statute." *Moore v. Brooklyn City R. Co.*, 108 N. Y. 98, 15 N. E. 191.

¹⁷ "We think that the question of the power of the court to grant an injunction at the suit of an individual injuriously affected by the *ultra vires* acts of the corporation is settled in the affirmative by the previous adjudications of this court." *Alpena v. Alpena Circuit Judge*, 97 Mich. 550 (injunction against municipality's incurring indebtedness), 56 N. W. 941, citing *Curtenius v. Hoyt*, 37 Mich. 583 (injunction against township's issuance of railroad aid bonds).

In *Hudson River Tel. Co. v. Water-vliet Turnpike & Railway Co.*, 135 N. Y. 393, 17 L. R. A. 674, 31 Am. St. Rep. 838, 32 N. E. 148, the court said: "All the injuries of which the plaintiff complains [and which it sought to remedy by injunction] are due to the adoption by the defendant of the single trolley system of electric propulsion. It becomes, therefore, of the first importance to determine

not the fact that the corporation has been guilty of an offense against the state, but the fact that special injury to the complainant has followed the commission of such offense, that gives the right to the injunction. In other words, while a private person may have an injunction to vindicate his private rights as well where they are violated by a corporation's abuse or transcending of its charter powers as where they are violated by any other manner of wrong, he cannot assume to vindicate the offended majesty of the state by injunction any more than he can by any other judicial process.¹⁸ In a Connecticut case in

whether this change of motive power was authorized by law. The plaintiff makes a vigorous attack upon the right of the railway company to the enjoyment of such a franchise, and urges many grounds in support of its position. We cannot assent to the argument of the learned counsel for the defendant, that the determination of this question is immaterial, because the state alone, by its attorney general, can bring suit for a usurpation of corporate powers, or because, ordinarily, the local authorities must prosecute for an unlawful obstruction of the streets, not involving the appropriation of private property. In the case of a corporation exercising a delegated authority for the public benefit, the actionable quality of a private injury resulting therefrom may depend upon the legislative will, and the aggrieved party may be without remedy if the damage sustained is the result of the proper exercise of a power or privilege conferred by law, and a right of action is not given by express enactment. This immunity from liability does not, however, extend to acts which are ultra vires, or which are equivalent to a confiscation or condemnation of the property rights of the citizen unless provision is made for due compensation. If the sovereign power has never granted to the defendant the right to make use of electricity in the traction of its cars in the streets of Albany, it

must respond to the plaintiff, and to all others whose lawful pursuits are invaded by its illegal procedure."

"Corporations will be restrained by a court of equity from a gross abuse of their powers when to the injury of individuals." Mayor, etc., of Frederick v. Groshon, 30 Md. 436, 96 Am. Dec. 591 (injunction against municipal corporation).

So where a turnpike company attempts to collect toll from persons whom the company's charter exempts from the payment thereof, an injunction will lie at the suit of such persons. Louisville & T. Turnpike Road Co. v. Boss, 19 Ky. L. Rep. 1954, 44 S. W. 981.

¹⁸ "It is clear that any suit to compel the performance of a corporate duty, in which the petitioners show no interest different from that of the whole public, should be brought in the name of the attorney general, and cannot be maintained in the name of these petitioners." Shackley v. Eastern R. Co., 98 Mass. 93 (suit to compel railroad company to run statutory number of trains) as quoted in Erin Tp. v. Detroit & E. Plank-Road Co., 115 Mich. 465, 73 N. W. 556.

In view of the existence of statutes providing for the bringing of suits by public officers for violations of the railroad law, saving the rights of private persons to bring suits against railroad companies for private damages and giving to courts of equity, in suits brought under the direction of

which a steam railroad company sought to enjoin the construction of an electric interurban railway, paralleling its road, the two separate grounds on which it predicated its right to an injunction being contained in two separate counts in its complaint, the lower court granted an injunction on the first count and denied the writ on the second. From the judgment rendered both parties appealed, the defendant from the granting of the injunction on the one count and the plaintiff from the denial of it on the other. In affirming the judgment of the lower court, the Supreme Court of Connecticut, after observing that the court below had found that the construction of the railway was *ultra vires* as to each of the three defendant street railway companies, said: "The sole question, * * * upon the plaintiff's appeal, is whether the plaintiff had sufficient interest to maintain this suit, and this depends upon whether any legal or equitable rights or interests of the plaintiff were about to be invaded by the proposed *ultra vires* acts. If the defendants owed to the plaintiff no legal or equitable duty to abstain from doing the acts complained of, the plaintiff is not entitled to an injunction to restrain them from doing that which does it no legal harm."¹⁹ Continuing, the court quoted Mr. High's statement, in his work on Injunctions to the effect that "the simplest and most generally accepted test in determining whether one is a proper party plaintiff to a bill for an injunction is whether he possesses a legal or equitable interest in the subject-matter of the controversy";²⁰ declared that this test is a reasonably safe guide if the terms "legal or equitable interest" be given a fairly liberal construction;²¹ quoted the statement of the Supreme Court of the United States that "the legal interest which qualifies a complainant other

the attorney general, power to grant injunctions to restrain corporations from transacting business not authorized by their charters, the Supreme Court of Michigan held that private citizens and property owners who had contributed to the building of a railroad through their city upon the representation and understanding that the road would increase the value of their property cannot maintain a bill to restrain the taking up of the track or the discontinuance of the use thereof in the city, the injury apprehended not being specific to them nor to their property, but common to their fellow citizens and property-

owners, but that the remedy was by suit in the name of the attorney general. *Henry v. Ann Arbor R. Co.*, 116 Mich. 314, 75 N. W. 886.

See, generally, as to the right of a stranger to a corporate contract to interpose the plea of *ultra vires*, § 1527 et seq. *supra*.

¹⁹ *New England R. Co. v. Central Ry. & Elec. Co.*, 69 Conn. 47, 36 Atl. 1061.

²⁰ High on Injunctions, par. 756 (2 High on Injunctions [4th Ed.], § 1556).

²¹ *New England R. Co. v. Central Ry. & Elec. Co.*, *supra*.

than the state itself to sue, in such a case, is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty,"²² and said: "The only injury, then, of which the plaintiff could be heard to complain in the court below, was an invasion of some of its legal or equitable rights. If none of these were threatened by the acts complained of, the plaintiff was not entitled to the injunction. * * * The acts complained of in the second count are merely ultra vires acts, illegal in a certain sense as against the state, but in and of themselves invading no right, legal or equitable, of the plaintiff. Neither the plaintiff's charter, nor any law of this state, imposed a duty upon the defendants towards the plaintiff not to build a railway deviating from the chartered route, or not to build one beyond the chartered termini, or not to exercise powers and rights not granted to them. The state²³ or the stockholders²⁴ may restrain the defendants from exercising powers not conferred by their charters, but this does not confer any right of action in this respect upon the plaintiff, unless its own legal or equitable rights are invaded by such exercise."²⁵

²² *New Orleans, M. & T. R. Co. v. Ellerman*, 105 U. S. 166, 26 L. Ed. 1015.

²³ See next preceding section and § 1524, *supra*.

²⁴ See § 1526, *supra*, and § 3322, *infra*.

²⁵ *New England R. Co. v. Central Ry. & Elec. Co.*, *supra*. See also *New Hartford Water Co. v. Village Water Co.*, 87 Conn. 183, 87 Atl. 358.

In affirming the decree dismissing the bill in *H. B. Anthony Shoe Co. v. West Jersey R. Co.*, 57 N. J. Eq. 607, 618, 42 Atl. 279, wherein the complainant alleged that it was the owner of land abutting on a certain street, and that the defendant railroad company had laid and was using four separate parallel tracks on such street in front of complainant's premises whereby complainant was practically excluded from the use of the street; denied that defendant had a right to maintain its tracks in the street; declared that they constituted a nuisance,

and prayed for an injunction, the New Jersey Court of Errors and Appeals declared that "assuming that the defendant company has laid its railroad tracks in the public highway without authority, and that they constitute a public nuisance, the complainant cannot successfully maintain this suit. Where the injury complained of is an erection in front of complainant's property, and he owns the soil in the street upon which it is built, the injury is to his individual rights, and not as part of the public, and the suit must be instituted in his name. In this case, as has been before shown, the complainant has no title to the soil in the street in front of his premises, or to any part of it. His injury in legal contemplation, is not different in character from that which every other citizen sustains. * * * A suit cannot be maintained to restrain a nuisance which injures the complainant only in right enjoyed by him as one of the public. In such

In Pennsylvania, it is expressly provided by statute that "it shall be the duty of the court * * * to examine, inquire and ascertain whether such corporation does in fact possess the right or franchise to do the act from which such alleged injury to private rights, or to the rights and franchises of other corporations, results; and if such rights or franchises have not been conferred upon such corporations such courts, if exercising equitable power, shall by injunction, at suit of the private parties or other corporations restrain such injurious acts." Referring to this statute, the Supreme Court of Pennsylvania has said that "if it does anything more than declare the previous law, [it] was intended to reinforce and make clearer the power of the courts to inquire into the rights and franchises of corporations in suits by private individuals, and perhaps in some degree to extend the class of cases in which such inquiry is open to suitors without the intervention of the commonwealth." Further, as to the actual effect of the statute, the court held that it did not make an injunction a matter of right; that "it was not intended to do away with or change the general principles on which equitable relief is administered. Notwithstanding, therefore, the use of the imperative 'shall' the injunction is not to be granted, unless a proper case for injunction be made out, in accordance with the principles and practice of equity. The word 'shall,' when used by the legislature to a court, is usually a grant of authority, and means 'may'; and, even if it be intended to be manda-

case, an information must be filed for the public, in the name of the attorney general, on behalf of the state. And it makes no difference, as to the remedy, that the individual would be much more inconvenienced by the nuisance than many others. * * * In cases of nuisance it is well settled that a complainant cannot acquire a stable footing in a court of equity without showing some special injury to himself, distinct from that done to the public at large. * * * Under ordinary circumstances, where there is no special injury, and where the remedy by indictment is sufficient to abate the nuisance, and to restore to the public use the entire highway, equity will not interfere."

On the authority of *H. B. Anthony Shoe Co. v. West Jersey R. Co.*, supra, the New Jersey Court of Chancery, in

Attorney General v. Greenville & H. Ry. Co. (N. J. Ch.), 46 Atl. 638, while retaining jurisdiction of the information, filed by the attorney general on the relation of a dredging company against a railroad company, which information attacked the construction of a branch road by the latter company across an avenue, the shore and submerged lands at the end of which were owned by the dredging company, on the ground among others that the construction of such road was beyond the railroad company's powers under the railroad laws, granted the defendant's motion to dismiss the bill for an injunction brought by the dredging company in connection with the attorney general's information and containing allegations similar to those contained in such information.

tory, it must be subject to the necessary limitation that a proper case has been made out for the exercise of the power.”²⁶ In a much later case, the same court declared that under the provisions of such statute “the inquiry is limited to the question whether there was a grant to do the thing complained of. If so, the court is without authority to interfere.”²⁷

§ 3322. Internal affairs of corporation. The rule, heretofore noted, which restricts stockholders in interfering with the management of corporate affairs by the directors applies, of course, with full force to those cases where it is sought to effect this interference by means of injunctions.²⁸ Equity, it has been said, rarely interferes “with the exercise of discretionary powers by corporate bodies or their officers to whom such powers are confided. And it is a well-settled principle of equity, that where acts requiring the exercise of judgment, science and professional skill are confided to the discretion of the officers of a corporation, the exercise of that discretion will not be legally disturbed, nor will such officers be enjoined, except when abusing their powers to the injury of others.”²⁹ But it has also been said—

²⁶ *Becker v. Lebanon & M. St. Ry. Co.*, 188 Pa. St. 484, 41 Atl. 612.

This statute “applies to direct invasion of rights, not consequential injuries resulting from contractual relations.” *Blankenburg v. Philadelphia Rapid Transit Co.*, 228 Pa. 338, 77 Atl. 506.

²⁷ *Alexander v. Wilkes-Barre Anthracite Coal Co.*, 254 Pa. 1, L. R. A. 1917 B 310, 98 Atl. 794, citing *Blauch v. Johnstown Water Co.*, 247 Pa. 71, 93 Atl. 169.

The statute “contemplates nothing more than that it shall be made to appear from the charter that the corporation has the power to do the particular act in controversy, and which involves some right of the contestant; but when we get beyond this, we assume something with which we have no business in a collateral proceeding; we assume to assert the rights of a third party, the commonwealth who may or may not, at her own option, insist upon the observance of those rights.” *In re Western Pennsylvania*

R. Co.’s Appeal, 104 Pa. St. 399, quoted in *Blauch v. Johnstown Water Co.*, *supra*.

Where a railroad company proposes to construct a street railway and thus exercise a right expressly withheld from it, the owner of property abutting on a street intended to be occupied by the company may have an injunction under the Pennsylvania statute. *Mory v. Oley Valley Ry. Co.*, 199 Pa. 152, 48 Atl. 971.

So also one street railway company may enjoin another from unlawfully laying tracks in a street already occupied by the complainant. *German-town Passenger Ry. Co. v. Citizens’ Passenger Ry. Co.*, 151 Pa. St. 138, 24 Atl. 1103.

²⁸ See §§ 1726, 1733.

²⁹ *Rogers v. Lafayette Agr. Works*, 52 Ind. 296, 304, citing *High on Injunctions*, § 763 (4th Ed., § 1186). See also *Talbot J. Taylor & Co. v. Southern Pac. Co.*, 122 Fed. 147; *Wallach v. Billings*, 161 Ill. App. 317.

When the directors of a corporation

and by a court of the same state as the one making the statement above quoted—that “it seems to be settled law that injunction is the proper remedy where the proposed unauthorized action of the corporation or its directors will prejudice the rights of a stockholder.”³⁰ While this last-quoted statement is so broad as to tend

have not been guilty of usurpation or fraud or gross negligence, dissatisfied stockholders are not entitled to an injunction to control the discretion of the directors in the matter of corporate business, policy or management. *Skeen v. Warren Irrigation Co.*, 42 Utah 602, 132 Pac. 1162.

“This court,” says the Supreme Court of Louisiana, “will not readily interfere with the acts of the board of directors in the management of a corporation in the absence of a clear showing of fraud, or a breach of trust, for there is a presumption that the acts of the board of directors are for the good of the corporation. If the stockholders are not satisfied with the management and acts of the board of directors, their remedy lies in the election of another board, and the court will not take away the management of the corporation from the board of directors, because some stockholders do not approve some of their acts.” *McCloskey v. New Orleans Brewing Co.*, 128 La. 197, 54 So. 738.

An injunction granted on an ex parte interlocutory application, depriving the directors of a corporation of the management of the corporate business is void. *Port Huron & G. Ry. Co. v. St. Clair Circuit Judge*, 31 Mich. 456.

“While the courts will not interfere with the internal affairs of a corporation, the equity powers of the court may be invoked to restrain officers or directors from abusing their powers.” *Lawrence v. Weber*, 65 N. Y. Misc. 603, 120 N. Y. Supp. 289. See also § 1526, supra.

“The legal interest which qualifies

a complainant other than the state itself to sue * * * is a pecuniary interest in preventing the defendant from doing an act where the injury alleged flows from its quality and character as a breach of some legal or equitable duty. A stockholder of the company has such an interest in restraining it within the limits of the enterprise for which it was formed, because that is to enforce his contract of membership.” *New Orleans, Mobile & Texas R. Co. v. Ellerman*, 105 U. S. 166, 26 L. Ed. 1015.

The fact that the defendant which it is sought to restrain from entering upon, cutting timber from, crossing over, hauling or banking logs on, or using or injuring, certain premises of the plaintiff, is a lumbering corporation, and that a part of its business is the handling of logs, will not bring the suit within the operation of a statute which forbids the issuance of an injunction to suspend the general and ordinary business of a corporation. *Marshfield Land & Lumber Co. v. John Week Lumber Co.*, 108 Wis. 268, 84 N. W. 434.

³⁰ *Redkey Citizens' Natural Gas, Light, Fuel & Petroleum Co. v. Orr*, 27 Ind. App. 1, 60 N. E. 716. See also § 1526.

The control of a court of equity over the business conduct of a corporation is exactly the same as its control of the conduct of a natural person. “The contracts of either will be rectified, annulled, or specifically enforced, and the duties of either as trustee, or its right as cestui que trust, will be enforced and protected. Any illegal conduct of either leading to irrepa-

to mislead, it is undoubtedly true that, properly qualified, the rule thereby announced is correct. What are some of the recognized qualifications of the rule cannot, perhaps, be better stated than in the language of the Supreme Court of the United States. In sustaining a demurrer to a bill in equity, brought by a shareholder in a water company, in which bill it was alleged that the company was unnecessarily supplying free water for certain municipal purposes to the injury of the plaintiff, of other shareholders, and of the company itself, that court said: "We understand * * * that, to enable a stockholder in a corporation to sustain in a court of equity in his own name, a suit founded on a right of action existing in the corporation itself, and in which the corporation itself is the appropriate plaintiff, there must exist as the foundation of the suit: Some action or threatened action of the managing board of directors or trustees of the corporation, which is beyond the authority conferred on them by their charter or other source of organization; or such a fraudulent transaction, completed or contemplated by the acting managers, in connection with some other party or among themselves, or with other shareholders as

able injury will be enjoined. A nuisance created by either will be restrained." *Stockton v. American Tobacco Co.*, 55 N. J. Eq. 352, 36 Atl. 971.

"To enjoin certain of the stockholders of a corporation from proceeding illegally and wrongfully, at the suit of other stockholders injured thereby, is among the acknowledged powers of a court of equity." *State v. Kennan*, 35 Wash. 52, 76 Pac. 516.

"The protection of the rights of shareholders in incorporated companies against the improper or illegal action of other shareholders or of the officers of the company is a favorite branch of the jurisdiction of equity by injunction, and it may be asserted, as a general rule, that courts of equity will enjoin, on behalf of the stockholders of an incorporated company, any improper alienation or disposition of the corporate property for other than corporate purposes, and will restrain the commission of acts which are contrary to law and tend to the destruction of the franchises

as well as the improper management of the business of the company, or a wrongful diversion of the funds. And, in such cases, equity may grant relief at the suit of a single stockholder. So, if the managers of the company are about to engage in any enterprise not contemplated by their charter, or are proceeding to apply the corporate funds to any other than corporate purposes, or, in general, if they are transcending their charter, equity will interfere." *Rogers v. Lafayette Agr. Works*, 52 Ind. 296, 304.

An interested property owner who is also a stockholder in a street railway company which is under the jurisdiction of the state railway commission may enjoin the company from discontinuing the lines operated by it over certain streets without authority from such commission so to do. *H. Herpolshiemer Co. v. Lincoln Traction Co.*, 96 Neb. 154, 147 N. W. 206.

A stockholder suing for an injunction to vindicate his own personal rights as such will not be entitled

will result in serious injury to the corporation, or to the interests of the other shareholders; or where the board of directors, or a majority of them, are acting for their own interest, in a manner destructive of the corporation itself, or of the rights of the other shareholders; or where the majority of shareholders themselves are oppressively and illegally pursuing a course in the name of the corporation, which is in violation of the rights of the other shareholders, and which can only be restrained by the aid of a court of equity. Possibly other cases may arise in which, to prevent irremediable injury or a total failure of justice, the court would be justified in exercising its powers, but the foregoing may be regarded as an outline of the principles which govern this class of cases. But, in addition to the existence of grievances which call for this kind of relief, it is equally important that before the shareholder is permitted in his own name to institute and conduct a litigation which usually belongs to the corporation, he should show, to the satisfaction of the court, that he has exhausted all the means within his reach to obtain within the corporation itself, the redress of his grievances, or action in con-

thereto when the act contemplated by the directors and complained of by the plaintiff will not prejudice such rights. *Quin v. Havenor*, 118 Wis. 53, 94 N. W. 642.

"If a corporation is employing its statutory powers, funds, etc., for purposes not within the scope of its institution, a court of equity will, upon the application of a single dissentient stockholder interfere by injunction. * * * The right of a stockholder to this interference seems to be placed upon the ground that from the fact that the corporation was created for certain purposes there is an implied contract that it shall not divert its powers or funds to other purposes, and that such diversion would be a species of breach of trust, * * * as well as a violation of law which might endanger the existence of its charter. * * * But it is to a dissentient stockholder that the relief is granted, and to a stockholder who comes with diligence to assert his rights. If a stockholder assents to acts *ultra vires*, or although not

originally or expressly assenting, has for an unreasonable time acquiesced and has permitted them to go unquestioned, so that other parties who have acted upon the faith of them (as for instance by making large expenditures of money,) would suffer great injury from their repudiation, a court of equity would not easily be induced to grant relief at the instance of such stockholder." *Stewart v. Erie & W. Transp. Co.*, 17 Minn. 372 (Gil. 348, 375). See also § 1526.

Under the National Bank Act (5 Fed. St. Ann. p. 188, § 5242) which provides that "no * * * injunction * * * shall be issued against [any national banking] * * * association or its property before final judgment in any suit, action, or proceeding, in any state, county, or municipal court," an injunction cannot issue against a national bank even after it has ceased to be a going concern and although the sole controversy is one between the shareholders and the directors. *Wallach v. Billings*, 161 Ill. App. 317.

formity to his wishes.³¹ He must make an earnest, not a simulated effort, with the managing body of the corporation, to induce remedial action on their part, and this must be made apparent to the court. If time permits, or has permitted, he must show, if he fails with the directors, that he has made an honest effort to obtain action by the stockholders as a body, in the matter of which he complains. And he must show a case, if this is not done, where it could not be done, or it was not reasonable to require it. The efforts to induce such action as complainant desires on the part of the directors, and of the shareholders when that is necessary, and the cause of failure in these efforts, should be stated with particularity, and an allegation that complainant was a shareholder at the time of the transactions of which he complains, or that his shares have devolved on him since by operation of law * * * should be in the bill, which should be verified by affidavit.”³² Beyond this point, and as to when and in what circumstances an injunction will lie at the suit of a stockholder³³ to restrain corporate acts which will result in injury to him, no inclusive

³¹ See further on this particular proposition *Dimpfel v. Ohio & M. R. Co.*, 110 U. S. 209, 28 L. Ed. 121; *Converse v. Dimock*, 22 Fed. 573, 574.

³² *Hawes v. Contra Costa Water Co.*, 104 U. S. 450, 26 L. Ed. 827, considering *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. Ed. 401, a suit by a stockholder in a bank to enjoin the collection from the bank of a tax claimed to be illegal, in which the court said: “It is now no longer doubted, either in England or the United States, that courts of equity in both, have a jurisdiction over corporations, at the instance of one or more of their members; to apply preventive remedies by injunction, to restrain those who administer them from doing acts which would amount to a violation of charters, or to prevent any misapplication of their capitals or profits, which might result in lessening the dividends of stockholders, or the value of their shares, as either might be protected by the franchises of a corporation, if the acts intended to be done create what is in the law denominated a breach of trust. And the

jurisdiction extends to inquire into, and to enjoin, as the case may require that to be done, any proceedings by individuals, in whatever character they may profess to act, if the subject of complaint is an imputed violation of a corporate franchise, or the denial of a right growing out of it, for which there is not an adequate remedy at law.”

See also *Skeen v. Warren Irrigation Co.*, 42 Utah 602, 132 Pac. 1162, wherein the doctrine embodied in the quotation from *Dodge v. Woolsey* is recognized as sound but is held to be inapplicable.

For a further and detailed treatment of the remedies of stockholders for injuries to the corporation, see the chapter on Stock and Stockholders, *infra*.

³³ Demand that corporation sue, as condition precedent, under both state and federal practice, to right of stockholder to bring suit generally, see §§ 2681-2683, *supra*, and the chapter on Stock and Stockholders, *infra*, and see also Chap. 41, *supra*.

rule can be laid down, but here, as in other suits for injunctive relief, each case will in large measure turn upon its own merits.³⁴

As illustrative of the views of the various courts upon the subject it has been held that an injunction will lie at the suit of stockholders to prevent the directors from misappropriating the corporation's funds,³⁵ and, again, that a preliminary injunction may issue at the suit of stockholders to prevent an unauthorized bond issue.³⁶ But stockholders will not be entitled to an injunction against the allowance as correct of a fraudulent claim against the corporation when the allowance thereof will not work irreparable mischief.³⁷ Where, however, the allegations of the complaint show the want of an adequate remedy at law, policyholders in a mutual life insurance company may enjoin the company from making a proposed assessment upon its members, including the plaintiffs, for the purpose of paying

34 "It is obvious * * * that the circumstances of each case must determine the jurisdiction of a court of equity to give the relief sought; that the pleadings must be relied upon to collect what they are, to ascertain in what character, and to what end a shareholder invokes the interposition of a court of equity, on account of the mismanagement of a board of directors; whether such acts are out of or beyond the limits of the act of incorporation, either of commission contrary thereto, or of negligence in not doing what it may be their chartered duty to do." *Dodge v. Woolsey*, 18 How. (U. S.) 331, 15 L. Ed. 401.

35 *People's Sav. Bank v. Colorado Min. Exch. Bldg. Co.*, 8 Colo. App. 354, 46 Pac. 620. See also *Attorney General v. Utica Ins. Co.*, 2 Johns. Ch. (N. Y.) 371.

On a bill by a stockholder charging that certain directors and officers of the corporation are misappropriating the earnings of the company by paying themselves large salaries, it will be proper for the court in the exercise of a sound discretion to grant a temporary injunction which has for

its purpose and effect the maintenance of the status quo until the final disposition of the case. *Forster v. Fruin & Walker Co.*, 170 Ill. App. 89.

As to the remedies where dividends are unlawfully paid, see Chap. 56, subd. xvi, *infra*.

Unlawful diversion of the funds of a beneficial association by the governing body thereof may be enjoined. *Wolf v. Gegenseitige Unterstuetzungs Gesellschaft Germania*, 149 Wis. 576, 136 N. W. 175.

36 *Taylor v. Philadelphia & R. R. Co.*, 7 Fed. 386.

37 *Rogers v. Lafayette Agr. Works*, 52 Ind. 296.

Notwithstanding the fact that street railroad companies, one of which holds a lease of the other's road, are in the hands of receivers appointed in creditors' suits in a federal court, stockholders in the lessor company may sue in a state court to enjoin the delivery of an extension of the lease, which extension it is claimed was *ultra vires* and had its basis in fraud. *Guaranty Trust Co. of New York v. North Chicago St. R. Co.*, 130 Fed. 801.

certain policies which, it is claimed, the company's managing officers know to be fraudulent, and from paying such policies.³⁸

An injunction will not be "granted against vague and indefinite injuries which the plaintiff conceives may possibly be inflicted on him, but only against well-defined invasions of his rights, which are shown to be actually threatened and intended," and hence a demurrer will lie to a petition for an injunction which, at most, merely discloses that the defendants are in a position through their ownership of a majority of the corporate stock to manage the affairs of the corporation and to exclude the plaintiff from his office of secretary and treasurer and from any control of the corporation's business, and which does not set out any facts showing that such defendants do not have a perfect right thus to act, nor any facts showing that they intend to do any particular act detrimental to the interests of the corporation or of the plaintiff as a stockholder therein.³⁹ So again a stockholder will not be entitled to a temporary injunction against the sale by the directors of the franchise and lease which constitute the assets of the corporation, on an allegation, not that the directors have threatened to make such a sale, but merely that the plaintiff has reason to fear and does fear that such a sale will be made.⁴⁰ While it is very probably true that an injunction pendente lite would issue to restrain the directors of a corporation from actually executing a mortgage without the consent of the number of stockholders required in the circumstances by statute, negotiations within the power of the directors which, completed, will require the execution of the mortgage will not be enjoined because of the fact that the necessary consent to the mortgage has not, at the time, been obtained.⁴¹ But discrimination by the managing officers of a corporation against one of its stockholders, as a result of which the value of his stock is unjustly depressed,

³⁸ *Carmien v. Cornell*, 148 Ind. 83, 47 N. E. 216.

³⁹ *Emerson v. South Fork Irrigation & Improvement Co.*, 59 Kan. 778, 53 Pac. 756.

⁴⁰ *Quin v. Havenor*, 118 Wis. 53, 94 N. W. 642. See also § 1998.

"A court of equity has the power, and should exercise it, to prevent a corporation from disposing of substantially all its property for the purpose of escaping from complying with its contracts, and defrauding its credi-

tors, when the corporation purchasing said property had notice of the contracts prior to the purchase, and is made a party to the bill." *People's Natural Gas Co. v. American Natural Gas Co.*, 233 Pa. 569, 82 Atl. 935. See in this connection §§ 1206-1210, *supra*.

⁴¹ *Leeman v. Edison Elec. Illuminating Co.*, 53 N. Y. Supp. 302, 304.

As to the necessity of consent by stockholders to a mortgage of the corporate property, see § 1301.

will justify the interposition of a court of equity, and the unlawful acts of the officers will be enjoined.⁴²

When necessary to save the business, credit and property of a corporation from destruction, the court may enjoin the continuance of a stockholders' meeting then in progress and the holding of any other such meeting until its further order.⁴³ Likewise, where the secretary of a corporation has issued over the corporate seal a large amount of spurious and fraudulent stock and as a result a controversy has arisen as to who are the actual stockholders of the corporation, an injunction will issue at the suit of a person claiming to be a stockholder to prevent others who likewise claim to be stockholders but who have excluded him from their meeting from acting or doing any business as stockholders until the conflicting claims can be adjudicated.⁴⁴

In the absence of fraud, an injunction will not lie to restrain the directors of a corporation, authorized by its charter to operate one or more manufacturing plants, from selling one of the two plants which it has actually been operating, as the judgment of the court would thereby be substituted for that of the directors.⁴⁵ So the purchase and installation of a pumping plant by the directors of an irrigation company involves a question of policy and not one of power or legality, and, no element of fraud or bad faith being present, such act cannot be made the basis of a suit, by dissatisfied stockholders, for an injunction.⁴⁶ Where under the express terms of an oil lease, such lease has expired through the failure of the lessee company to produce a stipulated quantity of oil, stockholders in such company are not entitled to a temporary injunction to prevent the company's board of directors from releasing the land to its lessors, even though

⁴² *Forrest v. Nebraska Hardware Co.*, 91 Neb. 735, 137 N. W. 839.

⁴³ *Merrifield v. Burrows*, 153 Ill. App. 523. And see § 1701.

⁴⁴ *State v. Kennan*, 35 Wash. 52, 76 Pac. 516. And see § 1702.

Regardless of whether a corporation can be restrained from dealings prohibited to one of its stockholders by contract, merely because such person is a stockholder, an injunction, the effect of which is to enjoin it from violating the contract entered into by one of its stockholders with a third person prior to its creation will lie against it when such stockholder

owned one-half of its normal capital stock and became its president and business manager and the corporation appeared to have organized for the fraudulent purpose of breaching the contract and of doing indirectly what could not be done directly. *Beal v. Chase*, 31 Mich. 490, distinguished in *American Preservers' Co. v. Norris*, 43 Fed. 711, 714. See also § 44.

⁴⁵ *McCloskey v. New Orleans Brewing Co.*, 128 La. 197, 54 So. 738. See also § 1187.

⁴⁶ *Skeen v. Warren Irrigation Co.*, 42 Utah 602, 132 Pac. 1162. See also § 1073.

the company has expended a large amount of money in the venture, where oil in less than the stipulated quantity has been produced.⁴⁷ Again, a member of a co-operative corporation, not for pecuniary profit, cannot enjoin action in accordance with the corporation's constitution when such constitution does not conflict with the corporation's charter.⁴⁸

But it has been held that an injunction may issue to restrain the merger of one corporation with another pending the hearing on a bill to dissolve the former, distribute its assets and cancel, as fraudulently issued, its common stock.⁴⁹ Moreover, since the act of dissolution like the act of association is an act of the members of the corporation and not a corporate act, a corporation will be enjoined from proceeding under legislative sanction to dissolve, and to transfer its property to another corporation in exchange for stock in the latter, until it gives security to a dissenting stockholder to pay for his stock when its value shall be ascertained.⁵⁰ Again where a corporation has ceased to be a going concern and all that remains to be done with respect to its affairs is to make distribution of its assets among the stockholders, the discretion of the directors may be interfered with in a proper case to prevent the compromise of a claim, which compromise might result prejudicially to the interests of minority stockholders.⁵¹

§ 3323. Holding or postponing of election. Without regard to the right of equity to try title to corporate office,⁵² the rule is that, in a proper case, an injunction will lie not only against the holding of an illegal or fraudulent election, but also against the fraudulent postponing of a valid election.⁵³

⁴⁷ *McLean v. Kishi*, — Tex. Civ. App. —, 173 S. W. 502.

⁴⁸ *Fairhope Single Tax Corporation v. Melville*, 193 Ala. 289, 69 So. 466.

⁴⁹ *Parrish v. Reese*, 165 Ala. 638, 51 So. 824.

Where the legal right of one corporation to consolidate with another is fairly open to question, an injunction against a proposed consolidation pendente lite will not be dissolved on appeal. *Young v. Rondout & Kingston Gaslight Co.*, 129 N. Y. 57, 29 N. E. 83, decided on authority of *Hudson River Tel. Co. v. Watervliet Turnpike & Railroad Co.*, 121 N. Y. 397, 24 N. E. 832.

See generally the chapter on Consolidation.

⁵⁰ *Lauman v. Lebanon Valley R. Co.*, 30 Pa. St. 42, 72 Am. Dec. 685, 691. See also *Tanner v. Lindell R. Co.*, 180 Mo. 1, 103 Am. St. Rep. 534, 543, 79 S. W. 155.

See, in this connection, §§ 1208, 1211, *supra*.

⁵¹ *Wallach v. Billings*, 161 Ill. App. 317.

⁵² See §§ 1828, 1829, *supra*, and § 3325, *infra*.

⁵³ § 1701, *supra*.

§ 3324. **Voting stock.** Both the unlawful voting of, and the unlawful denial of the right to vote, corporate stock are proper subjects of injunctive relief.⁵⁴

§ 3325. **Title to corporate office.** Ordinarily, title to corporate office is judicable only at law by *quo warranto*⁵⁵ and, where there exists no ground of jurisdiction essentially equitable, the validity of rival claims to office cannot be determined in equity. In other words, a suit for an injunction cannot be maintained when its sole purpose, as distinguished from its incidental result, is a trial of right to corporate office.⁵⁶ The Supreme Court of Massachusetts has said that

⁵⁴ § 1702, *supra*.

⁵⁵ § 1826 *et seq.*, *supra*.

⁵⁶ § 1828, *supra*.

“One objection strongly urged by the defendants is, to the jurisdiction of the court, which, it is contended, has no power to inquire into or determine the legality of an election of the directors of a corporation. They contend that this is exclusively within the jurisdiction of the courts of law by the appropriate remedies of *quo warranto* or *mandamus*, or by the proceeding authorized by statute. It is clear that a court of equity has no jurisdiction to remove an officer of a corporation from an office of which he has possession, or to declare the forfeiture of such office. Its decree will not, like the judgment of a court of law, operate in *rem*, and remove or oust anyone from an office which he in fact holds. When the object is simply to determine the regularity of an election, or to declare an office to which anyone has been duly elected, forfeited, a court of law is the proper and only competent tribunal. So it is the only proper tribunal to recover the possession of lands, or authoritatively to settle and declare the title in real or possessory actions. Yet when the object is to protect lands from waste or destruction, to compel the specific performance of a contract, or to exercise any other pow-

er over them vested in a court of equity, it may inquire and determine as to the title. Here, the allegations that [defendants] * * * obtained the positions [directors] they claim by breach of trust, fraud, and breach of agreement, gives this court jurisdiction of the matter for the purpose of restraining the breach of trust, and any acts of such breach that may work irreparable injury, and for the purpose of compelling them specifically to perform their contract. This could be done, even if the election held in such breach of trust had been conducted according to law, and would not be set aside by courts of law. If the question of the legality of an election, or whether a certain person holds such an office, arises incidentally in the course of a suit of which equity has jurisdiction, that court will inquire into and decide it as it would any other question of law or fact that arises in the cause. But the decision is only for the purpose of the suit; it does not settle the right to the office or vacate it, if the party is in actual possession.” *Johnston v. Jones*, 23 N. J. Eq. 216, 225.

In *Haskell v. Read*, 68 Neb. 107, 113, 96 N. W. 1007, 93 N. W. 997, the court recognized the fact that “it is held generally that a court of equity is without jurisdiction to pass upon the validity of an election of officers

"suits to remove or to institute corporation officers do not belong to the original jurisdiction of chancery, and the right to be such officer cannot, in general, and in the absence of special legislation affording this remedy, be tested by means of an injunction."⁵⁷ And this is undoubtedly the general rule. Of course, this general rule, like others, has its well-established exceptions and qualifications, but these are discussed elsewhere in this work,⁵⁸ and will not be considered at this point.

§ 3326. Right to inspect corporate books and records. In an earlier chapter it has been seen that the general rule is that a stockholder may enforce his right to inspect the books and records of his corporation by mandamus.⁵⁹ Even if a stockholder is ever entitled,

and directors of a private corporation, or determine whether persons claiming to be such are entitled to act in that capacity," but, citing *Reynolds v. Bridenthal*, 57 Neb. 280, 77 N. W. 658, and *Humboldt Driving Park Ass'n v. Stevens*, 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568, declared that "in this state [Nebraska] suits in equity seem to be maintainable for such purposes." Turning to the cited cases, it is found that the court in *Reynolds v. Bridenthal*, the later of the two, stated that the question whether injunction was the proper remedy "would seem to depend upon whether the stockholder suing has a remedy by quo warranto, and, if so, whether that remedy is adequate under the facts of the case" but declared that an independent investigation of the question was unnecessary "because we have a precedent from which we do not feel at liberty to depart," citing *Humboldt Driving Park Ass'n v. Stevens*, supra. In that case, the granting of an injunction as prayed was sustained on appeal, but the Supreme Court expressly stated that "the only question is, does the petition justify the judgment?" On the facts appearing in the petition, it was undoubtedly proper for equity to take jurisdiction,

but it is believed that the case is not authority for the broad, unqualified proposition that equity may, without regard to any peculiarly equitable ground of jurisdiction, try title to corporate office. As a matter of fact the court, in *Haskell v. Read*, supra, declared that the case then under consideration seemed to come within the rule that "the court may inquire into the validity of the election, and pass upon the title to corporate offices, when necessary to do complete justice in a suit of which it has jurisdiction on other grounds." To this proposition any number of cases may be cited and actually are cited elsewhere in this work. See § 1829, supra.

⁵⁷ *New England Mut. Life Ins. Co. v. Phillips*, 141 Mass. 535, 6 N. E. 534.

⁵⁸ § 1829, supra.

⁵⁹ See §§ 2844-2849, supra. As supporting the rule, see also the following decisions:

Alabama. *Nettles v. McConnell*, 151 Ala. 538, 43 So. 838.

California. *Poor v. Yarnell*, 28 Cal. App. 714, 153 Pac. 976.

Illinois. *Venner v. Chicago City R. Co.*, 246 Ill. 170, 138 Am. St. Rep. 229, 20 Ann. Cas. 607, 92 N. E. 643.

Maine. *Withington v. Bradley*, 111 Me. 384, 89 Atl. 201.

in Illinois, to resort to equity to obtain access to the corporate books and records,⁶⁰ he, at least, cannot do so when it does not appear from the bill that he has requested to be allowed to make an examination and that his request has been denied.⁶¹

§ 3327. Protection of corporate name. As appears at length in an earlier chapter of this work, a corporation may, in a proper case, enjoin the use by another person, natural or artificial, of a name identical with or prejudicially similar to its corporate name.⁶²

§ 3328. Right to exercise power of eminent domain. By the great preponderance of authority an entry on private property under color of the power of eminent domain will be enjoined until the right to make such an entry has been perfected by a full compliance with the constitution and governing statutes.⁶³ Thus it has been held that in-

Massachusetts. *Butler v. Martin*, 220 Mass. 224, 107 N. E. 999.

New Jersey. *Hodgens v. United Copper Co. (N. J. L.)*, 67 Atl. 756 (application for alternative writ to compel bringing within the state of books of domestic corporation for purposes of examination, granted).

Pennsylvania. *Rochester v. Indiana County Gas Co.*, 246 Pa. 571, 92 Atl. 717.

Wyoming. *Wyoming Coal Min. Co. v. State*, 15 Wyo. 97, 123 Am. St. Rep. 1014, 87 Pac. 337.

⁶⁰ See *Coquard v. National Linseed-Oil Co.*, 171 Ill. 480, 49 N. E. 563, and *Heitkamp v. American Pigment & Chemical Co.*, 158 Ill. App. 587, which carry the intimation that mandamus would not be an exclusive remedy in all circumstances.

⁶¹ *Coquard v. National Linseed-Oil Co.*, 171 Ill. 480, 49 N. E. 563.

⁶² § 725 et seq., supra.

⁶³ For a full discussion of this question, which more properly pertains to the law of Eminent Domain than to the law of Corporations, see 2 Lewis, *Eminent Domain* (3rd Ed.), § 901 et seq.

For a discussion of the principles

governing the exercise of the right of eminent domain, see Chap. 36, supra.

When condemnation is attempted without regard to the fulfillment of a condition precedent, an injunction will lie. *Chicago & Atchison Bridge Co. v. Pacific Mutual Tel. Co.*, 36 Kan. 113, 12 Pac. 535.

Where the judge of the court in which eminent domain proceedings have been instituted by one railroad company, seeking the right to cross the tracks of another such company, makes an order in vacation, prior to the term of court to which the writ is returnable, whereby the petitioning company, upon making a certain deposit, is authorized to make the desired crossing, and such order is coram non judice, and therefore absolutely void, the defendant company is entitled to an injunction against the exercise of the right conferred by such order until a hearing on the petition is had when, otherwise the crossing will have been completed and the mischief done prior to such hearing. *St. Louis S. W. R. Co. v. Stuttgart & R. B. R. Co.*, 188 Fed. 374.

If the objection to the entry is

junction will lie if the right to exercise eminent domain is claimed under a statute which is unconstitutional or void; ⁶⁴ if the power granted has been exhausted or has been lost by laches; ⁶⁵ if the use to which the property sought to be condemned is intended to be put is not a public use; ⁶⁶ if just compensation has not been paid or deposited as required by law.⁶⁷ But while the rights of a property owner will undoubtedly be protected against an illegal exercise of the power of eminent domain, it is no less true that the right of a corporation to take private property for a public use will likewise be so protected.⁶⁸ Thus where the statute authorizes a corporation, possessing the right to exercise the power of eminent domain, to enter on land for the purpose of making such examination and survey as may be necessary in view of the contemplated exercise of such power, and the entry of such a corporation for such statutory purpose is or will be resisted in such a way as to render probable a clash between the owner of the land and the corporation's representatives and the opposition of force to defeat the examination and survey, injunction is available to the corporation, no other remedy being open to it.⁶⁹

§ 3329. Violation of corporate franchise. Invasions of corporate franchises,⁷⁰ amounting to either the total or partial destruction thereof,⁷¹ are undoubtedly proper subjects of equitable relief by in-

based on mere irregularities in the proceedings which do not render such proceedings void, it would seem that the entry will not be enjoined. 2 Lewis, Eminent Domain (3rd Ed.), § 903.

⁶⁴ See 2 Lewis, Eminent Domain (3rd Ed.), p. 1571.

Where the exercise of the right of eminent domain, contemplated by a corporation, would mean a complete severance from the residue of the part of the land desired and a destruction of it in the character in which the owner is presently enjoying it, an injunction will lie where the legislative act under which the right of eminent domain is claimed is unconstitutional. *Seudder v. Trenton Delaware Falls Co.*, 1 Saxt. Ch. (N. J.) 694, 23 Am. Dec. 756.

⁶⁵ See 2 Lewis, Eminent Domain (3rd Ed.), p. 1572.

Laches may defeat the right of an

abutting owner to injunctive relief against a railroad company's unauthorized occupancy of a public street. *Staton v. Atlantic Coast Line R. Co.*, 147 N. C. 428, 61 S. E. 455.

⁶⁶ See 2 Lewis, Eminent Domain (3rd Ed.), p. 1572.

As to what constitutes a public use, see § 1503, *supra*.

⁶⁷ See, generally, as to compensation, § 1506, *supra*, and 2 Lewis, Eminent Domain (3rd Ed.), § 901.

⁶⁸ 2 Lewis, Eminent Domain (3rd Ed.), § 923.

⁶⁹ *Alabama Interstate Power Co. v. Mt. Vernon-Woodberry Cotton Duck Co.*, 186 Ala. 622, 65 So. 287.

⁷⁰ *Broadway & E. S. Stage Co. v. American Soc. for Prevention of Cruelty to Animals*, 15 Abb. Pr. N. S. (N. Y.) 51, 60.

⁷¹ *Oshorn v. Bank of United States*, 9 Wheat. (U. S.) 738, 6 L. Ed. 204.

junction. A number of years ago, one of the New York courts, recognizing this fact, declared that "while bills have been filed usually to restrain the commission of trespasses against real property only, and precedents for such a remedy against mere personal trespasses are more difficult to find, yet where the trespasses, oft repeated and damaging, are committed against a franchise created and granted by the sovereign power, a court of equity will not hesitate to enjoin them."⁷² Nor will an injunction against the destruction of a vested corporate franchise be refused because of the fact that the means whereby the destruction will be accomplished is a municipal ordinance of a quasi criminal character, the violation of which is made a penal offense.⁷³

⁷² *Broadway & E. S. Stage Co. v. American Soc. for Prevention of Cruelty to Animals*, 15 Abb. Pr. N. S. (N. Y.) 51, 60. As its reason for so holding the court declared "that the public at large have an interest in the protection of such rights and privileges as well as the parties particularly interested."

It is no objection to the exercise of equity jurisdiction to enjoin the destruction by a city of the vested franchise of a railroad company to load and unload freight in the city streets "that the attempted invasion of the franchise * * * is accompanied by acts which are personal trespasses." *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106.

⁷³ *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106. The complainant in this case, a railroad company, had, under the sanction of its charter, been granted a franchise, by the defendant city, to load and unload freight in the city streets, but subsequently the city had passed an ordinance making it a penal offense for any person or corporation to load or unload cars in the city streets. Complainant then sued for and obtained an injunction against the enforcement of the ordinance. Addressing itself to "the suggestion that the court, under the

peculiar circumstances of this case, must abdicate this jurisdiction [to enjoin the destruction of the franchise] because of the fact that it is dealing with an ordinance of a municipal corporation of a quasi criminal character, the violation of which is made an offense," the court said: "The power to prevent irreparable injury flowing from the deficiencies and injustice of the more technical rules of the common law, may be said to be the very life of equity jurisdiction. The court must, therefore, be jealous of its preservation, notwithstanding it may also be cautious in its exercise. Municipal corporations can claim no exemption from being subject to it. They must stand in our courts upon terms of equality with all other corporations and with natural persons. Our constitution declares that 'all corporations shall have the right to sue, and shall be subject to be sued, in all courts, in like cases as natural persons.' Const. 1875, art. 14, § 12. 'The legal effect of this provision is to place municipal corporations, as nearly as practicable, upon a basis of equality in the enforcement and defense of their rights in courts of justice in this state.' *Railroad Co. v. Morris*, 65 Ala. 193; *Davis v. Mayor*, 1 Duer, 452," and, therefore, the court held that the general rule, that the same principles will determine the

Where a corporation holds an exclusive franchise, a court of equity has power to protect such corporation from irreparable injury arising from the usurpation, either by a natural or an artificial person, of a like franchise.⁷⁴ So a water company may enjoin a municipality from violating its franchise-contract with the company by erecting and operating its own waterworks.⁷⁵

Interference by a municipality with a gas company's right to lay

question of equitable interference in behalf of or against a municipal corporation as would govern in any other case, applied with peculiar force. Continuing, the court said: "It cannot be tolerated that a municipal corporation, in view of these principles, should escape the grasp of a court of chancery, in a clear case of equitable cognizance, by the device of adding a penalty to an illegal and void ordinance, which is designed as a repudiation of its own valid grants or contracts, especially in a case where the public are largely concerned, and a court of law can afford no remedy adequate for the prevention of irreparable injury that would probably result from the enforcement of such ordinance. * * * The mere fact that an act is criminal does not divest the jurisdiction of equity to prevent it by injunction, if it be also a violation of property rights, and the party aggrieved has no other adequate remedy for the prevention of the irreparable injury which will result from the failure or inability of a court of law to redress such rights."

⁷⁴ *Elizabethtown Gas-Light Co. v. Green*, 46 N. J. Eq. 118, 18 Atl. 844.

See also *Osborn v. Bank of United States*, 9 Wheat. (U. S.) 738, 6 L. Ed. 204; *City of Carthage v. Empire Electric P. & S. Co.*, — Mo. App. —, 183 S. W. 718.

A grant of exclusive power to supply electric current in a township is not necessary to entitle a company, authorized to supply current there, to injunctive relief against another pow-

er company which is, without legal authority, attempting to supply current in such township to a competitor of the first company, and to entitle it to such relief it is not necessary that it establish the loss it will suffer by reason of the unlawful invasion, the question not being of the amount of damage but one of right. *Citizens Electric Illuminating Co. v. Lackawanna & W. V. Power Co.*, — Pa. —, 99 Atl. 462.

⁷⁵ *Walla Walla v. Walla Walla Water Co.*, 172 U. S. 1, 43 L. Ed. 341.

Where a public utility property is operating under an indeterminate permit received in exchange for the prior privilege, but the municipality insists upon conditions and limitations of the old grant, and proceeds accordingly, assuming to possess authority so to do, and invades the field reserved to the holder of the indeterminate permit without satisfying the conditions subsequent in that regard to the irreparable injury of the existing public utility, ground exists for equitable interference and relief adequate to the case. *Calumet Service Co. v. Chilton*, 148 Wis. 334, 135 N. W. 131.

The possibility of damage incident to the maintenance of pipes in the same street by different water companies does not entitle one water company which has no exclusive right to use the city streets to enjoin another such company from laying its pipes therein, since such possibility will be regarded as having been contemplated and assumed by the former when it

mains may be prevented by injunction.⁷⁶ Where a water company is refused a municipal permit to lay its mains in the city's streets as under its charter it is entitled to do, it need not proceed by mandamus, but may sue to enjoin interference on the part of the municipality with the laying of such mains.⁷⁷ It has been held that injunction is the proper remedy when a municipality wrongfully interferes with a telephone company's construction of underground conduits in the city's streets under the contract embodied in an ordinance passed by the municipality and accepted by the company.⁷⁸ Where a city attempts to destroy the franchise of a railroad company to load and unload freight in the city streets, an injunction will lie. Thus holding, the Supreme Court of Alabama said: "The jurisdiction of a court of equity to protect a franchise of this kind from unlawful invasion or disturbance is clearly settled, and has been often recognized by this court as benign and salutary. The value of such a right, or the cost of its unlawful disturbance, cannot be reduced to a pecuniary measure. When the purpose is its utter destruction, the duty to protect becomes correspondingly more urgent and imperative. The ground of its exercise is usually the prevention of irreparable injury, or such as cannot be adequately estimated in damages at law; at other times, the avoidance of a multiplicity of suits, and again the abatement of annoyance in the nature of a legal nuisance. Another controlling reason for interference by equity in such cases is that the public at large have an interest in the protection of such a privilege, as well as the parties particularly interested."⁷⁹ In a case decided by

accepted its charter. *New Hartford Water Co. v. Village Water Co.*, 87 Conn. 183, 87 Atl. 358.

⁷⁶ *Gas Light Co., City of New Brunswick v. Borough of South River*, 77 N. J. Eq. 487, 77 Atl. 473.

On granting a preliminary injunction against municipal interference with the laying of gas mains, the court will require that the gas company file a stipulation consenting that in case the municipality succeeds on final hearing the court may, without further litigation and by mandatory injunction or otherwise, direct the removal of the mains laid pending the suit. *Gas Light Co., City of New Brunswick v. Borough of South River*, *supra*.

The owners of land across which a gas pipe line has been laid with their consent have no right forcibly to remove or to injure such pipe line and upon attempting or threatening so to do may be enjoined. *Wichita Natural Gas Co. v. Ralston*, 81 Kan. 86, 105 Pac. 430.

⁷⁷ *Baltimore City v. Baltimore County Water & Electric Co.*, 95 Md. 232, 52 Atl. 670.

⁷⁸ *Chesapeake & P. Tel. Co. v. Baltimore*, 90 Md. 638, 644, 45 Atl. 446; *Chesapeake & P. Tel. Co. v. Baltimore*, 89 Md. 689, 716, 44 Atl. 1033, 43 Atl. 784.

⁷⁹ *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106.

one of the federal courts it was held that, "railroad companies, that have been, are, or will be deprived of parts of their property devoted to the public use of transportation without just compensation during the continuance of the rate making process by provisions of a state constitution, or of a state law, or by orders of a state commission, prescribing tentative rules and putting them in effect during the rate making process under severe penalties, may maintain suits for and obtain relief by injunction during the continuance of the rate making process to the same extent that they may after the process is complete," and, further, that the fact that such companies have actually tested, for several months, the fares and rates, challenged as confiscatory, is not ground for denying such relief, since the acquiescence of a person, suffering a continuing injury, in its infliction in the past constitutes no defense to, nor estoppel against an injunction restraining its infliction in the future.⁸⁰ Again it has been held that a railroad company may maintain a suit for an injunction to determine the legality, justice and reasonableness of an order made by the board of railroad commissioners whereby the right to cross its tracks and switch yards was given to another such company.⁸¹

But an application in accordance with the municipal ordinance regulating the matter of opening public streets is a condition precedent to the right of a water company to enjoin municipal interference with its opening of certain streets for the purpose of laying its pipes therein, and it is immaterial that, on the illegal application actually made, the company was denied permission to open the streets except upon its compliance with unreasonable conditions.⁸² Nor can a gas

⁸⁰ *Love v. Atchison, T. & S. F. Ry. Co.*, 185 Fed. 321.

⁸¹ *In re Luttgerding*, 83 Kan. 205, 110 Pac. 95.

Where, under the statute, the state railroad commission has unlimited power to vacate, alter, change or modify any order made by it; and thus power to correct its own errors, the courts cannot be appealed to in the first instance to declare an order of such commission to be void and to enjoin the taking of any action to enforce it. *Chicago, I. & L. R. Co. v. Railroad Commission of Indiana*, 175 Ind. 630, 95 N. E. 364.

Where the state railroad commission exceeds or abuses the authority

and discretion conferred upon it by making an order that illegally invades the property rights of a railroad company, the illegality of the order is available as a defense in proceedings at law to compel obedience on the part of the company or to recover the statutory penalty for a violation of the order, and, therefore, the company's remedy at law is adequate and an injunction will not be granted in the absence of some ground for equitable relief. *Louisville & N. R. Co. v. Railroad Com'rs*, 63 Fla. 491, 44 L. R. A. (N. S.) 189, 58 So. 543.

⁸² *New York & N. J. Water Co. v. North Arlington Borough*, 76 N. J. Eq 514, 74 Atl. 973.

company enjoin a town from interfering with its laying of pipes in the town streets when it has not fulfilled the condition precedent under which the town ordinance gave it the right to occupy the streets.⁸³

§ 3330. Failure of corporation to discharge franchise obligations.

The powers of the public service commissions which have of late years been created by so many of the states are frequently sufficiently broad to insure the discharge by a public service corporation of its franchise obligations, and therefore within the rule of adequate remedy at law⁸⁴ and without regard to the jurisdiction expressly conferred on such commissions, resort to equity to compel the discharge of such obligations will, in many instances, undoubtedly be improper. Keeping this fact in mind, it is very probably true that, in some of the states at least, "the policy of the law is to require by mandatory process the performance by public utility corporations of their duties to the public."⁸⁵ Thus it has been held that, if on no other ground than that of the prevention of a multiplicity of suits, a city has a right to sue to enjoin a gas company from violating the covenant in its contract with the city relative to the maximum price to be charged the inhabitants of the city for gas.⁸⁶ Likewise it has been held that a

⁸³ Chicago Municipal Gaslight & Fuel Co. v. Town of Lake, 130 Ill. 42, 22 N. E. 616.

⁸⁴ See § 3316, *supra*.

⁸⁵ Gainesville v. Gainesville Gas & Electric Power Co., 65 Fla. 404, 46 L. R. A. (N. S.) 1119, 62 So. 919.

See generally the chapter on Governmental Regulation, *infra*.

⁸⁶ Muncie Natural Gas Co. v. Muncie, 160 Ind. 97, 60 L. R. A. 822, 66 N. E. 436. Thus holding, the court spoke as follows: "The city, as a corporate entity, represents all of its inhabitants. The streets, over which it has exclusive power, are being used by appellant [the gas company] under a contract with the city that appellant has broken. This would entitle the city to at least nominal damages at law; and its right to restrain the further breach of the contract, which amounts to a negative specific enforcement of the contract, can be affirmed on the ground that it

will avoid a multiplicity of actions. This is not an independent source or occasion of jurisdiction, but, as laid down by Prof. Pomeroy, where a party is entitled to even legal relief, and there exists between him and a number of others entitled to relief a common interest, relation, or question as against another party, that can be determined by one suit, such facts afford a distinct basis for an appeal to equity. Pomeroy's Eq. Jur. § 243 et seq. In such cases it is not necessary that the party suing should himself be threatened by, or compelled to resort to, numerous actions to vindicate his right, because considerations of governmental policy enter into the question. As applied to this case, it is a matter of public expediency that by one suit rights shall be established for the time that the injunction has to run, instead of hundreds of the inhabitants of the city being each compelled to sue to vindicate

patron of a public utility company may resort to injunction to prevent the discontinuance of his service.⁸⁷ "An injunction," says the Supreme Court of Pennsylvania, "is the proper remedy to prevent the breach of a contract made by a natural gas company with a consumer by enjoining it from shutting off the gas."⁸⁸ Where, however, there appears no inadequacy in the relief which mandamus will afford, it is only by such remedy, declares the New Jersey Court of Chancery, that a gas company refusing to supply gas to the tenant of a dwelling house until the bill owing by a former tenant is paid can be compelled to perform its legal corporate duty in the matter.⁸⁹ A person refused telephone service except at a rate higher than that fixed by a valid municipal ordinance may, it has been held, enforce his rights under such ordinance by injunction.⁹⁰ So also, where the remedy at law is not adequate or effectual, a shipper may enjoin a common carrier from

cate his right, or otherwise to submit to a small, but annoying, injustice."

A municipality may enjoin a gas company from violating its municipal franchise. *Wheeling v. Natural Gas Co. of West Virginia*, 74 W. Va. 372, 82 S. E. 345.

Upon its payment into court for service pendente lite a fair proportion of the former contract price and stipulating to pay or secure such additional amount as may be adjudged against it on final hearing, a municipality, between which and the water company that has for a number of years been supplying it with water for public purposes, there is disagreement as to the amount which the municipality shall pay for future service and for the water supplied since the expiration of the contract formerly existing between it and the company, is entitled to a preliminary injunction to restrain the company from shutting off its supply as a result of its refusal to pay the sum demanded for the ad interim service, where the reasonableness of such sum, payment being refused on the ground of its unreasonableness, cannot be determined on ex parte affidavits but only on full hearing and proofs. *Borough of Washing-*

ton v. Washington Water Co., 70 N. J. Eq. 254, 62 Atl. 390.

⁸⁷ *Seaton Mountain Elec. Light, Heat & Power Co. v. Idaho Springs Inv. Co.*, 49 Colo. 122, 33 L. R. A. (N. S.) 1079, 111 Pac. 834.

As to the power of a public service corporation to discontinue its business, see § 826, *supra*.

⁸⁸ *People's Natural Gas Co. v. American Natural Gas Co.*, 233 Pa. 569, 82 Atl. 935.

⁸⁹ *Johnson v. Atlantic City Gas & Water Co.*, 65 N. J. Eq. 129, 56 Atl. 550.

Mandamus furnishes a complete remedy to a person to whom a gas company, in violation of its quasi public duty but not in violation of any contract, refuses to supply gas, and equity is without jurisdiction to enforce such duty by a mandatory injunction. *Cox v. Malden & M. Gas Light Co.*, 199 Mass. 324, 17 L. R. A. (N. S.) 1235, 127 Am. St. Rep. 503, 85 N. E. 180 (bill by assignees and trustees, under a voluntary assignment for the benefit of creditors, of corporation indebted to gas company).

⁹⁰ *Charles Simons Sons Co. v. Maryland Telephone & Telegraph Co.*, 99 Md. 141, 63 L. R. A. 727, 57 Atl. 193,

granting, to his prejudice and injury, discriminatory favors to other shippers.⁹¹ Again where the city ordinance granting a street car company a license to lay its tracks in the city streets requires such tracks to be laid in the center of the streets and it is practicable thus to locate them, injunction is available to a property owner who will suffer special damage from the laying of the tracks on one side, instead of in the center, of the street on which his property abuts.⁹²

§ 3331. Acts criminal or against public policy. That a court of equity will not interfere by injunction to prevent the commission of a crime is a rule which, when properly interpreted, is perhaps without exception.⁹³ Such rule, however, is not always properly understood. "When we say that a court of equity will never interfere by injunction to prevent the commission of a crime, we mean that it will not do so simply for the purpose of preventing a violation of a criminal law. But when the act complained of threatens an irreparable injury to the property of an individual a court of equity will interfere to prevent that injury, notwithstanding the act may also be a violation of a criminal law. In such case the court does not interfere to prevent the commission of a crime, although that may incidentally result, but it exerts its force to protect the individual's property from destruction, and ignores entirely the criminal portion of the act. There can be no doubt of the jurisdiction of a court of equity in such a case."⁹⁴ "The

⁹¹ Merchants' & Miners' Transp. Co. v. Granger & Lewis, 132 Ga. 167, 63 S. E. 700.

⁹² Longnecker v. Wichita Railroad & Light Co., 80 Kan. 413, 102 Pac. 492.

Landowners who by purchase of stock procure the extension of a street railway and an agreement to operate the same over their lands for a period of years, in consideration of their platting such lands and placing them on the market, cannot, after failing so to do for nearly the entire period, maintain injunction to prevent the removal of the extension, the company being solvent and any damages to which the landowners were entitled being recoverable at law. Sentney v. Hutchinson Interurban R. Co., 90 Kan. 610, 135 Pac. 678.

⁹³ Hamilton-Brown Shoe Co. v. Sax-

ey, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106.

⁹⁴ Hamilton-Brown Shoe Co. v. Saxey, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106.

An injunction "stays the arm of the wrongdoer. It does not seek to punish him for any past violations of the law." Littleton v. Fritz, 65 Iowa 488, 54 Am. Rep. 19, 22 N. W. 641.

If an act be of a criminal nature or an offense against the public which does not touch the enjoyment of property, it should not be brought within the direct jurisdiction of a court of equity. Attorney General v. Utica Ins. Co., 2 Johns. Ch. (N. Y.) 371, 378.

"It is hardly necessary to say that every criminal act which injures the person or property of another is also a civil tort, redressible by the courts,

power of equity to enjoin the doing of acts threatening irreparable injury to property rights or which would constitute a public nuisance," says the Supreme Court of Missouri, "is inherent and has been exercised, both in England and America, by courts of chancery since their evolution as a distinct tribunal, nor can this power be divested because the performance of such acts may be a violation of the criminal law. On the other hand, a court of equity is powerless to enjoin the commission of any crime not violative of property rights nor involving the creation of a public nuisance, for the reason that it has no jurisdiction to enforce the criminal law nor to prevent the performance of any act of a criminal nature which does not necessarily prejudice private or public rights subject to its jurisdiction and control."⁹⁵

When, therefore, a proper case for the application of the injunctive process is otherwise made out, equity will not withhold its restraining arm merely because the doing of the act complained of will render the doer liable to criminal prosecution,⁹⁶ the right of the public generally to have its laws observed in no sense limiting or curtailing the right of a private person to restrain, through equity a threatened act, the commission of which will certainly result in a private wrong to him by injuring, or depriving him of, his property rights.⁹⁷ This rule of law has often been recognized in the case of nuisances.⁹⁸ The fact that the

and preventable in proper cases by injunctive process." *Hardie-Tynes Mfg. Co. v. Cruise*, 189 Ala. 66, 66 So. 657.

⁹⁵ *State v. Woolfolk*, 269 Mo. 389, 190 S. W. 877.

⁹⁶ *State v. Feitz*, 174 Mo. App. 456, 160 S. W. 585. See also *Port of Mobile v. Louisville & N. R. Co.*, 84 Ala. 115, 5 Am. St. Rep. 342, 4 So. 106.

"When an irreparable and continuing unlawful injury is threatened to private property and business rights, equity will generally enjoin on behalf of the person whose rights are to be invaded, even though an indictment on behalf of the public will also lie." *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 744.

"It is the universal rule that equity will not interfere to prevent the commission of a crime. There is, of course, an exception to this rule, which is as general as the rule, viz.,

that equity will intervene to protect property and property rights from irreparable injury, even though the acts sought to be enjoined are criminal acts. But the courts will not award equitable relief, in the absence of a showing of irreparable injury, merely because the acts complained of constitute a violation of a criminal statute." *La Mesa Community Ditch v. Appelzoeller*, 19 N. M. 75, 140 Pac. 1051.

⁹⁷ *Rogers v. Nevada Canal Co.*, 60 Colo. 59, Ann. Cas. 1917 C 669, 151 Pac. 923.

However, the writ of injunction should not "be used as an ordinary supplement to the criminal laws of the state." *Daniels v. Portland Gold Min. Co.*, 202 Fed. 637.

⁹⁸ *Indiana. Columbian Athletic Club v. State*, 143 Ind. 98, 28 L. R. A. 727, 52 Am. St. Rep. 407, 40 N. E. 914.

one responsible for the nuisance is amenable to the provisions and penalties of the criminal law does not defeat the right of a private person to an injunction against the continued use of the premises in the manner complained of.⁹⁹ Nor does the fact that acts of the character of those complained of are by statute made misdemeanors and punishable as such make them any less a nuisance nor imply that the legislature intended the criminal remedy to be exclusive.¹

Thus it has been held that where, for the purpose of shooting a natural gas well, a gas company collects within a city a greater amount of nitroglycerin than is permitted by statute and by so doing endangers the life and property of a citizen, a temporary injunction may issue in a suit by the latter, notwithstanding the fact that the act complained of constitutes a crime.² So also, where an incorporated athletic club is conducting prize fights and, in so doing, is not only misusing its corporate powers and franchises, but is also maintaining a public nuisance, an injunction may issue without regard to the fact that, under the statute, prize fighting is a criminal offense.³ Quoting the

Iowa. *Littleton v. Fritz*, 65 Iowa 488, 54 Am. Rep. 19, 22 N. W. 641.

Massachusetts. *Carleton v. Rugg*, 149 Mass. 550, 5 L. R. A. 193, 14 Am. St. Rep. 446, 22 N. E. 55.

Michigan. *Detroit Realty Co. v. Barnett*, 156 Mich. 385, 21 L. R. A. (N. S.) 585, 120 N. W. 804.

South Carolina. *State v. City Club*, 83 S. C. 509, 65 S. E. 730.

Texas. See *Ex parte Allison*, 48 Tex. Cr. App. 634, 3 L. R. A. (N. S.) 622, 13 Ann. Cas. 684, 90 S. W. 492 (statute providing for injunctions against gambling houses).

⁹⁹*Cranford v. Tyrrell*, 128 N. Y. 341, 344, 28 N. E. 514.

A proceeding to abate a nuisance looks only to the property, the use of which constitutes the nuisance, and not to the punishment of the one maintaining such nuisance. *Carleton v. Rugg*, 149 Mass. 550, 5 L. R. A. 193, 14 Am. St. Rep. 446, 22 N. E. 55.

¹*People v. Truckee Lumber Co.*, 116 Cal. 397, 39 L. R. A. 581, 58 Am. St. Rep. 183, 48 Pac. 374.

"Many acts constitute at the same

time a public wrong and the invasion of a private right, and the fact that adequate punishment may be provided or may not be provided for a public wrong done is not in the way of the court furnishing redress for a civil wrong also inflicted in the same act." *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 Fed. 65, 79.

²*People's Gas Co. v. Tyner*, 131 Ind. 277, 16 L. R. A. 443, 31 Am. St. Rep. 433, 31 N. E. 59.

³*Columbian Athletic Club v. State*, 143 Ind. 98, 28 L. R. A. 727, 52 Am. St. Rep. 407, 40 N. E. 914. In this case, the court, adopting the language of counsel for the state, declared that "it would be monstrous to adjudge that, because acts constituting the abuse of corporate privileges are crimes, therefore the corporation may persist in doing them. This would be to encourage corporations to perpetrate the gravest abuses, since, under such a rule, the graver the abuse, the less the power of the civil branch of our law. It comes with an ill grace from a corporation to aver that, because the abuse of its

statement of the Supreme Court of Kansas to the effect that "every place where a public statute is openly, publicly, repeatedly, continuously, persistently and intentionally violated, is a public nuisance,"⁴ but basing its decision on other considerations, the Supreme Court of Indiana has held that the wasting of natural gas by an oil company, contrary to statute, constitutes a public nuisance, and that the state may have an injunction against the company notwithstanding violations of the statute are punishable by the infliction of money penalties.⁵

On the other hand, on the ground that smoking on the cars of a street railway company in violation of a city ordinance does not constitute an interference with property belonging to, or rights of a pecuniary nature possessed by, other passengers on such cars, and in view of the fact that such other passengers have sufficient protection under the criminal law if the ordinance be enforceable, one of the New York courts has refused to issue an injunction *pendente lite* restraining the company from permitting smoking on its cars.⁶ It has been held by the Supreme Court of Mississippi, however, that the continued prosecution of business by a foreign corporation in violation of the public policy of the state will be enjoined at the suit of the state notwithstanding it will have a remedy against the corporation in an action for penalties.⁷

§ 3332. Monopolies and unlawful combinations. Monopolies and unlawful combinations have been treated in a separate chapter, and the remedies available against them have been therein considered,⁸ and no more need be done at this point than to call attention to the fact that injunction is one of such remedies.

§ 3333. Libels and boycotts. In a case in one of the federal courts, the defendant was enjoined *pendente lite* from, *inter alia*, issuing

corporate privileges consists in committing crime, civil remedies are unavailing. It would outrage common sense unspeakably to give ear to a corporation defending itself against a civil proceeding by asserting its own infamy, and insisting that redress can only be had under the laws punishing crimes."

⁴State v. Crawford, 28 Kan. 726, 733, 42 Am. Rep. 182.

Where congress, in the exercise of its power over navigable streams, prohibits the putting of certain matter into such streams, a federal court of

equity has power to prevent, by injunction, a disregard of such prohibition. *United States v. North Bloomfield Gravel-Min. Co.*, 81 Fed. 243, 248 (bill alleging violation of federal hydraulic-mining act).

⁵State v. Ohio Oil Co., 150 Ind. 21, 47 L. R. A. 627, 49 N. E. 809.

⁶Mellen v. Brooklyn Heights R. Co., 87 N. Y. Misc. 65, 150 N. Y. Supp. 222.

⁷State v. Louisville & N. R. Co., 97 Miss. 35, Ann. Cas. 1912 C 1150, 53 So. 454, 51 So. 918.

⁸Chap. 54, *infra*.

circulars of the kind and character of those that he had been issuing, which advised the repudiation of contracts for the purchase of the commodity involved, unless he accompanied each future circular with the statement that the charges made therein, some of which would be injurious to the business and property of the corporation seeking the injunction and, if false, would be libelous, did not apply to such corporation. On an appeal by the defendant, the Circuit Court of Appeals directed that the injunction be modified in certain particulars but refused to vacate it so far as its scope was limited as above indicated, one of defendant's grounds of defense having been that the charges which he had made in the circulars theretofore issued had not been directed against the plaintiff. The court based its action in continuing the injunction squarely on the attempted interference with contract relations, but in ruling on the matter examined the law of injunctions as applied to libels critically and at length and in the course of its opinion declared that "courts of equity like courts of law follow established precedents. They cannot usurp powers they do not possess. We recognize the fact that equity is an elastic system; that its procedure is progressive and is capable of accommodating itself to the changing emergencies and demands of the age. If it were otherwise it could not so well have met the needs of our civilization. At the same time courts are not to usurp powers they do not possess. In a country which has constitutional guaranties of freedom of speech and of the press and of trial by jury, courts of equity should be slow to assume that they possess a power to deal with the publication of libels that the High Court of Chancery in England disclaimed."⁹ * * *

⁹ American Malting Co. v. Keitel, 209 Fed. 351. Reviewing, at this point, the English law upon the subject, the court said: "Lord Chancellor Hardwicke in 1742 (*Huggonson's Case*, 2 Atk. 469) declared that: 'Notwithstanding this should be a libel, yet, unless it is a contempt of the court, I have no cognizance of it, for, whether it is a libel against the public or private persons, the only method is to proceed at law.' It should be said, however, that in that case equity was asked to punish a past tort, not to restrain a future one. Lord Ellenborough in 1810, in a common-law court (*Du Bos v. Beresford*, 2 Camp. 511), said, in speaking of a picture,

that, if it was a libel upon the persons introduced into it, 'upon an application to the Lord Chancellor he would have granted an injunction against its exhibition.' But this dictum is known to have excited much astonishment in the minds of all practitioners in the court of chancery. Thus matters stood in England until 1869, when Vice Chancellor Malins granted injunctions against libels. *Springhead Spinning Co. v. Riley*, L. R. 6 Eq. 551; *Dixon v. Holden*, L. R. 13 Eq. 355. These decisions were, however, speedily overruled in 1875 in *Prudential Assurance Co. v. Knotts*, L. R. 10 Ch. App. 142. In *Collard v. Marshall* (1892) 1 Ch. 571, Chitty, J., said

For 150 years it has been understood in England that equity had no jurisdiction to enjoin a libel, and the power of the courts of that country to do so rests upon statute.¹⁰ In the United States a like view of the matter has been taken. * * * The fact that the false statements may injure the plaintiff in his business or as to his property does not alone constitute a sufficient ground for the issuance of an injunction. The party wronged has an adequate remedy at law.”¹¹

that, before the Judiciary Act, equity had no power to try a libel. In *Monson v. Tussauds, Limited* (1894) 12 B. 671, Lopes, L. J., said: ‘Prior to the Common-Law Procedure Act 1854, no court could grant any injunction in a case of libel. The Court of Chancery could grant no injunction in such a case, because it could not try a libel. Neither could courts of common law until the Common-Law Procedure Act of 1854, because they had no power to grant injunctions. Whether they had power to grant interlocutory injunctions after 1854, I think doubtful. As a matter of practice they never did.’ The Common-Law Procedure Act of 1854 conferred on the English courts of common law the power to grant injunctions in all personal actions of contract or tort, with no limitation as to defamation. And by the Judicature Act of 1873 a power was conferred upon the Chancery Division of the High Court to grant injunctions in cases of libel. But prior to these acts neither courts of law nor courts of equity could issue injunctions in England in such cases. The English law courts began to exercise such jurisdiction in 1878, and about the same time the equity courts began in like manner to exercise theirs. But it is understood that they interfere only in the ‘clearest cases,’ and especially by interlocutory injunctions. See *Bonnard v. Perryman* (1891) Ch. 269 (C. A.); *Kerr on Injunctions*, 5, 6.”

¹⁰ See note 9, *supra*.

¹¹ *American Malting Co. v. Keitel*,

209 Fed. 351. Continuing, the court said: “In all that has been said we have not lost sight of the fact that the courts have sometimes issued injunctions to restrain the publication of false statements injurious to business or property. The cases in which such a jurisdiction has been assumed have been those which have involved conspiracy, intimidation, or coercion. * * * But the complainant does not in terms charge the defendant with being engaged in any conspiracy or in any attempt to intimidate or coerce the complainant or its customers. And the alleged false statements and objectionable matter contained in the circulars do not amount to coercion or intimidation in law, either of the complainant or its customers. The customers may be deceived by false statements, but they are left free to form their own judgment and make their own choice. They are not coerced or intimidated or frightened. The circulars contain no threats of violence to the property of the complainant. He threatens to bring no suits either against the complainant or its customers. It is true that, where proper grounds exist for assuming jurisdiction, equity does not refuse jurisdiction because there is incidentally involved the restraining of a libel. A court of equity may restrain a boycott if the boycott is sought to be accomplished by the publication of circulars or printed matter; such a publication may be restrained without a violation of constitutional rights. That was made clear by the

This is undoubtedly the general rule. While equity will not refuse an injunction where it has jurisdiction to grant one, merely because such injunction will, incidentally, have the effect of restraining a

decision of the Supreme Court of the United States in *Gompers v. Bucks Stove & Range Co.*, 221 U. S. 418, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874, 31 Sup. Ct. 492. It is said that a man has a property right in his business and that an injunction may issue to protect that right against fraud and misrepresentation, notwithstanding the fact that the fraud and misrepresentation may be contained in a libelous publication. That was, as we understand it, the very question which was submitted to the English Court of Appeals in *Chancery* in 1875 in *Prudential Assurance Co. v. Knott* [L. R. 10 Ch. App. 142]. * * * The defendant had published a pamphlet which the plaintiff corporation claimed falsely represented it as being managed with reckless extravagance and as being in a state of insolvency and unable to fulfil its engagements, whereas the company was in an exceedingly prosperous and thriving condition, abundantly solvent and earning large profits, and was managed without extravagance. The bill further charged that the continued publication of the pamphlet would be very injurious to the company's credit and reputation. It accordingly prayed that its publication might be restrained. The injunction was refused. Lord Cairns said: 'It is attempted to give a color to the application by saying that these are libelous publications which will injure property, and then, when that proposition is further defined, it is said that the business of the company, the good will of the company, is property; that the company in its trade will be injured; and that therefore the interference of the court is asked for the protection of property. But, with regard to nine

out of ten libels, the same thing might be said. The cases in which actions are brought for libel are usually cases where things are written of men or corporations which have an effect upon their character and upon their trade or business or their character as connected with trade or business; but no case can be produced in which, in these circumstances, the Court of Chancery has interfered. Not merely is there no authority for this application, but the books afford repeated instances of the refusal to exercise jurisdiction.' He then quotes from the decision of Vice Chancellor Malins in *Dixon v. Holden* [L. R. 13 Eq. 355], * * * this passage: 'In the decision I arrive at, I beg to be understood as laying down that this court has jurisdiction to prevent the publication of any letter, advertisement, or other document which, if permitted to go on, would have the effect of destroying the property of another person, whether that consists of tangible or intangible property, whether it consists of money or reputation.' And says: 'I am unable to accede to these general propositions: They appear to me to be at variance with the settled practice and principles of this court. * * *' Lord Justice James and Lord Justice Mellish stated that they were of the same opinion.' *American Malting Co. v. Keitel*, supra.

In a later federal case, in which the plaintiff sought and was denied an injunction against the publishing of certain newspaper articles concerning a proprietary medicine distributed by him, the court stated that if the bill was one to restrain a libel of the plaintiff, an injunction would not lie, and continuing said: "This is the decided law, too long and too

libel,¹² and while it has been held that an injunction will lie to restrain the further publication of that which the jury in an action at law has found to be a libel or slander,¹³ when the defendant is insolvent and the plaintiff's judgment is therefore uncollectible,¹⁴ equity will not, it seems, enjoin a libel solely as such and in the absence of the existence of some established ground of equitable jurisdiction,¹⁵ even though

well established to need comment or to require citation of authority. It is also settled law in the United States that a court of chancery will not grant an injunction to restrain libelous utterances injurious to property rights and business. This was decided by Mr. Justice Bradley, sitting on the circuit bench while he was a justice of the Supreme Court of the United States, in *Kidd v. Horry*, 28 Fed. 773, and the rule stated in that case has been approved in a long line of judicial opinions in cases collated in the various reference books and in digests." *Willis v. O'Connell*, 231 Fed. 1004. See also *Balliet v. Cassidy*, 104 Fed. 704, in which the court dismissed a complaint which prayed an injunction against the publication and distribution of a newspaper, in which alleged libels of plaintiff had appeared, in any case where it should contain any article referring to the plaintiff.

¹² *American Malting Co. v. Keitel*, 209 Fed. 351.

In *Flint v. Hutchinson Smoke Burner Co.*, 110 Mo. 492, 16 L. R. A. 243, 33 Am. St. Rep. 476, 19 S. W. 804, wherein it was argued in behalf of the plaintiffs that the case was one of libel "plus something else," the court said: "If that something else is sufficient to give a court of equity jurisdiction, then the jurisdiction is not defeated because there is libel or slander added."

"We think it entirely possible," says the Montana Supreme Court, "for a state of facts to exist under which the [constitutional] right to

speak or publish might be so used as to constitute a nuisance and be restrained as such." *Empire Theatre Co. v. Cloke*, 53 Mont. 183, L. R. A. 1917 E 383, 163 Pac. 107.

¹³ *Flint v. Hutchinson Smoke Burner Co.*, 110 Mo. 492, 16 L. R. A. 243, 33 Am. St. Rep. 476, 19 S. W. 804.

¹⁴ *Wolf v. Harris*, 267 Mo. 405, 184 S. W. 1139.

¹⁵ "In this country a court of equity is without jurisdiction to restrain the publication of libel." *Vassar College v. Loose-Wiles Biscuit Co.*, 197 Fed. 982 (injunction to restrain defendant from using "Vassar" as trade name of candy manufactured by it, denied).

"Libel and slander, however illegal and outrageous, will not be enjoined. This is the settled rule." *Singer Mfg. Co. v. Domestic Sew. Mach. Co.*, 49 Ga. 70, 15 Am. Rep. 674 (injunction to restrain defendant from publishing claim that it had received the award of certain premiums actually awarded to complainant, denied). Compare *Bell & Co. v. Singer Mfg. Co.*, 65 Ga. 452.

"That a court of equity cannot, under its common-law powers, by injunction, restrain the publication of a mere libel, seems to be most in accordance with the authorities in this country, as well as in England." *Everett Piano Co. v. Bent*, 60 Ill. App. 372 (decree making perpetual preliminary injunction against circular alleging patent infringement, reversed). See also on the general proposition, *Allegretti Chocolate Cream Co. v. Rubel*, 83 Ill. App. 558,

the defendant be financially unable to respond in damages,¹⁶ and it is immaterial, as far as the application of this rule is concerned, that the injury to the corporation slandered or libeled is a continuing one, for which there is no accurate measure of damages.¹⁷ Nor is the application of the rule, in the case of printed misrepresentations regarding a manufactured article, affected by the fact that the manufacturer cannot prove special damage and hence is without a remedy at law.¹⁸ "The jurisdiction of a court of chancery," says the Supreme Court of Massachusetts, "does not extend to cases of libel or slander, or of false representations as to the character or quality of the plaintiff's property, or as to his title thereto, which involve no breach of trust or of contract."¹⁹

¹⁶ Willis v. O'Connell, 231 Fed. 1004.

¹⁷ Baltimore Life Ins. Co. v. Gleisner, 202 Pa. 386, 51 Atl. 1024. Said the court: "So far as a cause of action is stated in the bill, it is one for slander or libel, and cognizable at law. It is urged that the injury is a continuing one, for which there is no accurate measure of damages, and therefore is within the province of equity. But even in that class of cases the complainant's right must be so clear as to be practically conceded, or it must first be established by the verdict of a jury. In the present case complainant's right of action depends on facts, the burden of proof of which is on complainant, and which necessarily are for a jury in the first instance. The want of equity being apparent on the face of the bill, the demurrer was properly sustained."

¹⁸ Marlin Firearms Co. v. Shields, 171 N. Y. 384, 59 L. R. A. 310, 64 N. E. 163.

¹⁹ Boston Diatite Co. v. Florence Mfg. Co., 114 Mass. 69, 19 Am. Rep. 310. See also Finnish Temperance Soc. Sovittaja v. Raivaaja Pub. Co., 219 Mass. 28, Ann. Cas. 1916 D 1087, 106 N. E. 561; Raymond v. Russell, 143 Mass. 295, 58 Am. Rep. 137, 9 N. E. 544.

"It is well settled that an injunc-

tion will not be granted to restrain slander or libel of title or of reputation. * * * Not that it is not a wrong, not that the wrong might not be irreparable, but simply because courts of chancery, in the exercise of the extraordinary powers lodged in them, have uniformly refused to act in such a case, leaving parties to their remedy at law. * * * Equity, it must be remembered, will not enjoin every wrong. There are injuries done by one man to another which no law will remedy, Telling lies, unless those lies be of a peculiar character, is one of such injuries. But there are very many wrongs, wrongs recognizable and capable of redress at law, that yet are not such wrongs as a court of equity will enjoin. * * * The most that can be said of the conduct of the defendant is, that he is telling and publishing untruths—lies, if you will—calculated and intended to help himself and damage the complainant. To say that he may be enjoined from doing this is to say that the writ of injunction may issue to restrain a libel or to stop slander. It is true that courts of equity constantly refuse to lay down any absolute limitation to its power to issue this writ. But this only means that cases coming within the principles on which the court has long acted are not beyond

In this country, the reason for this rule, or, at least, a reason which has been particularly emphasized, is based on the existence of the constitutional guaranties of freedom of speech and of the press, and of trial by jury.²⁰ "The law of libel," says the Supreme Court of Missouri, "is peculiar. * * * The freedom of the press has been so jealously guarded both in England and in this country that our law of libel is like no other law on the books. Our [Missouri] Constitution provides that a man may say, write, and publish 'whatever he will' being answerable only for the 'abuse of liberty.' Libel is the only act injurious to the rights of another which a man cannot, under proper conditions, be restrained from committing; and that is so because the Constitution says he shall be allowed to do it, and answer for it afterwards."²¹ Of the same general import are the statements of the New York Court of Appeals to the effect that "the constitutional guaranty of freedom of speech and press, which in terms provides that 'every citizen may freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of that right; and no law shall be passed to restrain or abridge the liberty of speech or of the press'²² * * * has for its only limitations the law of slander and libel. Hitherto freedom of speech and of the press could only be interfered with where the speaker or writer offended against the criminal

its power simply because the facts are novel or the injury peculiar. The principle is, that to authorize the writ there must be an irreparable, expected injury to a property right. It is a perversion of language to say that the complainant has a property right in the truth of the report [as to its having received the award of certain premiums]. He has perhaps a right to the report, but a perversion of the truth, a claim that it is different from what it in fact is, can in no fair sense be called an infringement of his right of property in the report." *Singer Mfg. Co. v. Domestic Sew. Mach. Co.*, 49 Ga. 70, 15 Am. Rep. 674. Compare *Bell & Co. v. Singer Mfg. Co.*, 65 Ga. 452.

²⁰ *American Malting Co. v. Keitel*, 209 Fed. 351.

²¹ *Hamilton-Brown Shoe Co. v. Saxey*, 131 Mo. 212, 52 Am. St. Rep. 622, 32 S. W. 1106.

The Nebraska Constitution (art. 1, § 5) provides that "every person may freely speak, write and publish on all subjects, being responsible for the abuse of that liberty; and in all trials for libel, both civil and criminal, the truth when published with good motives, and for justifiable ends, shall be a sufficient defense," and this provision, the Nebraska Supreme Court has held, forbids injunctive relief against the publication of "political matter" in a newspaper when the only ground upon which such relief is sought is that the "political matter" (see the separate opinion of Justice Sedgwick in which he notes the fact that the opinion of the majority of the court does not define "political matter") complained of is misleading or false. *Howell v. Bee Pub. Co.*, 100 Neb. 39, L. R. A. 1917 A 160, Ann. Cas. 1917 D 655, 158 N. W. 358.

²² *New York Const. art. 1, § 8.*

law, or where the words amounted to a slander or libel of a person or corporation or their property, and the guaranteed right of trial by jury entitled the parties accused of slander or libel to have 12 men pass upon the question of their liability to respond in damages therefor and to measure such damages. But the precedent which the plaintiff seeks to establish would open the door for a judge sitting in equity to establish a censorship not only over the past and present conduct of a publisher of a magazine or newspaper, but would authorize such judge by decree to lay down a chart for future guidance in so far as a plaintiff's property rights might seem to require, and, in case of the violation of the provisions of such a decree, the usual course and practice of equity would necessarily be invoked, which would authorize the court to determine whether such published articles were contrary to the prohibitions of the decree, and, if so found, punishment as for a contempt might follow. Thus a party could be punished for publishing an article which was not libelous, and that, too, without a trial by jury."²³ And so it is that the Montana Supreme Court declares that it is "unable to conceive how any one can possess the right to publish what he pleases, subject only to penalty for abuse,²⁴ and at the same time be prevented by any court from doing so."²⁵

In connection with these constitutional guaranties, however, attention should be called to the distinction between a suit to enjoin a libel of a business and a suit to enjoin "verbal acts" whereby persons are sought to be intimidated into refusing to have business dealings with a particular individual—in other words, a suit to enjoin a boycott, a remedy frequently invoked in such cases.²⁶ This distinction has been stated to be that in one case "when the acts complained of consist of such misrepresentations of a business that they tend to its injury, and damage to its proprietor, the offense is simply a libel; and in this country the courts have with great unanimity held that they will not interfere by injunction, but that the injured party must rely upon his remedy at law. On the contrary when the attempt to injure consists of acts or words which will operate to intimidate and prevent the

²³ *Marlin Firearms Co. v. Shields*, 171 N. Y. 384, 59 L. R. A. 310, 64 N. E. 163.

²⁴ Montana Const. art. 3, § 10.

²⁵ *Empire Theatre Co. v. Cloke*, 53 Mont. 183, L. R. A. 1917 E 383, 163 Pac. 107.

²⁶ As to the employment of injunc-

tion in such cases, see *Cooke, Combinations, Monopolies and Labor Unions* (2nd Ed.), § 95 et seq. Reference should also be had, in this connection, to the provisions of section 6 of the Clayton Act (38 U. S. Stat. L. 731, Fed. St. Ann. 1916 Supp. p. 272).

customers of a party from dealing with or laborers from working for him, the courts have with nearly equal unanimity interposed by injunction. In the one case it is an injury to a man's business by libeling it; in the other, by force, threats, and other like means, he is prevented from pursuing it; and, while the damage might be as great in one case as in the other,—but most likely with different consequences to the good order and peace of the community,—the courts have determined upon different remedies. What constitute such actionable threats or intimidations must be determined in each case from all the circumstances attending it. If the things done or the words spoken are such that they will excite fear or a reasonable apprehension of damages, and so influence those for whom designed as to prevent them from freely doing what they desire, and the law permits, they may be restrained, and the courts will look beyond the mere letter of the act or word into its spirit or intent.”²⁷ In *Gompers v. Buck's Stove and Range Company*,²⁸ the celebrated contempt case which grew out of the alleged violation of an injunction against the continuance of a boycott and which was before the Supreme Court of the United States a few years ago, such court said: “Courts differ as to what constitutes a boycott that may be enjoined. All hold that there must be a conspiracy causing irreparable damage to the business or property of the complainant. Some hold that a boycott against the complainant, by a combination of persons not immediately connected with him in business, can be restrained. Others hold that the secondary boycott can be enjoined, where the conspiracy extends not only to injuring the complainant, but secondarily coerces or attempts to coerce his customers to refrain from dealing with him by threats that unless they do, they themselves will be boycotted. Others hold that no boycott can be enjoined unless there are acts of physical violence, or intimidation caused by threats of physical violence. But whatever the requirement of the particular jurisdiction, as to the conditions on which the injunction against a boycott may issue, when these facts exist, the strong current of authority is that the publication and use of letters, circulars, and printed matter may constitute a means whereby a boycott is unlawfully continued, and their use for such purpose may amount to a violation of the order of injunction. * * * While the bill in this case alleged that complainant's interstate business was restrained, no relief was asked under the provisions of the Sherman

²⁷ *Coeur d'Alene Consol. & Min. Co. v. Miners' Union of Wardner*, 51 Fed. 260, 19 L. R. A. 382, quoted in *Barr v. Essex Trades Council*, 53 N. J. Eq. 101, 30 Atl. 881. See also *Sherry v. Perkins*, 147 Mass. 212, 9 Am. St. Rep. 689, 17 N. E. 307.
²⁸ 221 U. S. 418, 55 L. Ed. 797.

Anti-Trust Act. But if the contention be sound that no court, under any circumstances, can enjoin a boycott if spoken words or printed matter were used as one of the instrumentalities by which it was made effective, then it could not do so, even if interstate commerce was restrained by means of a blacklist, boycott, or printed device to accomplish its purpose. And this, too, notwithstanding § 4 * * * of that act²⁹ provides that where such commerce is unlawfully restrained, it shall be the duty of the Attorney General to institute proceedings in equity to prevent and enjoin violations of the statute. * * * In the case of an unlawful conspiracy, the agreement to act in concert when the signal is published gives the words 'Unfair,' 'We Don't Patronize,' or similar expressions, a force not inherent in the words themselves, and therefore exceeding any possible right of speech which a single individual might have. Under such circumstances they become what have been called 'verbal acts,' and as much subject to injunction as the use of any other force whereby property is unlawfully damaged. When the facts in such cases warrant it, a court having jurisdiction of the parties and subject-matter has power to grant an injunction." So in an earlier Michigan case in which the complainants sought to enjoin the boycotting of their business, the Supreme Court of Michigan said: "It is urged that courts of equity will not restrain the publication of a libel, and that this boycotting circular is a libel, the publication and circulation of which cannot be enjoined. The same claim was made that courts of equity have no jurisdiction to restrain the commission of a crime. But the answer is, and always has been, that parties cannot interpose this defense when the acts are accompanied by threats, express or covert, or intimidation and coercion, and the accomplishment of the purpose will result in irreparable injury to, and the destruction of, property rights. If all there was to this transaction was the publication of a libelous article, the position would be sound. It is only libelous in so far as it is false. Its purpose was not alone to libel complainants' business, but to use it for the purpose of intimidating and preventing the public from trading with the complainants. It called upon them [it] to boycott them. The defendants, by their conduct, gave all the patrons of complainants, and others as well, the meaning they attached to the word 'boycott,' and they all evidently understood it as the defendants interpreted it by their conduct and acts. It is true that, under our Constitution, no one can be enjoined from publishing a libel. (Const. Mich. art. 4,

²⁹ 26 U. S. Stat. L. 209, 7 Fed. St. Ann. 344.

§ 42.) By this provision, every person is entitled to 'freely speak, write, and publish his sentiments on all subjects, being responsible for the abuse of such right.' ''³⁰

§ 3334. Parties defendant. As appears elsewhere in this work,³¹ the officers, agents and stockholders of a corporation are not necessary parties defendant in either an action at law or a suit in equity against the corporation unless, generally, they have a distinct individual and indivisible interest or a distinct several liability as participants in the wrongdoing or breach of contract complained of; and it is ordinarily improper to join them as such parties defendant merely because of their relation to the corporation. And this rule undoubtedly obtains in the case of a suit for an injunction as well as in the case of any other suit in equity.³²

It has been held, however, that where upon the termination of a sales-agency contract a bill is filed to restrain the former corporate sales-agent from using the former principal's name in advertising and from selling or disposing of goods consigned to it by its former principal and then on hand, the secretary of the corporation sought to be enjoined, who is interested in and actively engaged in its business, is properly named in the bill as a defendant.³³ But consumers of natural gas are not necessary parties to a bill by a municipal corporation to enjoin the gas company from violating its franchise contract and for an accounting of gas sold.³⁴

Where, however, the wrongful act sought to be enjoined has been committed by a corporation in the exercise of its corporate functions, the suit should be brought against such corporation instead of against its incorporators.³⁵ In a suit for an injunction by one railroad company to determine the legality, justice and reasonableness of an order made by the board of railroad commissioners whereby the right to

³⁰ *Beck v. Railway Teamsters' Protective Union*, 118 Mich. 497, 42 L. R. A. 407, 74 Am. St. Rep. 421, 77 N. W. 13.

³¹ Section 3026, *supra*.

As to equitable actions by stockholders for injuries to corporation, see Chap. 56, subd. Remedies of Stockholders, etc.

³² It would seem that natural persons are improperly joined as defendants in a bill for injunction when the cause of action, if any, against

them, springs solely from their official relation to the corporation sued and no separate acts are charged against them. *Vassar College v. Loose-Wiles Biscuit Co.*, 197 Fed. 982.

³³ *C. P. Goerz American Optical Co. v. Jackson & Semmelmeier*, 175 Ill. App. 482.

³⁴ *Wheeling v. Natural Gas Co. of West Virginia*, 74 W. Va. 372, 82 S. E. 345.

³⁵ *Dieter v. Estill*, 95 Ga. 370, 22 S. E. 622.

ross its tracks and switch yards was given to another such company, he board of railroad commissioners and the company given the right of crossing may, it has been held, be properly joined as defendants.³⁶

§ 3335. Persons bound. While it has been said that "undoubtedly, the current of authority is to the effect that the commands and directions of an injunction are not addressed to or binding upon one who is not a party, either by name or designation, and in consequence that a person not so made a party is not subject to committal for a breach of the injunction, which, technically speaking, can be committed only by a party to it,"³⁷ the same court which made such statement also

³⁶ *Ex parte Luttgerding*, 83 Kan. 105, 110 Pac. 95.

³⁷ *In re Rice*, 181 Fed. 217, 220.

In re Coggs, 100 Mo. App. 585, 15 S. W. 183, was an application, under habeas corpus, for petitioner's discharge from imprisonment for violating an injunction. The injunction involved restrained "the defendants, their servants or employees, or any one for them, or in their name and behalf, from interfering with plaintiff," etc. The petitioner was not a party to the injunction proceeding, nor was he in any sense an agent or employee of the defendants," and "one of the questions raised by the return and reply is whether or not, since the petitioner was not a party to said injunction suit, nor served with process therein, he was rightfully adjudged guilty of contempt for a violation of the injunction." Citing *Ex parte Lennon*, 166 U. S. 548, 41 L. Ed. 1110, Presiding Judge Smith stated that the latter case was one "where the petitioner was not a party to the bill, which was brought to enforce compliance with the Interstate Commerce Act, and to compel railway companies to comply with said act in certain particulars, and to enjoin them from refusing to receive from the complainant certain cars for transportation, etc., to which the petitioner was not a party, nor served with process

of subpoena, nor had notice of the application made by the complainant for an injunction, nor was he served by the officers of the court with such injunction. The court held that these facts were immaterial, so long as it was made to appear that he had notice of the issue of the injunction. To render a person amenable to an injunction, it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor have been actually served with a copy of it, so long as he appears to have had actual notice; citing *High on Injunct.* § 1444; *Mead v. Norris*, 21 Wis. 312; *Wellsey v. Mornington*, 11 Beav. 181. No reason can be seen why this rule has no application to the facts of this case. If the petitioner had not admitted in his testimony that he had actual notice of the injunction before his interference with the plaintiffs' property, I think it may be fairly inferred from the other facts to which he testified. It seems to me that, as the case is one where the petitioner failed to purge himself of the contempt charged, for the purpose of indicating its power and maintaining its dignity the court could not do less than impose the punishment specified in its order," and the petition for discharge was accordingly denied. It is true that the Supreme Court of the United

made the further one that "on principle it would seem, whatever the holding of some of the authorities to the contrary, that the directions and commands of an injunction, though not addressed to strangers, are admonitions and orders to any one, although not named in any way in the suit, who acts in the assertion of the principal's right only, contrary to the terms of an injunction addressed to his principal, and that a mere agent may, in that way, be guilty of its breach, in the proper sense. He claims under one to whom the injunction speaks, acts for him only, and intentionally puts himself in privity with him, and in consequence is amenable to its commands."³⁸ Thus it comes about that whenever an injunction, whatever its nature may be, is directed to a corporation, it also runs against the corporation's officers, agents, employees and servants, provided they have notice of its issuance,

States made the statement in *Ex parte Lennon*, supra (see also *Nashville, C. & St. L. Ry. Co. v. McConnell*, 82 Fed. 65, 87), that "to render a person amenable to an injunction it is neither necessary that he should have been a party to the suit in which the injunction was issued, nor to have been actually served with a copy of it, so long as he appears to have had actual notice," but the case can hardly be authority for the proposition that strangers to an injunction suit are bound by the injunction issued if they have actual notice thereof regardless of whether they come within the terms of the injunction either *eo nomine* or by description—in other words, that the injunction, on actual notice, operates against the world and not merely against those expressly mentioned either by name or by description—as it was expressly stated that *Lennon*, the petitioner, was an employee of the corporation which, together with its "officers, agents, servants, and employees" (as to this latter fact see the case in the Circuit Court of Appeals, 64 Fed. 320), was enjoined, and therefore the case would seem to stand for no more than consonance with the rule (see *infra*, this section) that, on actual notice, an injunction binds the agents, etc., of the

person enjoined, especially when it is expressly directed, by description, to such agents, etc. Nor does *Mr. High*, in the section of his work cited, sanction any broader rule. As a matter of fact, in an earlier section of his work (section 1435), such author while recognizing that a person may be in contempt by aiding and abetting the violation of an injunction, expressly says that "while it would seem that the agents of one against whom an injunction is awarded, having knowledge of the order may be held liable for acts committed in violation of its terms, yet one who was not a party to the proceedings, and who has acquired no rights from any of the parties *pendente lite*, is not guilty of a breach of the injunction by exercising a right which belonged to him before the suit. So a stranger to the cause, who is unconnected with the parties defendant, will not be punished for doing the act prohibited by the injunction."

³⁸ *In re Rice*, 181 Fed. 217, 220.

A person who comes within the description of those enjoined and who has actual notice of the injunction violates the same at his peril. *People v. District Court of El Paso County*, 19 Colo. 343, 35 Pac. 731.

even though they were not made parties defendant to the suit, were not served with notice of the application, and did not receive the same notice of the granting of the injunction as did the corporation. "A corporation can act only through its officers and employees, and a duty imposed by law, or by an order of a court of competent jurisdiction, upon a corporation, applies to the officers and employees of that corporation, and takes effect as to them so soon as they are in fact properly notified of the nature and scope of the law or order. Writs of injunction, of whatever nature they may be, when directed to a corporation, always run against it and its agents, servants, employees, etc. The order now before us was so allowed, and it was so issued. It would very much embarrass the courts in administering the law if counsel are right in this contention [to the contrary]. The difficulties would almost be insuperable if it were necessary to make all the several thousand employees of the defendant railroads parties before the orders and processes of the court become effective as to them. They belong to the instrumental force of their respective corporations, and in that respect are a part of them. It is therefore sufficient, I think, if in fact they are served with full and proper notice of the orders and processes of the court to make them binding upon them. It is not necessary to make them parties."³⁹ Moreover, formal service of the writ of injunction would seem not to be necessary in order for a person bound thereby to be chargeable with notice thereof. "In considering the question of a defendant's liability for a breach of injunction," says Mr. High,⁴⁰ "it is to be borne in mind that the injunction becomes operative from the time of the order being made, and not from the date of the writ itself, or from the time of its being drawn up. The mandate of the court being effectual upon all parties having notice thereof from the time it is given, to fix defendant's liability for a violation it is only necessary to show that he was actually apprised of the existence of the order at the time of committing the acts con-

³⁹ Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co., 54 Fed. 746, 750, 19 L. R. A. 395. See also *Ex parte Lennon*, 64 Fed. 320, 323.

The mere fact that a corporation is held not guilty of violating an injunction entered against it does not preclude its president from being found guilty of a violation thereof. *Fiedler v. Bambrick*, 135 Mo. App. 301, 115 S. W. 1033.

The pledgee of substantially all of

the stock of a corporation is not liable to other creditors of the pledgor for depreciation in the value of such stock resulting from the giving of a mortgage on the property of the corporation by its officers in violation of an injunctive order. *Haring v. Hamilton*, 107 Wis. 112, 82 N. W. 698.

⁴⁰ 2 High on Injunctions (4th Ed.), § 1421. See also *Wenger v. Fisher*, 55 W. Va. 13, 46 S. E. 695, which, citing High, holds to the same effect.

stituting the violation.”⁴¹ Notice will be sufficient if it proceeds from a source entitled to credit and informs the defendant clearly and plainly as to what is forbidden.⁴² So, notice by telegraph may be sufficient,⁴³ and, where a corporation is enjoined, a posted statement by it to its employees may be all that is necessary to hold, in contempt, one of such employees who violates the injunction.⁴⁴

Notwithstanding all of this there remains the fact that persons may avoid the necessity of complying with a mandatory injunction issued against them as employees of a corporation, bound by the same injunction, by actually severing their connection with such corporation.⁴⁵ “It is undoubtedly true,” says one of the courts, “that an injunction or an enjoining order against a corporation and its officers, although the officers are not named personally, and are not parties to the record in any way, is binding upon them; but the scope of such an injunction or enjoining order is to restrain the officers from doing the act prohibited in their official capacity as an officer of the corporation, or in their individual capacity, for the benefit or in the interest of the corporation enjoined. If after the service of such an order or such an

⁴¹ See also *In re Rice*, 181 Fed. 217, 221; *Pitcock v. State*, 91 Ark. 527, 134 Am. St. Rep. 88, 121 S. W. 742; *Murphey v. Harker*, 115 Ga. 77, 41 S. E. 585.

⁴² *Cape May & S. L. R. Co. v. Johnson*, 35 N. J. Eq. 422, 425.

“It is immaterial from what source he [the defendant] derives the information, so long as it is from a source which is entitled to credit; and if he receives the notice from such a source, and also receives information which clearly and plainly indicates what is the act from which he must abstain, he is bound to obey the order of the court, whether he is ever served with the writ or not; and a refusal or failure to comply with the order of the court, whatever it may be, under such circumstances, is as much a contempt as if the defendant has been personally served by the sheriff with the writ. This proposition is too well settled now either to require extended discussion, or to admit of serious question.” *Murphey v. Harker*, 115 Ga. 77, 41 S. E. 585.

Where a person who is claimed to be bound by an injunction was not a party to the suit and was not served either with the injunction or with a copy of it, the question whether he had notice of the issuance of the order would seem to be one of fact to be determined from the evidence. *Ex parte Lennon*, 64 Fed. 320, 323, *aff'd* 166 U. S. 548, 41 L. Ed. 1110.

When a party charged with violating an injunction claims to have had neither knowledge nor notice of its existence, the circumstances in which he avoided service is a proper subject of inquiry in determining the bona fides of his avowal of want of knowledge and notice. *In re Rice*, 181 Fed. 217, 221.

⁴³ *Cape May & S. L. R. Co. v. Johnson*, 35 N. J. Eq. 422, 424. See also *State v. Knight*, 3 S. D. 509, 44 Am. St. Rep. 809, 54 N. W. 412.

⁴⁴ *Ex parte Lennon*, 166 U. S. 548, 41 L. Ed. 1110.

⁴⁵ *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 730, 743, 19 L. R. A. 387.

injunction upon a corporation, an officer thereof severs his connection bona fide with such corporation, his action thereafter as an individual in the enforcement of his own vested rights, and not in fraud of the order of the court, nor for the benefit of or in the interest of the corporation of which he was lately a member, would not be in contravention of such order, nor subject him to punishment for contempt.”⁴⁶

⁴⁶ Mexican Ore Co. v. Mexican Guadalupe Min. Co., 47 Fed. 351, 356.

CHAPTER 52

LIABILITY OF CORPORATION FOR TORTS

I. NATURE AND EXTENT OF LIABILITY GENERALLY

- § 3336. Introductory.
- § 3337. Effect of legislative authority.
- § 3338. Torts involving intent and malice.
- § 3339. Defense of ultra vires.
- § 3340. Principles determining liability—In general.
- § 3341. — Liability by reason of ratification or adoption.
- § 3342. — Assault and battery.
- § 3343. — Conspiracy.
- § 3344. — Conversion.
- § 3345. — False arrest and imprisonment and malicious prosecution.
- § 3346. — Fraud and deceit.
- § 3347. — Libel and slander.
- § 3348. — Negligence.
- § 3349. — Nuisance.
- § 3350. — Trespass.
- § 3351. — Wrongful death.
- § 3352. — Torts of special police officers.
- § 3353. Joint and several liability of corporation and agent or servant.
- § 3354. Exemplary damages—In general.
- § 3355. — For what torts awarded.

II. BREACH OF SPECIAL DUTY

- § 3356. In general.
- § 3357. Carriers of passengers—In general.
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- § 3359. — Exemplary damages.

III. CHARITABLE CORPORATIONS

- § 3360. *Duncan v. Findlater*; *Fofoffes of Heriot's Hospital v. Ross*; *Mersey Docks v. Gibbs*.
- § 3361. *Glavin v. Rhode Island Hospital*.
- § 3362. Controlling theories.
- § 3363. Application of theories.

I. NATURE AND EXTENT OF LIABILITY GENERALLY

§ 3336. **Introductory.** Of necessity, a corporation can only commit a tort through the instrumentality of its officers, agents or employees, and accordingly the principles which control in determining

its liability for torts are, in the main, those which control the principal's liability for the agent's torts. It would be foreign to the scope and purpose of this work to enter upon the extended treatment of the law of agency which a full treatment of these basic principles would require, especially since these principles of agency have recently received adequate and admirable exposition in a separate treatise.¹ The present chapter, therefore, is designed to give concrete illustrations of the application, limitation and qualifications of these principles as affected by the fact that the master is a corporation.

Regardless of any opinion, obtaining early in the history of bodies corporate, that a private corporation, being an ideal existence without soul, mind, hands or body, and with only such powers as were conferred upon it by its charter, could not be chargeable with either wrongful omission or commission, the law is to-day—and has been for long years past—well settled that there is nothing inherent in the nature of a private corporation which precludes it from being guilty of a tort and being held liable therefor.² The souls, minds, hands and bodies of the natural persons who shape its course, direct its operations and control its activities are regarded as imputable to the corporation, and, possessed of these human attributes, even though

¹ See Mechem, Agency (2nd Ed.).

² According to former Chief Justice Tilghman of Pennsylvania, there probably never was a time when corporations were deemed incapable of committing torts and immune from liability for such as they actually committed. Said the Chief Justice in *Chestnut Hill & S. H. Turnpike Co. v. Rutter*, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675 (decided in 1818), in which a turnpike company, sued in trespass on the case, was held liable for obstructing a watercourse and overflowing land: "It is objected that the present action is not on contract but on tort, and a very refined argument is brought forward, to prove that a corporation cannot be guilty of a tort. A corporation, say the defendant's counsel, is a mere creature of law, and can act only as authorized by its charter. But the charter does not authorize it to do wrong, and therefore it can do no wrong. The argument is fallacious in its principles, and mis-

chievous in its consequences, as it tends to introduce actual wrongs and ideal remedies; for a turnpike company may do great injury, by means of laborers who have no property to answer the damages recovered against them. It is much more reasonable to say, that when a corporation is authorized by law to make a road, if any injury is done in the course of making that road by the persons employed under its authority, it shall be responsible, in the same manner that an individual is responsible for the actions of his servants touching his business. The act of the agent is the act of the principal. There is no solid ground for a distinction between contracts and torts. Indeed with respect to torts, the opinion of the courts seems to have been more uniform than with respect to contracts. For it may be shown, that from the earliest times to the present, corporations have been held liable for torts."

it be but a fiction, the corporation, for the purpose of administering justice, is deemed capable both of omitting and of committing acts which work injury to others, and will be made to respond therefor in damages. Moreover, even though it is only those powers which are conferred, expressly or impliedly, upon it by its charter which the corporation may lawfully exercise,³ that fact does not prevent it from contracting in excess of those powers and incurring liability in consequence of doing so,⁴ and no more will the courts recognize such fact as preventing the corporation from conceiving and executing to the tortious injury of another and thereby rendering itself liable in an action *ex delicto*.⁵

§ 3337. Effect of legislative authority. It has often been held that when an act authorized by the legislature, acting within its constitutional powers, is done by a corporation with due care and in good faith, the corporation is not liable to persons injured by the act in an action for trespass, nuisance, etc., but that the remedy, if there is any at all, is that provided by the statute. "If the thing done," it was said in an English case, "is within the statute, it is clear that no compensation can be afforded for any damages sustained thereby, except so far as the statute itself has provided it, and this is clear on the legal presumption that the act creating the damage being within the statute must be a lawful act."⁶ In such a case, if the statute provides no remedy, the damage is *damnum absque injuria*.⁷

³ See § 782 et seq.

⁴ See Chap. 37.

⁵ That the corporation cannot defend on the ground that the tort was *ultra vires*, see § 3339, *infra*.

⁶ *Duncan v. Findlater*, 6 Clark & F. 894, 907.

⁷ *United States*, *Pumpelly v. Green Bay & M. Canal Co.*, 13 Wall. 166, 20 L. Ed. 557.

Connecticut. *Burroughs v. Housatonic R. Co.*, 15 Conn. 124, 38 Am. Dec. 64. See *Hollister v. Union Co.*, 9 Conn. 436, 25 Am. Dec. 36.

Delaware. *Bailey v. Philadelphia, W. & B. R. Co.*, 4 Harr. 389, 44 Am. Dec. 593.

Maine. *Lawler v. Baring Broom Co.*, 56 Me. 443; *Gowen v. Penobscot R. Co.*, 44 Me. 140; *Parker v. Cutler*

Milldam Co., 20 Me. 353, 37 Am. Dec. 56.

Massachusetts. *Stevens v. Proprietors of Middlesex Canal*, 12 Mass. 466; *Hazen v. Essex Co.*, 12 Cush. 475.

Ohio. *Parrot v. Cincinnati, H. & D. R. Co.*, 10 Ohio St. 624.

Vermont. *Baxter v. Winooski Turnpike Co.*, 22 Vt. 114, 52 Am. Dec. 84.

England. *Metropolitan Board of Works v. McCarthy*, L. R. 7 H. L. 243; *Hammersmith & City Ry. Co. v. Brand*, L. R. 4 H. L. 171; *Whitehouse v. Birmingham Canal Co.*, 27 Law J. Exch. 25.

"When the legislature authorizes an act," said the Massachusetts court, "the necessary and natural consequence of which is damage to the property of another, he who

In a case decided by it a numbers of years ago,⁸ in which a municipal corporation was the defendant, the Supreme Court of the United States said: "That cannot be a nuisance, such as to give a common law right of action, which the law authorizes. We refer to an action at common law such as this is. A legislature may and often does authorize and even direct acts to be done which are harmful to individuals, and which without the authority would be nuisances; but in such a case, if the statute be such as the legislature has power to pass, the acts are lawful, and are not nuisances, unless the power has been exceeded. In such grants of power a right to compensation for consequential injuries caused by the authorized erections may be given to those who suffer, but then the right is a creature of the statute. It has no existence without it. If this were not so, the suffering party would be entitled to repeated actions until an abatement of the erections would be enforced, or perhaps he might restrain them by injunction."⁹ This doctrine has been applied where a person has sought to recover against a railroad company for damages caused by the operation of its road;¹⁰ and where it has been sought to recover for damage to adjoining land from the construction or maintenance of a canal under authority from the legislature.¹¹ Thus it has been held that a railroad company operating its road with due care under authority conferred by its charter is not liable to adjoining land-owners for damages caused by smoke, noise, vibration, etc., resulting from the operation of its trains, unless such liability is imposed by its

does the act cannot be complained of as a trespasser or wrongdoer." *Stevens v. Proprietors of Middlesex Canal*, 12 Mass. 466.

⁸ But subsequently to *Baltimore & P. R. Co. v. Fifth Bapt. Church*, note 16, *infra* this section.

⁹ *Northern Transp. Co. of Ohio v. Chicago*, 99 U. S. 635, 25 L. Ed. 336.

¹⁰ *Connecticut. Burroughs v. Housatonic R. Co.*, 15 Conn. 124, 38 Am. Dec. 64.

Maine. *Chapman v. Atlantic & St. L. R. Co.*, 37 Me. 92.

Michigan. *Michigan Cent. R. Co. v. Anderson*, 20 Mich. 244.

Pennsylvania. *Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co.*, 54 Pa. St. 345, 93 Am. Dec. 708.

Rhode Island. *Smith v. Old Colony & N. R. Co.*, 10 R. I. 22.

England. *Hammersmith & C. Ry. Co. v. Brand*, L. R. 4 H. L. 171; *Glasgow Union Ry. Co. v. Hunter*, L. R. 2 H. L. Sc. 78.

A railroad company which is authorized to construct and operate its road across a public highway, and to maintain gates across the highway, is not liable to a traveler on the highway who is delayed by the closing of the gates during passage of a train. *Caledonian Ry. Co. v. Ogilvy*, 2 Macq. H. L. Cas. 229.

¹¹ *Stevens v. Proprietors of Middlesex Canal*, 12 Mass. 466; *Whitehouse v. Birmingham Canal Co.*, 27 L. J. Exch. 25.

charter or by some other statute;¹² and, on the same principle, that a railroad company operating its road within the authority conferred by its charter, and with due care, is not liable to adjoining land-owners for loss by fire caused by the emission of sparks from its locomotives.¹³ So also it has been held that a railroad company which has constructed and is maintaining its road across a public highway under authority conferred by its charter is not, in the absence of negligence, liable to the owner of adjoining land because he is impeded in going to and from his house, or because his horses are frightened by noise made by passing trains.¹⁴ Of course, if a charter is unconstitutional, it affords no protection to those acting under it.¹⁵

This doctrine is well settled in England and in most jurisdictions in this country but it is not recognized to the full extent in all jurisdictions. Some courts have restricted it to public corporations exercising powers for the benefit of the public, and have held that legislative authorization exempts from liability only as far as the state is concerned and that private corporations, including railroad companies, are liable for injuries caused to the property of others, though the injury is done in the exercise of powers conferred upon them by the legislature, and though they are not guilty of negligence.¹⁶

¹² *Fisher v. Seaboard Air Line R. Co.*, 102 Va. 363, 1 Ann. Cas. 622, 46 S. E. 381, distinguished in *Townsend v. Norfolk R. & Light Co.*, 105 Va. 22, 4 L. R. A. (N. S.) 87, 115 Am. St. Rep. 842, 8 Ann. Cas. 558, 52 S. E. 970, which is followed in *Terrell v. Chesapeake & O. R. Co.*, 110 Va. 340, 32 L. R. A. (N. S.) 371, 66 S. E. 55, the latter in turn being followed in *Chesapeake & O. R. Co. v. Greaver*, 110 Va. 350, 66 S. E. 59; *Hammersmith & C. R. Co. v. Brand*, L. R. 4 H. L. 171; *Glasgow Union R. Co. v. Hunter*, L. R. 2 H. L. Sc. 78. See also *Beseman v. Pennsylvania R. Co.*, 50 N. J. L. 235, 13 Atl. 164 (decision based on incidental character of injury sustained) discussed in *Ridge v. Pennsylvania R. Co.*, 58 N. J. Eq. 172, 43 Atl. 275.

¹³ *Connecticut. Burroughs v. Housatonic R. Co.*, 15 Conn. 124, 38 Am. Dec. 64.

Maine. Chapman v. Atlantic & St. L. R. Co., 37 Me. 92.

Michigan. Michigan Cent. R. Co. v. Anderson, 20 Mich. 244.

Pennsylvania. Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co., 54 Pa. St. 345, 93 Am. Dec. 708.

Rhode Island. Smith v. Old Colony & N. R. Co., 10 R. I. 22.

¹⁴ *Caledonian Ry. Co. v. Ogilvy*, 2 Macq. H. L. Cas. 229.

¹⁵ *Chenango Bridge Co. v. Paige*, 83 N. Y. 178, 38 Am. Rep. 407; *Hamilton County v. Cincinnati & W. Turnpike Co.*, *Wright (Ohio)* 603.

¹⁶ "The acts that a legislature may authorize, which, without such authorization, would constitute nuisances, are those which affect public highways or public streams, or matters in which the public have an interest and over which the public have control. The legislative authorization exempts only from liability to suits, civil or criminal, at the instance of the State; it does not affect any claim of a private citizen for damages for any

Especially does this view obtain when, the corporation being a pub-

special inconvenience and discomfort not experienced by the public at large." *Baltimore & P. R. Co. v. Fifth Bapt. Church*, 108 U. S. 317, 27 L. Ed. 739. This case involved the right of a religious corporation to recover in an action for damages brought by it against a railroad company for a private nuisance created and maintained by the latter through the erection and use of its engine house and machine shop on land adjoining that occupied by plaintiff's church edifice, and, prior to making the statement above quoted, the court said: "It is no answer to the action of the plaintiff that the Railroad Company was authorized by Act of Congress to bring its track within the limits of the City of Washington, and to construct such works as were necessary and expedient for the completion and maintenance of its road, and that the engine house and repair shop in question were thus necessary and expedient; that they were skillfully constructed; that the chimneys of the engine house are higher than required by the building regulations of the city, and that as little smoke and noise are caused as the nature of the business in them will permit. In the first place, the authority of the Company to construct such works as it might deem necessary and expedient for the completion and maintenance of its road, did not authorize it to place them wherever it might think proper in the city, without reference to the property and rights of others. As well might it be contended that the Act permitted it to place them immediately in front of the President's house or of the Capitol, or in the most densely populated locality. Indeed, the Corporation does assert a right to place its works upon property it may acquire anywhere in the city. What-

ever the extent of the authority conferred, it was accompanied with this implied qualification, that the works should not be so placed as by their use to unreasonably interfere with and disturb the peaceful and comfortable enjoyment of others in their property. Grants of privileges or powers to corporate bodies, like those in question, confer no license to use them in disregard of the private rights of others, and with immunity for their invasion. The great principle of the common law, which is equally the teaching of Christian morality, so to use one's property as not to injure others, forbids any other application or use of the rights and powers conferred. Undoubtedly, a railway over the public highways of the District, including the streets of the City of Washington, may be authorized by Congress, and if when used with reasonable care it produces only that incidental inconvenience which unavoidably follows the additional occupation of the streets by its cars with the noises and disturbances necessarily attending their use, no one can complain that he is incommoded. Whatever consequential annoyance may necessarily follow from the running of cars on the road with reasonable care is *damnum absque injuria*. The private inconvenience in such case must be suffered for the public accommodation. But the case at bar is not of that nature. It is a case of the use by the Railroad Company of its property in such an unreasonable way as to disturb and annoy the plaintiff in the occupation of its church to an extent rendering it uncomfortable as a place of worship. It admits, indeed, of grave doubt whether Congress could authorize the Company to occupy and use any premises within the city limits, in a way which would

lie service one, the particular act complained of was committed in its private, rather than public, capacity¹⁷ and was at best, not im-

subject others to physical discomfort and annoyance in the quiet use and enjoyment of their property, and at the same time exempt the Company from the liability to suit for damages or compensation, to which individuals acting without such authority would be subject under like circumstances. Without expressing any opinion on this point, it is sufficient to observe that such authority would not justify an invasion of others' property, to an extent which would amount to an entire deprivation of its use and enjoyment, without compensation to the owner. Nor could such authority be invoked to justify acts, creating physical discomfort and annoyance to others in the use and enjoyment of their property, to a less extent than entire deprivation, if different places from those occupied could be used by the Corporation for its purposes, without causing such discomfort and annoyance."

See also in connection with the first-quoted statement in *Baltimore & P. R. Co. v. Fifth Bapt. Church*, supra; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432; *Bohan v. Port Jervis Gas-Light Co.*, 122 N. Y. 18, 9 L. R. A. 711, 25 N. E. 246.

In a Maryland case it was held that a railroad company which caused injury to abutting property by making a tunnel in a street was liable therefor, although authorized to do so both by the municipality and by the state legislature, and although it used due care to avoid the injury. "Notwithstanding authority may have been obtained both from the city and state legislature, to make the extraordinary use of the street," said the court, "yet that authority must be exercised at the peril of the party to whom it

is delegated; and if any injury accrues to private property in the exercise of the power the party producing it must be held liable. If * * * the injury be produced by the careless or negligent exercise of the authority, then there can be no question of the liability; but if due care be exercised, and the injury is the natural or inevitable result of the consequence of the doing the act authorized to be done, then, in a case like the present, the party doing the act and producing the injury, must indemnify the sufferer. That there was no negligence or want of care in doing the work is no answer in a case like this." *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117. And see *New Albany & S. R. Co. v. Huff*, 19 Ind. 315; *Indiana Cent. Ry. Co. v. Boden*, 10 Ind. 96; *Evansville & C. R. Co. v. Dick*, 9 Ind. 433; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Tinsman v. Belvidere Delaware R. Co.*, 26 N. J. L. 148, 69 Am. Dec. 565; *Sinnickson v. Johnson*, 17 N. J. L. 129, 34 Am. Dec. 184; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432; *Crittenden v. Wilson*, 5 Cow. (N. Y.) 165, 15 Am. Dec. 462.

¹⁷"A public service corporation is to be considered in two aspects. It has duties which it owes to the public, and which it must perform. It has other duties not of a public nature which are incidental to those of a public character, in the performance of which it stands upon the footing of a private corporation. With respect to the duties of the first class, it may be said that, in doing that which under the law it may be required to do, it cannot be considered as doing an unlawful act; and if a lawful act be done without negligence, any injury which it occasions is *damnum absque*

peratively enjoined upon the corporation but merely permitted.¹⁸

inuria. This aspect of the case was before this court in *Fisher v. Seaboard Air Line Railway Co.*, 102 Va. 363, 46 S. E. 381 [1 Ann. Cas. 622]. * * * That railroad corporations—public service corporations—are in many aspects to be regarded as quasi public corporations, can no longer be doubted. Upon that theory their duties are measured and their rights determined; and the control which the state asserts, * * * rests upon the public character of such corporations. A railroad, in the operation of its trains in the transportation of freight and passengers, is in the exercise of a public duty, and should be permitted to apply the same principles of construction when it pleads, for its protection, the powers conferred upon it by the legislature, as are urged when the obligations imposed by the same charter are insisted upon in the effort to compel such corporations faithfully to perform the duties which they have assumed with respect to the public.” *Townsend v. Norfolk Railroad & Light Co.*, 105 Va. 22, 4 L. R. A. (N. S.) 87, 115 Am. St. Rep. 842, 8 Ann. Cas. 558, 52 S. E. 970 (rev’g judgment for defendant, sued for maintaining a nuisance through the operation of its power plant, on the overruling of plaintiffs’ demurrer to defendant’s special plea of authority and the abiding of plaintiffs by such demurrer), followed in *Terrell v. Chesapeake & O. R. Co.*, 110 Va. 340, 32 L. R. A. (N. S.) 371, 66 S. E. 55, which, in turn, was followed in *Chesapeake & O. R. Co. v. Greaver*, 110 Va. 350, 66 S. E. 59.

¹⁸ In *Louisville & N. Terminal Co. v. Jacobs*, 109 Tenn. 727, 61 L. R. A. 188, 72 S. W. 954, wherein defendant was sued for creating and maintaining a nuisance through the improper location and the operation or man-

agement of its roundhouse, the court said: “It will be observed * * * that no location is fixed [by the defendant’s charter] for the property to be acquired for terminal purposes. The state thus left not only the selection of the property to be so used to the will of the corporation, but the fixing of the site of the roundhouse within the limits of the property. This being so, there is no warrant for the contention that a reasonable use of this roundhouse would protect the company, if otherwise liable, against a claim for compensation made by one whose property had been injured by such use. In such a case its charter would give it no right to enjoy its property at the expense of another’s, and to it would be applied, as to an individual, the maxim, ‘Sic utere tuo ut alienum non lædas.’ To a claim for exemption from liability rested on a charter right the answer may be properly made that the state has not authorized the wrong complained of, and in locating its roundhouse so that the injury necessarily resulted to the adjacent landowner it did so at its peril. Even in England, though the general rule is that, when Parliament has authorized the construction of such a work at a particular place where its use would constitute a nuisance at common law, no compensation could be claimed in respect to injury to private rights, apart from a negligent use, unless provided for in the act, to avoid liability it is held that statutory sanction sufficient to justify the creation of a nuisance must be express, or must arise by necessary implication. *Hill v. Managers of the Metropolitan Asylum Dist.*, L. R. 4 Queen’s Bench Div. 433, was an action brought by adjacent property owners to recover damages ‘in respect of and to obtain an in-

In most of the states in this country it is now provided by the constitution or bill of rights that private property shall not be taken or appropriated to public uses without compensation to the owner, and it has been held that the destruction of private property, either total or partial, or the diminution of its value by an act which directly affects it, which deprives the owner of the ordinary use of it, is a taking, within the meaning of this provision. If the legislature, therefore, where there is such a provision, authorizes an improvement, as, for example, the construction of a canal or railroad, the making of which will require or cause the destruction of private

junction against the recurrence of what the plaintiffs alleged to be a nuisance affecting their rights by the erection and maintenance' of an asylum for the reception of smallpox patients. One of the defenses of the managers to the action was that the erection and maintenance of the asylum was under the direction of the local government board, which derived its authority from an act of Parliament. To this defense Pollock, B., said: 'There are no provisions in that act requiring them to build the very hospital, and on the very site, and to carry it on in the very manner in which it was carried on,' and, this being so, 'it cannot be supposed that the legislature armed them with an option so to perform their duty as to create or not to create a nuisance affecting the rights of others.' This case went by appeal to the House of Lords, and is reported in L. R. 6 Appeal Cases, 193. There separate opinions were delivered by Lord Chancellor Selborne, Lord Blackburn, and Lord Watson, concurring, however, in sustaining the rule announced by Pollock, B. In the course of the opinion of Lord Watson this strong language is used: 'Where the terms of the statute are not imperative, but permissive, when it is left to the discretion of the persons empowered to determine whether the general powers committed to them shall be put into execu-

tion or not, I think that fair inference is that the legislature intended that discretion to be exercised in strict conformity with private rights, and did not intend to confer license to commit nuisance in any place which might be selected for the purpose.' The case of *Truman v. London, B. & S. C. Ry. Co.*, L. R. 25 Ch. Div. 423, is of like import. But, over and beyond this, we think this corporation, in selecting a place for its roundhouse, acted in a private capacity, and is responsible for the injurious consequences which may result from its use."

Although the first-quoted statement in *Baltimore & P. R. Co. v. Fifth Bapt. Church*, supra, this section, note 16, is broad and general in character, the facts of that case, which, of course, give rise to the only matter to be decided, would seem to involve the question, discussed in *Louisville & N. Terminal Co. v. Jacobs*, supra, as to the effect of permission as distinguished from command, rather than the question of the effect of the act's being committed in the private, as distinguished from the public, capacity of the corporation, any views of the court in *Beseman v. Pennsylvania R. Co.*, 50 N. J. L. 235, 13 Atl. 164; *Terrell v. Chesapeake & O. R. Co.*, 110 Va. 340, 32 L. R. A. (N. S.) 371, 66 S. E. 55, or any other case to the contrary notwithstanding.

property, or a diminution of its value, without affording means of relief and indemnification, the owner of the property destroyed or injured may maintain an action at common law against the corporation causing the injury to recover his damages. Although it might be lawful to do what the legislature should authorize, as has been said by the Supreme Court of Massachusetts, yet, to enforce the principles of the constitution for the security of private property, it would be necessary to consider such a legislative act as inoperative, so far as it trenching upon the right of individuals.¹⁹ In no jurisdiction can a corporation set up the authority conferred by its charter to defeat an action for a tort, unless the act by which the injury was caused was clearly within the authority conferred upon it.²⁰ And it is well settled that when a corporation claims authority from the legislature for doing an act causing injury to others, and which would constitute a nuisance or trespass without such authority, the charter is to be strictly construed against the corporation and in favor of the public. No act which would be a tort, if unauthorized, is to be regarded as authorized, unless authority to do the very act is conferred in express terms or by necessary implication.²¹

¹⁹ *Stevens v. Proprietors of Middlesex Canal*, 12 Mass. 466. See also *Hooker v. New Haven & N. Co.*, 14 Conn. 146, 36 Am. Dec. 477; *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147; *Trenton Water Power Co. v. Raff*, 36 N. J. L. 335; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432.

In *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432, it was said: "Whether you flood the farmer's fields so that they cannot be cultivated, or pollute the bleacher's stream so that his fabrics are stained, or fill one's dwelling with smells and noise so that it cannot be occupied in comfort, you equally take away the owner's property. In neither instance has the owner any less of material things than he had before, but in each case the utility of his property has been impaired by a direct invasion of the bounds of his private dominion. This is the taking of his property in a constitutional

sense; of course, mere statutory authority will not avail for such interference with private property."

²⁰ *Hazen v. Boston & M. R. R.*, 2 Gray (Mass.) 574; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432; *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; *Attorney General v. Mid-Kent Ry. Co.*, 3 Ch. App. 100; *Simpson v. South Staffordshire Water Works Co.*, 4 De Gex, J. & S. 679; *Great Western Ry. Co. v. May*, L. R. 7 H. L. 283.

²¹ *Connecticut*. *Hooker v. New Haven & N. Co.*, 14 Conn. 146, 36 Am. Dec. 477.

Illinois. *Snell v. Buresh*, 123 Ill. 151, 13 N. E. 856; *Alton & U. A. Horse Railway & Carrying Co. v. Deitz*, 50 Ill. 210, 99 Am. Dec. 509.

Indiana. *Indianapolis, B. & W. Ry. Co. v. Smith*, 52 Ind. 428.

Kentucky. *Lexington & O. R. Co. v. Applegate*, 8 Dana 289, 33 Am. Dec. 497.

When the legislature authorizes a corporation to do an act which may result in injury to others, it is always implied that the corporation shall use due care to prevent injury. If a corporation, there-

Massachusetts. *Coolidge v. Williams*, 4 Mass. 140.

New Hampshire. *Eaton v. Boston, C. & M. R. Co.*, 51 N. H. 504, 12 Am. Rep. 147; *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201.

New Jersey. *McAndrews v. Colliard*, 42 N. J. L. 189, 36 Am. Rep. 508; *Newark Plank Road & Ferry Co. v. Elmer*, 9 N. J. Eq. 754.

New York. *Bohan v. Port Jervis Gas-Light Co.*, 122 N. Y. 18, 9 L. R. A. 711, 25 N. E. 246; *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 57 Am. Rep. 701, 8 N. E. 537; *Brown v. Cayuga & Susquehanna R. Co.*, 12 N. Y. 491.

In *Tinsman v. Belvidere Delaware R. Co.*, 26 N. J. L. 148, 69 Am. Dec. 565, an action for damages claimed as a result of the construction by the defendant railroad company of an embankment in an eddy and creek's mouth, in which the plaintiff had the right to raft, land, and store lumber for the use of his mill, so that the water was prevented from flowing in its accustomed channel and the plaintiff deprived of the full enjoyment of his privilege, the court said: "It seems to be supposed that there is some virtue in the fact that the legislature have, in express terms, authorized the very act complained of. It is not pretended that in terms they authorized the injury of which the plaintiff complains to be inflicted, but they authorized the work to be done from which injury has resulted. Now, if the act had authorized the work to be done, and had at the same time declared that the act should not be construed to exempt the defendants from liability for injuries occasioned in the doing of the work, their legal liability could not be questioned. The

act would be lawful, but the defendants would be liable nevertheless for the consequences of the act. The statute in such case would not create the liability of the defendants for damages for injuries inflicted; it would simply leave their liability as it stood at common law, unaffected by the statute. And that consideration presents this question in its true aspect. Did the legislature intend, by passing the act in question, to exempt these defendants from responsibility for injuries inflicted in executing the work? Admit that the legislature might lawfully have granted such exemption, admit that the injury inflicted is not within the protection of that clause of the constitution which prohibits the taking of private property for public use without just compensation: was it the intention or within the contemplation of the legislature to exempt the defendants from liability for injuries inflicted in the execution of the work? It would have been easy for the legislature to declare, in express terms, that in the construction of the work the corporation should be regarded as the agents of the state, and that they should not be liable for damages resulting from the execution of the work. Can any one imagine that the legislature would have granted a charter containing such a clause? And yet this court are asked to do, by judicial construction and by the application of technical rules, what it is obvious the legislature never would have done, and never designed to do; viz., to deprive the party of his common-law remedy for injuries sustained. The legislature have manifested no such intention. None such can be implied: 1. Because statutes in derogation of common-law

fore, fails to use due care in the exercise of an authority conferred upon it by its charter, and as a result of its negligence another is injured in his person or property, the authority conferred by its charter does not exempt it from liability.²²

For example, a corporation authorized by its charter to mine coal has no greater rights than those of private persons engaged in the same business, and must, to the same extent as private persons, so carry on their business as not to negligently injure other persons in the enjoyment of their property rights. If such a company so places its slack and refuse upon the surface of its own land that they may be expected, in the ordinary course of events, to wash down and finally reach the lands of others, to their damage, the corporation is liable to a landowner injured by the washing of such slack and refuse into a creek running through his land, causing it to overflow its banks, inundate the land, and cover parts of it with debris. And the corporation cannot escape liability on the ground that it was merely carrying on the business authorized by its charter. "That the coal company is a corporation," said the court in such a case, "can make no difference. Its rights are just as great, and no greater, than those of a private person in the same business. That it is authorized by its charter to mine coal generally in the state cannot enlarge its rights in any particular locality. Even had its charter empowered it to establish a business and carry it on in a particular place, it cannot be presumed that the state intended to authorize it to carry on the business in a manner destructive of the property rights of others without compensation. While the thing to be done may be lawful in a general

rights are to be strictly construed, and we are not to infer that the legislature intended to alter the common-law principles further than is clearly expressed, or than the case absolutely required * * *; 2. Because it would be contrary to natural justice and equity to permit private individuals to construct a work for their own benefit, and not hold them responsible for all damages done to private property by them in the execution of that work; 3. Because it is against the spirit if not within the letter of the constitution, which prohibits private property to be taken for public use without just compensation."

²² *Baltimore & P. R. Co. v. Reaney*, 42 Md. 117; *Delaware & R. Canal Co. v. Lee*, 22 N. J. L. 243; *Fero v. Buffalo & S. L. R. Co.*, 22 N. Y. 209, 78 Am. Dec. 178; *Ireland v. Oswego, H. & S. Plank Road Co.*, 13 N. Y. 526; *Boughton v. Carter*, 18 Johns. (N. Y.) 405; *Pennsylvania & O. Canal Co. v. Graham*, 63 Pa. St. 290, 3 Am. Rep. 549; *Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co.*, 54 Pa. St. 345, 93 Am. Dec. 708; *Chestnut Hill & S. H. Turnpike Co. v. Rutter*, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675.

way, there are and must be limitations upon the means by which it is to be done.”²³

The degree of care required depends, of course, upon the nature of the act and must be in proportion to the danger.²⁴

§ 3338. Torts involving intent and malice. Not only has any early doctrine under which a corporation would not be held liable in tort in any case been overruled,²⁵ but likewise any early rule under which such artificial person could be held liable only for negligent omissions and for positive acts into which the elements of intent and malice did not enter.²⁶

²³ *Columbus & H. Coal & Iron Co. v. Tucker*, 48 Ohio St. 41, 12 L. R. A. 577, 29 Am. St. Rep. 528, 26 N. E. 630.

²⁴ *Frankford & B. Turnpike Co. v. Philadelphia & T. R. Co.*, 54 Pa. St. 345, 93 Am. Dec. 708.

²⁵ See § 3336, *supra*.

²⁶ The view that a corporation, because of its impersonal nature, could not commit torts involving the element of malice was based on the proposition that, to support an action for such a tort, “it must be shown that the defendant was actuated by a motive in his mind, and a corporation has no mind.” *Alderson, B.*, in *Stevens v. Midland Counties Ry. Co.*, 10 Exch. 352. See also *Owsley v. Montgomery & W. P. R. Co.*, 37 Ala. 560 (overruled by *Jordan v. Alabama Great Southern R. Co.*, 74 Ala. 85, 49 Am. Rep. 800); *McLellan v. Cumberland Bank*, 24 Me. 566; *Childs v. Bank of Missouri*, 17 Mo. 213 (overruled by *Boogher v. Life Ass’n of America*, 75 Mo. 319, 42 Am. Rep. 413).

“The old doctrine that a corporation, having no mind, cannot be liable for acts of agents involving malice has been completely exploded in modern jurisprudence. While a corporation is non-personal in its formal legal entity, it represents natural persons, and must necessarily perform its duties through natural persons as agents; hence must spring the correla-

tive responsibility for the acts of its agents within the scope of their employment.” *Hypes v. Southern R. Co.*, 82 S. C. 315, 21 L. R. A. (N. S.) 873, 17 Ann. Cas. 620, 64 S. E. 395. See also *Southwestern Telegraph & Telephone Co. v. Long*, — Tex. Civ. App. —, 183 S. W. 421.

“There are not wanting authorities * * * affirming that as a corporation ‘is an artificial being, invisible, intangible, and existing only in the contemplation of law,’ to which the law cannot impart animus, passion, or moral quality; which is incapable of the commission of an offense, deriving criminality from an evil intent, or consisting in a violation of social duty, it cannot be subjected to a civil action of which an essential, distinguishing element is malice, or a mischievous purpose or motive. The current of authority now is, that corporations are responsible, civilly, the same as natural persons, for wrongs committed by their officers, servants or agents, while in the course of their employment, or which are authorized, or subsequently ratified. * * * The idea that a corporation is not liable for a tort involving a malicious intent had origin in the day when it was denounced as soulless, and was an application of the quaint syllogism ascribed by Lord Coke to Chief Baron Manwood, that ‘None can create souls but

While the courts of to-day hold corporations liable, of course, for their negligence—using that word in its broad, rather than in its re-

God; but a corporation is created by the king; therefore a corporation can have no soul,' from which was deduced the conclusion that it could do no wrong. There was a reluctance to look beyond legal entity, to the natural persons, its constituent members, or to the agents or servants through whom its faculties were exercised and its legal existence kept alive. To the mere legal entity, motive, good or evil cannot be imputed, but is imputable to its representatives; and as the corporation derives benefit from the representation, there is but little of justice in a claim of exemption from the responsibilities it may involve. We have among us not only purely domestic corporations but corporations existing by the separate authority of several states, drawn into the daily transaction of business with all classes of the community, holding property of every species under the protection of the law of the state, compelled to a frequent resort to the courts for prevention or redress of injuries. Foreign corporations, by a liberal comity, here exercise corporate power, transact business, hold and enjoy property. It is by the representation of natural persons that their franchises are exercised, their business transacted and property acquired. It would not be just if a natural person suffer wrong from the malicious acts of the representative of a corporation, while within the scope of his employment, for the courts to refuse to look beyond the legal entity to its real and true character, an association or aggregation of natural persons capable of acting by a corporate name and in continuous succession. This is not unjust to the corporation, for it 'tends to induce greater care and caution in the selection of those who are to be intrusted

with corporate affairs.' " Jordan v. Alabama Great Southern R. Co., 74 Ala. 85, 49 Am. Rep. 800. See also Rivers v. Yazoo & M. R. Co., 90 Miss. 196, 9 L. R. A. (N. S.) 931, 43 So. 471.

"It was formerly held that a railroad company could not be held for the wilful act of its employee, unless the act was previously ordered or subsequently ratified by the corporation. That rule has been modified, and in the * * * case of Gilliam v. S. & N. A. R. Co. [70 Ala. 268], * * * the supreme court of Alabama, after saying that the rule has never been fully satisfactory, say: 'The precise modification is that if the agent, while acting within the range of his employment, do an act injurious to another, either through negligence, wantonness, or intention, then for such abuse of the authority conferred upon him, or implied in his appointment, the master or employer is responsible in damages to the person thus injured; but if the agent go beyond the range of his employment or duties, and of his own will do an unlawful act injurious to another, the agent is liable, but the master or employer is not.' To this proposition many authorities are cited. The court proceeds: 'The older cases follow the doctrine declared in *McMannus v. Crocket*, 1 East, 106, and relieve the master or employer from liability for tortious acts of the agent if intentionally done, although within the range of his duties, unless the tortious act was commanded or adopted by the master. In *Railroad Co. v. Webb*, 49 Ala. 240, this court held that a railroad company cannot be sued in trespass for the wilful tort of its employee unless the act was previously ordered or subsequently ratified by the corporation. We think the principle

stricted, sense—²⁷ they go further and hold that in a proper case, for example, where the act is in the scope of the servant's employment or

there announced should be so far modified as to limit its application to tortious acts of the agent done outside of his employment; to this extent we adopt the modified rule as applicable to railroads and their employees.''' *Pressley v. Mobile & G. R. Co.*, 15 Fed. 199.

27 "Corporations act and perform their duties through the agency of their servants and employees. Where it is the duty of a corporation to perform an act, and the authority to do it is imposed on one of its employees, such employee stands in the place of and as a representative of the corporation, and the corporation is responsible for the negligence of the officer or agent charged with the performance of such duty." *Escambia County Elec. Light & Power Co. v. Sutherland*, 61 Fla. 167, 55 So. 83 (headnote by the court).

"Respecting the acts and responsibilities of corporations, the law is that artificial persons, like natural persons, are liable in damages for acts of negligence imputable to them, whereby injuries result to third persons. A corporation acts through its officers and employees, who, in the exercise of their respective functions, and to that extent, represent the corporation. The rules and principles of law applicable to the relation of master and servant apply equally to corporations and their agents, and damages resulting from the negligence of both classes of persons are measured by the same rule. If a servant is guilty of a wrongful act when engaged in his master's business and while acting within the general scope of his authority, the master is liable although he did not authorize the particular act. It is no defense in such case that the servant disobeyed private instructions, or abused his

authority. So a person who puts a servant in a place of trust or responsibility, or commits to him the management of his business, or the care of his property, is held responsible for damages resulting to third persons through the lack of judgment or discretion of the servant while executing the trust, although he departed from the strict letter of his authority in the execution thereof. The same rules obtain in respect to railroad companies. Accordingly, it is laid down that the employees of such a corporation, both of the higher and the subordinate class, who are engaged in service at its stations or on its trains, are presumed to be authorized by it to do such service, and to perform the acts usually incident to their positions; and it is liable for their tortious acts which are performed in the course of such service." *Denver, S. P. & P. R. Co. v. Conway*, 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. 142.

"We concede * * * that one directly representing a corporation may, by his negligent conduct, charge the corporation; but when the act charged is one of omission rather than of commission, and the work itself is in charge of competent employees, it requires rather a strong showing of neglect or inattention to hold the corporation liable." *Walters v. Summerfield Co.*, 160 Iowa 127, 140 N. W. 388 (action for death of employee).

The nondelegable duties of a private corporation "consist of those primary or absolute duties which the law as a matter of sound public policy for some salutary purpose imposes as a condition upon which the corporation shall exist and carry on a business which may injuriously affect the persons or property of others. A failure to perform that class of duties is re-

where it is a breach of some duty owed by the corporation to the injured person,²⁸ recovery may be had against a corporation for not

garded as the personal omission or default of the corporation itself, and, if such failure be the result of negligence, the negligence is that of the corporation, and not that of a servant to whom such nondelegable duties may have been intrusted." *Jacksonville Ice & Electric Co. v. Moses*, — Tex. Civ. App. —, 134 S. W. 379.

An averment of negligence on the part of a defendant corporation may be supported by proof of negligence on the part of its servant acting in the line of his employment. *Illinois Cent. R. Co. v. Bottoms*, 1 Ala. App. 302, 55 So. 260.

²⁸ "The theory of the appellant is that, if the evidence of the plaintiff be taken as true, he cannot recover, because the act of the motorman was wilful and malicious; and, if that be not accepted, the only other evidence was that of the defendant's witnesses, who exonerate the defendant from all blame. There is some actual, and a great deal of apparent, conflict between the authorities as to the liability of the master for wilful and wanton acts of his servants. In many of the cases cited by the text-books, and elsewhere, the acts of the servants were committed under such circumstances as clearly place them outside of the scope of their employment, and hence there can be no responsibility on the part of the master, as, quoad the particular act complained of, the relation of master and servant did not exist. Then, again, there are a great many cases in which the master has been held liable owing to the fact that such relations existed between him and the injured party as to make him responsible, although, strictly speaking, the servant was not authorized by the master to do the particular act,—such, for example, as when a passenger

of a common carrier is injured by an assault or other wanton act of the servant. The case of *Railway Co. v. Peacock*, 69 Md. 257, 14 Atl. 709, is an example of the former, while *Railroad Co. v. Barger*, 80 Md. 23, 30 Atl. 560, shows what rule this court has applied with reference to the latter. But neither of those classes is wholly applicable to the case before us. Our predecessors, in *Brown v. Purviance*, 2 Har. & G. 316, stated the general rule to be that 'the master is answerable for all injuries arising from the negligence or unskilfulness of his servant in executing duties assigned him; but when he abandons his duty, and wilfully becomes a wrongdoer, the master is exempt from all responsibility for such wrongful acts.' It was there said that the case of *McManus v. Crickett*, 1 East, 106, 'fully and satisfactorily settled' the nature of the liability to which a master is subjected for the acts of his servant; and although *McManus v. Crickett* has been criticized, explained, and modified by many authorities, it will be observed that the rule stated by our predecessors, as above quoted, in terms only relieved the master when the servant abandoned his duty,—meaning, of course, his duty to his master by virtue of his employment. As was well said in *Evans v. Davidson*, 53 Md. 245: 'In one sense, when there is no express command by the master all wrongful acts done by the servant may be said to be beyond the scope of the authority given; but the liability of the master is not determined upon any such restricted interpretation of the authority and duty of the servant. If the servant be acting at the time in the course of his master's service, and for his master's benefit, within the scope of his employment,

only an act of its agent or servant which was intentional and wilful²⁹ but even where the act complained of was malicious as

then his act, though wrongful or negligent, is to be treated as that of the master, although no express command or privity of the master be shown.'

* * * It is true that in that case the servant was only charged with being negligent but whether negligently or wilfully done in the course of the servant's employment, and in furtherance of the master's business, the latter is liable; but if the act of the servant is wilfully or wantonly done, and not connected with, or having relation to, his employment, then, of course, the master cannot be held responsible. The pivotal question, therefore, in such cases, usually is whether the servant was acting at the time in the course of his master's service, and for his benefit, within the scope of his employment; and the mere fact that he acted unlawfully, wilfully, or wantonly does not necessarily show that he is no longer in his master's employ. The statement in *McManus v. Crickett* that 'the servant, by wilfully driving the chariot against the plaintiff's chaise without his master's assent, gave a special property for the time, and so for that purpose the chariot was the servant's,' carries the doctrine too far, and is not in accord with most of the modern decisions. In *Cote v. Schaum*, 51 Md. 309, this court said: 'Indeed, the authorities are numerous to show that a master is liable for the illegal acts of his servant, done by force or in wantonness, while in the performance of an act within the scope or course of his employment.' " *Baltimore Consol. Ry. Co. v. Pierce*, 89 Md. 495, 45 L. R. A. 527, 43 Atl. 940 (action for personal injuries sustained as result of defendant's trolley car running into plaintiff's wagon).

See §§ 3340-3352, *infra*, in which

specific applications of the general rule are treated.

29 Arkansas. *Duggins v. Watson*, 15 Ark. 118, 60 Am. Dec. 560.

Connecticut. *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 58 Am. Dec. 439.

Illinois. *Chicago, B. & Q. R. Co. v. Dickson*, 63 Ill. 151, 14 Am. Rep. 114; *Toledo, W. & W. R. Co. v. Harmon*, 47 Ill. 298, 95 Am. Dec. 489.

Indiana. *Evansville & T. H. R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 102; *Evansville & C. R. Co. v. Baum*, 26 Ind. 70.

Iowa. *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa 314, 24 Am. Rep. 748.

Maine. *Goddard v. Grand Trunk Ry. Co.*, 57 Me. 202, 2 Am. Rep. 39.

Nevada. *Quigley v. Central Pac. R. Co.*, 11 Nev. 350, 21 Am. Rep. 757.

New York. *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479, 51 Am. Dec. 315.

South Carolina. *Redding v. South Carolina R. Co.*, 3 S. C. 1, 16 Am. Rep. 681.

Tennessee. *Nashville & C. R. Co. v. Starnes*, 9 Heisk. 52, 24 Am. Rep. 296.

Wisconsin. *Craker v. Chicago & N. W. Ry. Co.*, 36 Wis. 657, 17 Am. Rep. 504.

England. *Green v. London General Omnibus Co.*, 7 C. B. (N. S.) 290; *Eastern Counties Ry. Co. v. Broom*, 6 Exch. 314.

"The master is liable in damages for injuries wilfully and intentionally, inflicted by the servant while acting within the general scope or line of the employment." *City Delivery Co. v. Henry*, 139 Ala. 161, 34 So. 389.

"We think it is well settled that a corporation is liable for the wilful acts

well.³⁰ It is true a corporation cannot entertain any intent or malice, but there is no reason why a specific intent or malice entertained by an agent or servant of a corporation, in doing an act for the corporation in the course of his employment, should not be imputed to the corporation, just as the act of the agent or servant is imputed to

and torts of its agents committed within the general scope of their employment, as well as acts of negligence; and that the corporation is thus bound, although the particular acts were not previously authorized, nor subsequently ratified, by the corporation." *Jeffersonville R. Co. v. Rogers*, 38 Ind. 116, 10 Am. Rep. 103 (ejection of passenger).

"It is now well established that private corporations, under certain circumstances, will be held liable for torts both negligent and malicious on the part of their servants, agents, and employees." *Sawyer v. Norfolk & S. R. Co.*, 142 N. C. 1, 115 Am. St. Rep. 716, 9 Ann. Cas. 440, 54 S. E. 793.

"A corporation is controlled by its board of directors and is responsible for the negligence, misfeasances, and frauds of its board of directors, and when that has been the proximate cause of the injury to another, the corporation, and not that other, must bear the loss." *Fairgate Realty Co. v. Drozda (Mo.)*, 181 S. W. 398.

³⁰ "Malice may be imputed to a corporation as to an individual, and it may be held liable for * * * torts involving malice or wilful wrong." *White v. International Textbook Co.*, 173 Iowa 192, 155 N. W. 298.

In *Craker v. Chicago & N. W. Ry. Co.*, 36 Wis. 657, 668, 17 Am. Rep. 504, affirming a judgment in favor of the plaintiff, a woman, against the defendant, a railroad company, for an indecent assault made upon the plaintiff by the conductor of the defendant's train upon which she was riding as a passenger, the court said: "We cannot help thinking that there has

been some useless subtlety in the books in the application of the rule respondeat superior, and some unnecessary confusion in the liability of principals for wilful and malicious acts of agents. This has probably arisen from too broad an application of the dictum of Lord Holt, that 'no master is chargeable with the acts of his servant but when he acts in the execution of the authority given to him, and the act of the servant is the act of the master.' *Middleton v. Fowler*, 1 Salk., 282. For this would seem to go to excuse the master for the negligence as well as for the malice of his servant. One employing another in good faith to do his lawful work, would be as little likely to authorize negligence as malice; and either would then be equally de hors the employment. Strictly, the act of the servant would not, in either case, be the act of the master. It is true that so great an authority as Lord Kenyon denies this in the leading case of *McManus v. Crickett*, 1 East, 106, which has been so extensively followed; and again, in *Ellis v. Turner*, 8 Term, 531, distinguishes between the negligence and the wilfulness of the one act of the agent, holding the principal for the negligence but not for the wilfulness. It is a singular comment on these subtleties, that *McManus v. Crickett* appears to rest on *Middleton v. Fowler*, the only adjudged case cited to support it; and that *Middleton v. Fowler* was not a case of malice, but of negligence, Lord Holt holding the master in that case not liable for the negligence of his servant, in such circumstances as no court could now

it. An act done by an agent or servant of a corporation, as such, and in the course of his employment, is, in contemplation of law, the act of the corporation; and, as the act is thus held to be the act of the corporation, the intent with which it is done may also be imputed to it.³¹

doubt the master's liability. In spite of all the learned subtleties of so many cases, the true distinction ought to rest, it appears to us, on the condition whether or not the act of the servant be in the course of his employment, as is virtually recognized in *Ellis v. Turner*. But we need not pursue the subject. For, however that may be in general, there can be no doubt of it in those employments in which the agent performs a duty of the principal to third persons, as between such third persons and the principal. Because the principal is responsible for the duty, and if he delegate it to an agent, and the agent fail to perform it, it is immaterial whether the failure be accidental or wilful, in the negligence or in the malice of the agent; the contract of the principal is equally broken in the negligent disregard, or in the malicious violation, of the duty by the agent. It would be cheap and superficial morality to allow one owing a duty to another to commit the performance of his duty to a third, without responsibility for the malicious conduct of the substitute in performance of the duty. If one owe bread to another and appoint an agent to furnish it, and the agent of malice furnish a stone instead, the principal is responsible for the stone and its consequences. In such cases, malice is negligence. Courts are generally inclining to this view, and this court long since affirmed it."

"If a corporation have no soul, it has a mind, and can commit a tort involving a mental element. It can, therefore, have a bad, malicious motive through its representative agents acting in its transactions." *West Virginia Transp. Co. v. Standard Oil Co.*

50 W. Va. 611, 56 L. R. A. 804, 88 Am. St. Rep. 895, 40 S. E. 591.

That the act of the corporation's agent, committed by him within the general scope of his employment and with the object of accomplishing that employment or some portion thereof, was ill-advised, malicious, and contrary to the express order of the corporation will not affect the latter's liability therefor. *Singer Sew. Mach. Co. v. Phipps*, 49 Ind. App. 116, 94 N. E. 793.

"The whole course of the authorities * * * shews," said Chief Justice Erle in a leading English case, "that an action for a wrong will lie against a corporation, where the thing that is complained of is a thing done within the scope of their incorporation, and is one which would constitute an actionable wrong if committed by an individual. The doctrine relied on (by the defendant) that a corporation, having no soul, cannot be actuated by a malicious intention,—is more quaint than substantial." *Green v. London General Omnibus Co.*, 7 C. B. (N. S.) 290.

"The rule in reference to affecting the master with the wilfulness or malice of a servant must be the same whether the master be a corporation, a receiver in charge of the business and property of a corporation, or an individual." *Dillingham v. Anthony*, 73 Tex. 47, 3 L. R. A. 634, 15 Am. St. Rep. 753, 11 S. W. 139 (action against receivers of railroad).

³¹ "It is true that for many purposes a corporation is held to be a separate entity from the natural persons who compose it, yet it is, in fact, but the aggregation of such persons, and the mind of such of them as are

It is well settled, for this reason, that a corporation may, to the same extent as a natural principal or master, be liable for the malicious

chosen to manage its affairs is its mind." *Southwestern Telegraph & Telephone Co. v. Long*, — Tex. Civ. App. —, 183 S. W. 421 (action for slander). As to the relation of the corporation to its stockholders, see §§ 22-52.

"When one acts through an agent, he trusts the agent as to the manner of performance, and it must be assumed that he has selected the agent because satisfied that the agent would act as he would act under the circumstances. If this trust or confidence be misplaced, and if the agent, foregoing his opportunities to vindicate himself in his personal capacity, chooses rather to mingle his personal resentment with his service as agent and share his responsibility for it with his employer, the employer who has selected him has little ground to complain of being held responsible for his wrongful acts; while the individual, who, unable to select the person with whom he will transact such business as he has with the principal, suffers from the misconduct of the agent in the transaction of the business, may reasonably expect the principal to discharge the liability for such misconduct. It is impossible to separate the performance of a service as agent from the manner of the performance. The principal has the selection of his agents, and where such principal chooses to act, or must perforce act through its agents, their wrongful acts committed in the performance of the service are the wrongful acts of the principal." *Wells Fargo & Co. Express v. Sabel*, 59 Tex. Civ. App. 62, 125 S. W. 925 (action against corporation for assault and battery).

"Where the servant is authorized to use force against another when necessary in executing his master's

orders or in conducting the business intrusted to him, the master commits it to him to decide what degree of force he shall use, and if through misjudgment or violence of temper the servant goes beyond the necessity of the occasion, and gives a right of action to another, he cannot be said, as to third persons, to have been acting beyond the line of his duty, or to have departed from his master's business." *Conchin v. El Paso & S. W. R. Co.*, 13 Ariz. 259, 28 L. R. A. (N. S.) 88, 108 Pac. 260, quoting *Rogahn v. Moore Manufacturing & Foundry Co.*, 79 Wis. 573, 48 N. W. 669.

In a leading Connecticut case, in which it was held that a banking corporation could be liable in an action for malicious prosecution of a civil action, Chief Justice Church said: "The objection to the remedy of this plaintiff against the bank, in its corporate capacity, is not so much, that, as a corporation, it cannot be made responsible for torts committed by its directors, as that it cannot be subjected for that species of tort, which essentially consists in motive and intention. The claim is, that as a corporation is ideal only, it cannot act from malice, and therefore, cannot commence and prosecute a malicious or vexatious suit. This syllogism, or reasoning, might have been very satisfactory to the schoolmen of former days; more so, we think, than to the jurist who seeks to discover a reasonable and appropriate remedy for every wrong. To say that a corporation cannot have motives, and act from motives, is to deny the evidence of our senses, when we see them thus acting, and effecting thereby results of the greatest importance, every day. And if they can have any motive, they can have a bad one,—they can intend to

wrongs of its agents or servants, if committed in the course of a transaction which is within the scope of their authority.³²

do evil, as well as to do good. If the act done is a corporate one, so must the motive and intention be. In the present case, to say, that the vexatious suit, as it is called, was instituted, prosecuted, and subsequently sanctioned, by the bank, in the usual modes of its action; and still to claim, that, although the acts were those of the bank, the intention was only that of the individual directors, is a distinction too refined, we think, for practical application." *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 58 Am. Dec. 439.

³² *United States*. *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73.

Alabama. *Jordan v. Alabama Great Southern R. Co.*, 74 Ala. 85, 49 Am. Rep. 800.

California. *Maynard v. Fireman's Fund Ins. Co.*, 47 Cal. 207, 34 Cal. 48, 91 Am. Dec. 672.

Connecticut. *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 58 Am. Dec. 439.

Indiana. *Pittsburgh, C. C. & St. L. Ry. Co. v. Sullivan*, 141 Ind. 83, 27 L. R. A. 840, 50 Am. St. Rep. 313, 40 N. E. 138.

Maryland. *Carter v. Howe Mach. Co.*, 51 Md. 290, 34 Am. Rep. 311.

Massachusetts. *Foggy v. Boston & L. R. Corporation*, 148 Mass. 513, 12 Am. St. Rep. 583, 20 N. E. 109; *Reed v. Home Sav. Bank*, 130 Mass. 443, 39 Am. Rep. 468.

Michigan. *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426, 21 L. R. A. 278, 56 N. W. 9.

Missouri. *Boogher v. Life Ass'n of America*, 75 Mo. 319, 42 Am. Rep. 413.

New Jersey. *Vance v. Erie Ry. Co.*, 32 N. J. L. 334, 90 Am. Dec. 665.

New Mexico. *Childers v. Southern Pac. Co.*, 20 N. M. 366, 149 Pac. 307.

New York. *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597; *Vanderbilt v. Richmond Turnpike Co.*, 2 N. Y. 479, 51 Am. Dec. 315; *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 38 Hun 637, aff'd 106 N. Y. 669, 12 N. E. 825.

Ohio. *Atlantic & G. W. Ry. Co. v. Dunn*, 19 Ohio St. 162, 2 Am. Rep. 382.

South Carolina. *Redding v. South Carolina R. Co.*, 3 S. C. 1, 16 Am. Rep. 681.

Tennessee. *Wheless v. Second Nat. Bank*, 1 Baxt. 469, 25 Am. Rep. 783.

England. *Green v. London General Omnibus Co.*, 7 C. B. (N. S.) 290; *Eastern Counties Ry. Co. v. Broom*, 6 Exch. 314.

In a California case in which a corporation was held liable in an action for libel, it was said: "The claim for immunity to associations of men constituting bodies corporate, is that corporations are mere legal entities which can only be conceived of and apprehended as existing in abstract contemplation; and that being mere legal entities, they are utterly incapable of malevolence, and are without the power to will good or evil. If it be conceded that a corporation in its nature and essence exists in idea only, it must be admitted that in its manifested power there is always to be recognized the guiding and controlling hand of human intelligence, which is the agency by means whereof its purposes are carried into effect. It is argued that a corporation with certain defined powers and privileges, and no implied powers, cannot do a wrong of the nature of that complained of, because the commission of such wrong by the representative

“Where a person is injured by the act of a servant done in the course of his employment, we see no good reason,” says the Supreme Court of Ohio, “why the motive or intention of the servant should operate to discharge the master from liability. If the nature of the injurious act is such as to make the master liable for its consequences, in the absence of the particular intention, it is not perceived how the presence of such intention can be held to excuse the master. We do not say that when the nature of the act is such as to render it equivocal, whether the act comes within the scope of the servant’s employment or not, the intention with which the act is done is not to be looked to in determining its true character. What we say is, that when it plainly appears the act of the servant was done in the course of his employment, the wilfulness or wrongful motive of the servant in doing the act will not excuse the master.³³ Thus a corporation may be liable for a trespass upon land,³⁴ upon goods,³⁵ or against the person, as in assault and battery,³⁶ in trover for the conversion

authority of the body politic and corporate is not within the scope of the objects and purposes of the corporation, and therefore the stockholders, who may have had no malice toward the plaintiff and no immediate agency in the publication of the alleged libel, should not be required to respond in damages for the wrong done by the directors. This argument carried to every legitimate consequence would result in entire immunity to a corporation for all wrongs which might be committed by its officers, agents and servants; because the objects and purposes of a corporation, ascertained from the organic law of its being, do not embrace the right and privilege of committing torts. But the cases are numerous showing that for acts done by the agents of a corporation, in delicto, as well as in contractu, in the course of its business, and in their employment, the corporation is responsible, as an individual is responsible under similar circumstances. * * * The directors are the chosen representatives of the corporation, and constitute, as already observed, to all purposes of dealing with others, the

corporation. What they do within the scope of the objects and purposes of the corporation, the corporation does. If they do an injury to another, even though it necessarily involves in its commission a malicious intent, the corporation must be deemed by imputation to be guilty of the wrong, and answerable for it, as an individual would be in such case.” Currey, C. J., in *Maynard v. Fireman’s Fund Ins. Co.*, 34 Cal. 48, 56, 91 Am. Dec. 672.

³³ *Passenger Ry. v. Young*, 21 Ohio St. 518, 8 Am. Rep. 78 (passengers ejected from street car and injured).

See, however, *Berryman v. Pennsylvania R. Co.*, 228 Pa. 621, 30 L. R. A. (N. S.) 1049, 77 Atl. 1011 (decided in 1910), in which the Supreme Court of Pennsylvania declared that “the rule respondeat superior applies only where the injury results from the negligent manner in which the duty is discharged. The master cannot be held responsible for the malicious acts of his servants.”

³⁴ See § 3350, *infra*.

³⁵ See § 3350, *infra*.

³⁶ See § 3342, *infra*.

of property,³⁷ for a nuisance,³⁸ for fraud and deceit,³⁹ for libel and slander,⁴⁰ for false arrest and imprisonment,⁴¹ for malicious prosecution⁴² and even for wrongful death.⁴³

§ 3339. Defense of ultra vires. In some cases it has been held that if the officers of a corporation engage in an ultra vires business or transaction, and a tort is committed in the course of such business or transaction, either by the managing officers, or by a subordinate agent under authority from them, the corporation is not liable. Thus, in a Maryland case, where a national bank had engaged in the business of selling the bonds of a railroad company on commission, and the teller of the bank made false and fraudulent representations to induce a person to purchase bonds, it was held that an action for the deceit would not lie against the bank. The decision was based by the court, not on the ground that the teller was not authorized by the managing officers of the bank to make the sale, but on the ground that the business was ultra vires, and on this ground only.⁴⁴ This view, however, cannot be sustained, and the great weight of authority is against it. If a subordinate agent or servant of a corporation engages in an ultra vires transaction without any authority from the

³⁷ See § 3344, *infra*.

³⁸ See § 3349, *infra*.

³⁹ See § 3346, *infra*.

⁴⁰ See § 3347, *infra*.

⁴¹ See § 3345, *infra*.

⁴² See § 3345, *infra*.

⁴³ See § 3351, *infra*.

⁴⁴ *Weckler v. First Nat. Bank of Hagerstown*, 42 Md. 581, 20 Am. Rep. 95. The court said: "We are clearly of opinion that this business of selling bonds on commission, is not within the scope of the powers of the corporation, and the bank could not, under any circumstances, carry it on; and being thus beyond its corporate powers, the defense of ultra vires is open to the appellee (the corporation). And it follows from this that the bank is not responsible for any false representations made by its teller to the appellant, by which she was induced to purchase the bonds in question." See, to the contrary, *Searle v. First Nat. Bank of Montrose*, 2 Walk. (Pa.) 395, *infra*, this section, note 54.

There are other cases to the same effect. Thus, in a Georgia case it was held that a railroad company which had entered into a partnership for the business of running a line of steamboats was not liable as a partner in tort for injury to a passenger on one of the boats, as the partnership was ultra vires. *Gunn v. Central Railroad & Banking Co.*, 74 Ga. 509.

And in an Iowa case it was held that an incorporated agricultural society, which had entered into an ultra vires contract employing others to run conveyances to and from its fair grounds for the purpose of transporting persons attending the same, was not liable for injuries caused by the negligence of a person so employed. *Bathe v. Decatur County Agr. Society*, 73 Iowa 11, 5 Am. St. Rep. 651, 34 N. W. 484.

See also *Haag v. Vanderburgh County Com'rs*, 60 Ind. 511, 28 Am. Rep. 654; *Gillett v. Missouri Valley R. Co.*, 55 Mo. 315, 17 Am. Rep. 653,

managing officers, and commits a tort in the course of such transaction, the corporation is not liable. But this is because his act is not authorized by the corporation, and not merely because it is beyond the powers conferred upon the corporation by its charter. A very different case is presented when the stockholders of a corporation at a corporate meeting, or the directors or managing officers, authorize or sanction an ultra vires business or transaction. In such a case the business is that of the corporation, though unauthorized by its charter, and for torts committed in the course of such business it is liable. A corporation, though it has no right to engage in an ultra vires business, has the capacity to do so. It may do wrong. If it does so, and thereby injures others, public policy requires that it shall answer in damages; and the doctrine that it is liable in such a case is well supported by authority.⁴⁵ "Corporations," according

⁴⁵ **United States.** Salt Lake City v. Hollister, 118 U. S. 256, 30 L. Ed. 176; First Nat. Bank of Carlisle v. Graham, 100 U. S. 699, 25 L. Ed. 750.

Alabama. Central Railroad & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; South & North Alabama R. Co. v. Chappell, 61 Ala. 527.

Illinois. First Nat. Bank of Monmouth v. Strang, 138 Ill. 347, 27 N. E. 903, aff'g 28 Ill. App. 325.

Massachusetts. Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 22 L. R. A. 364, 39 Am. St. Rep. 467, 35 N. E. 776.

Missouri. Alexander v. Relfe, 74 Mo. 495.

New Jersey. New York, L. E. & W. Ry. Co. v. Haring, 47 N. J. L. 137, 54 Am. Rep. 123.

New York. Bissell v. Michigan Southern R. Co., 22 N. Y. 258.

North Carolina. Hussey v. Norfolk Southern R. Co., 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923; Gruber v. Washington & J. R. Co., 92 N. C. 1.

Pennsylvania. Searle v. First Nat. Bank of Montrose, 2 Walk. 395.

Tennessee. Hutchinson v. Western & A. R. Co., 6 Heisk. 634.

Wisconsin. Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229.

"Ultra vires is not pertinent to cases of torts. In a broad sense all torts of corporations are ultra vires. But, where injury is due to the improper use of power granted, it is not ultra vires. There is not an assumption of power, but an abuse of power granted." *Burke v. State*, 119 N. Y. Supp. 1089.

"The doctrine of ultra vires, in so far as it relates to private corporations, is applicable only to matters ex contractu. A tort is necessarily ultra vires because no corporation is authorized by its charter to commit a wrong." *Southwestern Telegraph & Telephone Co. v. Long*, — Tex. Civ. App. —, 183 S. W. 421.

"The doctrine as now understood and applied by the courts is that corporations are liable for every wrong, every trespass, and every tort committed by their agents and employees within the scope of their employment as such, and to the same extent as individuals under like circumstances; and the doctrine of ultra vires, as formerly understood and applied, does not under the modern decisions have any application to such cases. * * * The doctrine of ultra vires, as formerly understood and applied by the courts to corporations, was that such

to the Supreme Court of the United States, "are liable for every wrong of which they are guilty, and in such cases the doctrine of ultra vires has no application,"⁴⁶ but "an action may be maintained against a corporation for its malicious or negligent torts, however foreign they may be to the object of its creation or beyond its granted powers."⁴⁷ "It would indeed be an anomalous result in legal

institutions were endowed with a species of infallibility; that they in their corporate character could not do or sanction any act by and through their agents or servants which they were not authorized to do by their respective charters conferring corporate powers; that because they were not authorized to do wrongful and tortious acts they could therefore do no wrong. But it was soon ascertained that these institutions, notwithstanding they had no legal authority to do wrong, yet often assumed powers ultra vires to do and actually did commit all sorts of trespasses and unlawful and wrongful acts through wholly irresponsible servants and employees, often caused the greatest losses and damages to private individuals and their property; and the courts, to protect society, were finally impelled ex necessitate to place the responsibility of corporations on a more enlightened and reasonable basis. The doctrine of ultra vires, as now interpreted by the courts, and applied to corporations, signifies merely such acts and doings of any corporation which, though it may have the power to perform or to adopt and sanction through its agents or servants, yet it has no legal authority to do under its charter of corporate powers; in the same sense precisely that every act performed by a natural person which the law either in express terms or by necessary implication does not sanction, nor confer on him any right to do, would be illegal, and might be termed ultra vires." *Denver & R. G. Ry. Co. v. Harris*, 3 Johnson (N. M.) 109, 2 Pac. 369.

Officers and agents of a corporation, although intrusted generally with the management of the business of the corporation or a particular branch thereof, have no implied authority to do ultra vires acts or enter into ultra vires transactions, and if they do so without the consent of the corporation and in the course of such transaction commit a fraud or other wrong against third persons, the corporation is not liable. *City Nat. Bank of Ft. Worth v. Martin*, 70 Tex. 643, 8 Am. St. Rep. 632, 8 S. W. 507. But see *Southwestern Telegraph & Telephone Co. v. Long*, — Tex. Civ. App. —, 183 S. W. 421, *supra*.

On the subject of ultra vires generally, see Chap. 37, *supra*.

⁴⁶ *Merchants' Nat. Bank of Boston v. State Nat. Bank of Boston*, 10 Wall. (U. S.) 604, 19 L. Ed. 1008. To the same effect, see *First Nat. Bank of Carlisle, Pennsylvania v. Graham*, 100 U. S. 699, 25 L. Ed. 750. See also *Little Rock Traction & Electric Co. v. Walker*, 65 Ark. 144, 40 L. R. A. 473, 45 S. W. 57; *Chamberlain v. Southern California Edison Co.*, 167 Cal. 500, 140 Pac. 25; *Sawyer v. Norfolk & S. R. Co.*, 142 N. C. 1, 115 Am. St. Rep. 716, 9 Ann. Cas. 440, 54 S. E. 793; *Stockgrowers' Bank of Wheatland v. Gray*, 24 Wyo. 18, 154 Pac. 593.

⁴⁷ *First Nat. Bank of Carlisle, Pennsylvania v. Graham*, 100 U. S. 699, 25 L. Ed. 750.

"The corporation can be held responsible for acts which are not strictly within the corporate powers, but which were assumed to be performed for the corporation and by the corporate agents who were competent to

science," said Chief Justice Beasley in a New Jersey case, "if a corporation should be permitted to set up that inasmuch as a branch of the business prosecuted by it was wrongful, therefore all the special wrongs done to individuals in the course of it were remediless. But in such situations corporate bodies, like individuals, cannot take advantage of their own wrong by way of defense. If corporations are not to be held responsible for injuries to persons done in the transaction of a series of wrongful acts, such an immunity would have a wide scope. All wrongs done by such bodies are, in a sense, *ultra vires*, and if the want of a franchise to do the tortious act be a defense, then corporations have a dispensation from liability for these acts peculiar to themselves."⁴⁸ In accordance with this doctrine it has been held that a railroad company, if it engages in the *ultra vires* business of running a steamboat, horse car, or stage line in connection with its road, is liable for injuries caused by the negligence or other torts of its agents or servants in the conduct of such business;⁴⁹ that railroad companies which enter into an *ultra vires* consolidation agreement are liable for injury to a passenger and damage to his baggage from negligence in the joint operation of their roads;⁵⁰ and

employ the corporate powers actually exercised." *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 43 L. Ed. 543.

"A corporation," it was said in a New York case, "is liable to the same extent and under the same circumstances as a natural person for the consequences of its wrongful acts, and will be held to respond in a civil action at the suit of an injured party, for every grade and description of forcible, malicious or negligent tort or wrong which it commits, however foreign to its nature or beyond its granted powers the wrongful transaction or act may be." *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30.

⁴⁸ *New York, L. E. & W. Ry. Co. v. Haring*, 47 N. J. L. 137.

"Like natural persons, * * * [corporations] can overleap the legal and moral restraints imposed upon them; in other words, they are capable of doing wrong." *Bissell v. Michigan Southern & N. I. R. Co.*, 22 N. Y. 258.

"The rule is now well settled that, while keeping within the apparent scope of corporate powers, corporations have a general capacity to render themselves liable for torts, except for those where the tort consists in the breach of some duty which, from its nature, could not be imposed upon or discharged by a corporation." *Western News Co. v. Wilmarth*, 33 Kan. 510, 6 Pac. 786.

⁴⁹ *Alabama. Central Railroad & Banking Co. v. Smith*, 76 Ala. 572, 52 Am. Rep. 353.

New Jersey. New York, L. E. & W. Ry. Co. v. Haring, 47 N. J. L. 137.

New York. Buffet v. Troy & B. R. Co., 40 N. Y. 168.

North Carolina. Gruber v. Washington & J. R. Co., 92 N. C. 1.

Tennessee. Hutchinson v. Western & A. R. Co., 6 Heisk. 634.

England. See South Wales Ry. Co. v. Redmond, 10 C. B. (N. S.) 675.

⁵⁰ *Bissell v. Michigan Southern R. Co.*, 22 N. Y. 258.

that a corporation created for educational purposes, if it engages in the ultra vires business of operating a public ferry and carrying passengers for hire, is liable for injury to a passenger caused by the negligence of the ferryman in managing a boat.⁵¹ So the fact that it is ultra vires and illegal for a department store corporation to engage in the practice of dentistry will not relieve it from liability for the torts of its servants committed in its actual practice thereof.⁵² It has also been held that, when a corporation becomes a bailee of property, it cannot escape liability in tort for conversion of the property or for loss or injury due to its negligence, on the ground that the contract of bailment was not authorized by its charter.⁵³ Where the cashier of a national bank bought and sold stock for customers of the bank in its name, with the knowledge of the directors, the Supreme Court of Pennsylvania held the bank liable for stocks embezzled by the cashier, notwithstanding the fact that it was ultra vires for it to thus deal in stocks.⁵⁴

§ 3340. Principles determining liability—In general. Generally speaking, the rules governing liability for a tort committed by an agent or servant are the same whether the principal or master be a natural person or a corporation.⁵⁵ All of the authorities agree that

⁵¹ *Nims v. Mt. Hermon Boys' School*, 160 Mass. 177, 22 L. R. A. 364, 39 Am. St. Rep. 467, 35 N. E. 776.

⁵² *Hannon v. Siegel-Cooper Co.*, 167 N. Y. 244, 52 L. R. A. 429, 60 N. E. 597.

⁵³ *First Nat. Bank of Carlisle, Pennsylvania v. Graham*, 100 U. S. 699, 25 L. Ed. 750; *First Nat. Bank of Monmouth v. Strang*, 138 Ill. 347, 27 N. E. 903, aff'g 28 Ill. App. 325.

⁵⁴ *Searle v. First Nat. Bank of Montrose*, 2 Walk. (Pa.) 395. Compare *Weekler v. First Nat. Bank*, 42 Md. 581, 20 Am. Rep. 95, supra, this section, note 44.

Where the managing officer of a bank, while acting in a fiduciary capacity for its customer, induced the latter by false and fraudulent representations and fraudulent concealment of facts to invest in bonds bought and held by the bank for speculative purposes, it was held that the customer might rescind the purchase and re-

cover from the bank the money paid. *Carr v. National Bank & Loan Co. of Watertown*, 167 N. Y. 375, 82 Am. St. Rep. 725, 60 N. E. 649, aff'g 43 N. Y. App. Div. 10, 59 N. Y. Supp. 618.

⁵⁵ *United States. Denver & R. G. Ry. Co. v. Harris*, 122 U. S. 597, 30 L. Ed. 1146; *First Nat. Bank of Carlisle, Pennsylvania v. Graham*, 100 U. S. 699, 25 L. Ed. 750; *Merchants' Nat. Bank of Boston v. State Nat. Bank of Boston*, 10 Wall. 604, 19 L. Ed. 1008; *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. 202, 16 L. Ed. 73; *Southern Exp. Co. v. Platten*, 93 Fed. 936.

Alabama. Central Railroad & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353; *Henderson-Migell Mercantile Co. v. Chapman & Co.*, 3 Ala. App. 296, 57 So. 82.

California. Maynard v. Fireman's Fund Ins. Co., 34 Cal. 48, 91 Am. Dec. 672.

Connecticut. Goodspeed v. East

a principal or master is liable for every tort which he expressly directs or authorizes, and this is just as true of a corporation as of a natural person. A corporation is liable, therefore, whenever a tortious act is committed by an officer or agent under express direction or authority from the stockholders or members acting as a body, or,

Haddam Bank, 22 Conn. 530, 58 Am. Dec. 439.

Kentucky. Pennsylvania Iron Works Co. v. Voght Mach. Co., 29 Ky. L. Rep. 861, 96 S. W. 551.

Massachusetts. Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 22 L. R. A. 364, 39 Am. St. Rep. 467, 35 N. E. 776.

New Jersey. New York, L. E. & W. Ry. Co. v. Haring, 47 N. J. L. 137, 54 Am. Rep. 123; Brokaw v. New Jersey R. & Transp. Co., 32 N. J. L. 328, 90 Am. Dec. 659.

New York. Fishkill Sav. Institution v. National Bank of Fishkill, 80 N. Y. 162, 36 Am. Rep. 595.

Oklahoma. Moore v. Atchison, T. & S. F. R. Co., 26 Okla. 682, 110 Pac. 1059.

Pennsylvania. Erie City Iron Works v. Barber, 106 Pa. St. 125, 51 Am. Rep. 508; Chestnut Hill & S. H. Turnpike Co. v. Rutter, 4 Serg. & R. 6, 8 Am. Dec. 675.

England. Green v. London General Omnibus Co., 7 C. B. (N. S.) 290; Yarborough v. Bank of England, 16 East 6; Eastern Counties Ry. Co. v. Broom, 6 Exch. 314; Ranger v. Great Western Ry. Co., 5 H. L. Cas. 86; Maund v. Monmouthshire Canal Co., 4 Man. & G. 452.

"As it [a corporation] can only speak or act by agent, there is stronger reason for holding it answerable for the acts and representations of the agent done within the ostensible scope of his authority and while transacting the business of the principal, than where the principal is a natural person. However, the same rule applies alike to natural and artificial persons." Erie City Iron

Works v. Barber, 106 Pa. St. 125, 51 Am. Rep. 508.

"Person," in the Georgia statute (Civil Code, § 4413) which provides that "every person shall be liable for torts committed by his servants by command, or in the prosecution or within the scope of his business, whether the same be by negligence, or voluntary," applies to a corporation as well as to a natural person. Louisville & N. R. Co. v. Hudson, 10 Ga. App. 169, 73 S. E. 30.

A corporation, like an individual, is bound by the acts of its agents within the scope of their authority, even those fraudulently done, but although the legal consequences of such acts must be visited upon the corporation it does not follow that the latter can justly be charged with guilty participation in them. Carolina Glass Co. v. State, 87 S. C. 270, 69 S. E. 391.

A corporation cannot be held as for a tort for an act which had it been committed by a natural person would not have constituted a tort, the rules which would apply in the latter case also applying in the former. Southwestern Telegraph & Telephone Co. v. Andrews, — Tex. Civ. App. —, 178 S. W. 574.

The complaint in an action against a corporation for a tort committed by its agent should allege the tortious act to have been that of the corporation, and need not set out the facts which show that such act was within the scope of the agent's employment, state the name of the guilty agent, or even allege that the tort was committed by an agent. Seibor v. Oregon-Washington R. & Nav. Co., 70 Ore. 116, 140 Pac. 629.

generally, from the directors as the governing body. As to this there can be no question, when it is once conceded that a corporation can in any case be liable in tort.⁵⁶ It is also well settled that a principal or master is liable for all torts within the scope of the authority of his agent or servant which are committed by the latter in the course of his employment, although such torts were not expressly authorized and were not ratified by the principal or master; and this is true of corporations. When it is sought to hold a corporation liable for a tort, it is no answer for it to say that its agent or servant was not expressly authorized to commit the wrongful act,⁵⁷ nor even that such act was contrary to or in violation of the instructions or orders given by it to the offending agent or servant.⁵⁸ It is sufficient to impose

⁵⁶ "Whether the corporation authorized or participated in the tort is matter of proof." *Hussey v. Norfolk Southern R. Co.*, 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923.

⁵⁷ "The result of the authorities is, as we think, that in order to hold a corporation liable for the torts of any of its agents, the act in question must be performed in the course and within the scope of the agent's employment in the business of the principal.

* * * There need be no written authority under seal or vote of the corporation, constituting the agency or authorizing the act. But in the absence of evidence of this nature there must be evidence of some facts from which the authority of the agent to act upon or in relation to the subject-matter involved may be fairly and legitimately inferred by the court or jury." *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 43 L. Ed. 543.

Evidence of the defendant corporation's knowledge of or actual participation in the conduct complained of is not required in order to sustain a count in the complaint charging wantonness on the part of the corporation's servants acting within the line and scope of their employment. *Birmingham Realty Co. v. Thomason*, 8 Ala. App. 535, 63 So. 65.

⁵⁸ *Arkansas. Sweden v. Atkinson*

Improvement Co., 93 Ark. 397, 27 L. R. A. (N. S.) 124, 125 S. W. 439.

Indiana. *Pennsylvania Co. v. Weddle*, 100 Ind. 138, 141.

Louisiana. *Gann v. Great Southern Lumber Co.*, 131 La. 400, 59 So. 830.

Oklahoma. *Moore v. Atchison, T. & S. F. R. Co.*, 26 Okla. 682, 110 Pac. 1059.

Oregon. *Seibor v. Oregon-Washington R. & Nav. Co.*, 70 Ore. 116, 140 Pac. 629.

"The rule of 'respondeat superior,' or that the master shall be civilly liable for the tortious acts of his servant, is of universal application, whether the act be one of omission or commission, whether negligent, fraudulent, or deceitful. If it be done in the course of his employment, the master is liable; and it makes no difference that the master did not authorize, or even know of the servant's act or neglect, or even if he disapproved or forbade it, he is equally liable, if the act be done in the course of his servant's employment." *Philadelphia & R. R. Co. v. Derby*, 14 How. (U. S.) 468, 14 L. Ed. 502. But see *Axtell v. Northern Pac. R. Co.*, 9 Idaho 392, 74 Pac. 1075, an action for the loss of property as a result of the building of a certain dam by alleged employees of the defendant railroad company, in which the court held that an in-

liability that the act was within the scope of the authority of the agent or servant and was committed by him in the course of his employment.⁵⁹ "This rule," said Chief Justice Shaw, "is obviously

struction embodying this rule did not state the law applicable to the case.

A corporation is responsible for the torts of its servant committed in the course of his employment with a view to the furtherance of the corporation's business and not for a purpose personal to himself, without regard to whether they were committed negligently or wilfully, provided they were within the scope of his agency (*Nava v. Northwestern Tel. Exchange Co.*, 112 Minn. 199, 127 N. W. 935; *Lesch v. Great Northern R. Co.*, 93 Minn. 435, 101 N. W. 965), or to whether they were in excess of his authority or contrary to his express instructions. *Barrett v. Minneapolis, St. P. & S. M. R. Co.*, 106 Minn. 51, 18 L. R. A. (N. S.) 416, 130 Am. St. Rep. 585, 117 N. W. 1047 (overruling "any statement to the contrary" in *Brevig v. Chicago, St. P., M. & O. Ry. Co.*, 64 Minn. 168, 66 N. W. 401); *Smith v. Munch*, 65 Minn. 256, 68 N. W. 19. See also *Roemer v. Jacob Schmidt Brewing Co.*, 132 Minn. 399, L. R. A. 1916 E 771, 157 N. W. 640.

"When an agent of a corporation in the course of the discharge of duties intrusted to him by it, and within the apparent scope of his authority, does an act from which a third person suffers injury, the corporation also is liable for the damages flowing therefrom, even though the agent may have failed in his duty to the principal, or may have disobeyed his instructions. * * * If the act is prompted by fraudulent or malicious motives, the fraud or malice of the agent is imputable to the corporation." *Grorud v. Lossi*, 48 Mont. 274, 136 Pac. 1069.

"A master may be held responsible for the acts of his servant within the general scope of his employment while

engaged in the master's business, even though the servant may have disregarded some particular direction of the master in respect to the manner in which he shall discharge his duties." *Kastner v. Long Island R. Co.*, 76 N. Y. App. Div. 323, 78 N. Y. Supp. 469.

"It is true that a principal is held to be responsible for the tort of an agent, even though the agent's wrongful act was done in violation of the principal's wish and direction. Indeed, it may be assumed that in most instances agents who commit wrongs to third persons go counter to the wish of their principal. But the liability in such cases as in all cases, only exists when the agent was acting about the principal's business; and the wrongful act was incident to the performance of that business. That is the old rule, 'Qui facit per alium facit per se.' The books say the agent must have acted within the scope of his authority, or in the course of his employment, in order that the principal shall respond therefor. What is the scope of the agency is fixed by the testimony, and by the law relevant to the testimony." *Murray v. Southern Bell Telephone & Telegraph Co.*, 103 S. C. 427, 88 S. E. 31.

59 California. *Chamberlain v. Southern California Edison Co.*, 167 Cal. 500, 140 Pac. 25.

Indiana. *Pittsburgh, C., C. & St. L. Ry. Co. v. Sullivan*, 141 Ind. 83, 27 L. R. A. 840, 50 Am. St. Rep. 313, 40 N. E. 138.

New York. *Fishkill Sav. Institution v. National Bank of Fishkill*, 80 N. Y. 162, 36 Am. Rep. 595.

Oregon. *Hill v. President, etc., of Tualatin Academy & Pacific University*, 61 Ore. 190, 121 Pac. 901.

founded on the great principle of social duty, that every man, in the management of his own affairs, whether by himself or by his agents or servants, shall so conduct them as not to injure another; and if he does not, and another thereby sustains damage, he shall answer for it." ⁶⁰ As a general rule, however, a corporation is no more liable

Pennsylvania. *Chestnut Hill & S. H. Turnpike Co. v. Rutter*, 4 Serg. & H. 6, 8 Am. Dec. 675.

England. *Yarborough v. Bank of England*, 16 East 6; *Eastern Counties Ry. Co. v. Broom*, 6 Exch. 314; *Barwick v. English Joint Stock Bank*, L. R. 2 Exch. 259; *Maund v. Monmouthshire Canal Co.*, 4 Man. & G. 452.

"To render the master liable for the tortious acts of his servant, it is, as a general rule, sufficient to show that he gave to the servant authority, or made it his duty, to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. In such a case the master will be deemed to have consented to and authorized the act of the servant, and will not be relieved of liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders." *Southwestern Portland Cement Co. v. Reitzer*, — Tex. Civ. App. —, 135 S. W. 237, apparently paraphrasing *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597. See also *Conchin v. El Paso & S. W. R. Co.*, 13 Ariz. 259, 28 L. R. A. (N. S.) 88, 108 Pac. 260; *Perkins Bros. v. Anderson*, — Tex. Civ. App. —, 155 S. W. 556.

"Corporations are liable for the wrongful acts of their agents or employees, done in the course of their employment, or in the line of their assigned duties." *Gassenheimer v. Western Ry. of Alabama*, 175 Ala. 319, 40 L. R. A. (N. S.) 998, 57 So. 718.

"If the agent of a corporation, acting within the scope of his duties, even though abusing his authority in that he uses methods not expressly or impliedly authorized, or which could reasonably have been anticipated, commits a remediable wrong to another, causing that other recoverable damages, the corporation as well as the agent is liable." *Topolewski v. Plankinton Packing Co.*, 143 Wis. 52, 126 N. W. 554 (headnote by the judge).

A corporation is liable for torts committed by its servants when acting within the scope of their employment and for torts which although in excess of such servants' authority are ratified by it. *White v. Apsley Rubber Co.*, 194 Mass. 97, 8 L. R. A. (N. S.) 484, 80 N. E. 500.

Instructions, in an action against a railroad company for the death of a boy which resulted from his being knocked from the top of defendant's moving freight train, on which he was riding as a trespasser, by one of defendant's trainmen, are erroneous when they deny a right of recovery if the jury find that the trainman's act was "not done in the interest and business" of the company instead of denying it only if they find that such act was "not done in the line of his employment and while acting within the scope of his authority." *Williams' Adm'r v. Southern Ry. in Kentucky*, 115 Ky. 320, 73 S. W. 779.

⁶⁰ *Farwell v. Boston & W. R. Corporation*, 4 Mete. (Mass.) 49, 38 Am. Dec. 339.

"The ground of the master's responsibility for the malicious torts of

than a natural person would be for torts not within the scope of the authority of its officers, agents or servants and committed by them outside of the course of their employment, unless it has expressly authorized or has ratified the same; and it can make no difference whether the officer, agent or servant undertakes to act for the corporation in a matter which is beyond his authority, or acts for himself.⁶¹ Thus, Judge Alvey of the Supreme Court of Maryland, in a

his servants or agents is this: That, where one of two innocent persons must suffer for the wrong of a third, the loss must fall upon him who has enabled the third person to do the wrong." *Baltimore & O. R. Co. v. Strube*, 111 Md. 119, 73 Atl. 697.

"The rule of respondeat superior, within its proper scope, is applicable to corporations." *Southern Exp. Co. v. Williamson*, 66 Fla. 286, 63 So. 433.

"The liability of a corporation for a tort committed by its agent is but an application of the doctrine of respondeat superior, long recognized as a part of the law of agency; and in respect of such liability private corporations stand before the law on the same footing as natural persons. A state of facts which would not render a natural person liable for an act of one who was at the time his agent would not render a corporation liable if it is the principal or employer sought to be charged. * * * The principal is liable when the wrong was committed by the agent while acting within the general scope of his employment; and he is not liable when the agent, in committing the wrong, steps outside of the line or scope of his employment to accomplish some purpose of his own having no relation to the business of the corporation in which he is employed. The doctrine of respondeat superior has no application where the employee, for the time being, abandons the business he was employed to transact, and commits an independent wrong while engaged

* * * in a transaction having no connection with that business." *Henderson-Mizell Mercantile Co. v. Chapman & Co.*, 3 Ala. App. 296, 57 So. 82.

"The maxim respondeat superior means that a railway, like other masters, is civiliter responsible for the acts of its servants, if the particular act causing the injury be within the scope of, and be done in the exercise of, the servant's delegated authority." *Southern Ry. Co. v. Morrison*, 105 Ga. 543, 31 S. E. 564.

⁶¹ *United States. Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 43 L. Ed. 543; *Friedlander v. Texas & P. R. Co.*, 130 U. S. 416, 32 L. Ed. 991; *Moores v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 28 L. Ed. 385.

Georgia. Behre v. National Cash Register Co., 100 Ga. 213, 62 Am. St. Rep. 320, 27 S. E. 986.

Louisiana. Legendre v. New Orleans Brewing Ass'n, 45 La. Ann. 669, 40 Am. St. Rep. 243, 12 So. 837.

Maryland. Central Ry. Co. v. Brewer, 78 Md. 394, 27 L. R. A. 63, 28 Atl. 615; *Carter v. Howe Mach. Co.*, 51 Md. 290, 34 Am. Rep. 311; *Weekler v. First Nat. Bank of Hagerstown*, 42 Md. 581, 20 Am. Rep. 95.

Michigan. Preston v. Marquette County Sav. Bank, 122 Mich. 696, 81 N. W. 920.

Minnesota. Second Nat. Bank of St. Paul v. Howe, 40 Minn. 390, 12 Am. St. Rep. 744, 42 N. W. 200.

New York. Knox v. Eden Musee American Co., 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; *Manhattan Life Ins. Co. v. Forty-*

leading case decided some years ago, said: "While, on the one hand, it is right to consider the agents and servants of corporations as clothed with liberal discretion in the exercise of the authority given them, and to hold the corporations liable for all acts done within the limits of that discretion, on the other hand, it is but just and right that corporations and their innocent stockholders should not be made to suffer the consequences of the wrongful acts of such agents and servants acting beyond the limits of their authority. If, therefore,

Second & G. St. Ferry R. Co., 139 N. Y. 146, 34 N. E. 776, aff'g 64 Hun 635, 19 N. Y. Supp. 90; Mott v. Consumers' Ice Co., 73 N. Y. 543; Mali v. Lord, 39 N. Y. 381, 100 Am. Dec. 448; Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599; Vanderbilt v. Richmond Turnpike Co., 2 N. Y. 479, 51 Am. Dec. 315; Eichner v. Bowery Bank, 24 App. Div. 63, 48 N. Y. Supp. 978.

Texas. East Line & R. River R. Co. v. Garrett, 52 Tex. 133.

England. Allen v. London & S. W. Ry. Co., L. R. 6 Q. B. 65; Poulton v. London & S. W. Ry. Co., L. R. 2 Q. B. 534.

"Beyond the scope of his employment the servant is as much a stranger to his master as any third person, and the act of the servant not done in the execution of the service for which he was engaged cannot be regarded as the act of the master." Case v. Steel Coal Co., 162 Ky. 68, L. R. A. 1915 D 867, 171 S. W. 993.

"For a wilful or intentional trespass by an employee outside of the line of his duty under his employment it is settled that the employer is not responsible, even though it be committed while the servant is in the exercise of his employment. But in the latter case its wilful and separate character must appear." McFarlan v. Pennsylvania R. Co., 199 Pa. 408, 49 Atl. 270.

"It seems to be clear * * * that the act of the servant causing actionable injury to a third person

does not subject the master to civil responsibility in all cases where it appears that the servant was at the time in the use of his master's property, or because the act, in some general sense, was done while he was doing his master's business, irrespective of the real nature and motive of the transaction. On the other hand, the master is not exempt from responsibility in all cases on showing that the servant, without express authority, designed to do the act or the injury complained of. If he is authorized to use force against another when necessary in executing his master's orders, the master commits it to him to decide what degree of force he shall use; and if, through misjudgment or violence of temper, he goes beyond the necessity of the occasion, and gives a right of action to another, he cannot, as to third persons, be said to have been acting without the line of his duty, or to have departed from his master's business. If, however, the servant, under guise and cover of executing his master's orders, and exercising the authority conferred upon him, wilfully and designedly, for the purpose of accomplishing his own independent, malicious or wicked purposes, does any injury to another, then the master is not liable. The relation of master and servant, as to that transaction, does not exist between them. It is wilful and wanton wrong and trespass, for which the master cannot be held responsible. And, when it is said that the master is not

property be entrusted to an agent or servant for sale or safe-keeping, there is clearly an implied authority to do all such things as may be proper and necessary for the protection of that property; or if a servant be assigned to a position requiring the performance of certain duties, he has an implied authority to do all such things as may be required to enable him to perform those duties. And for all acts done within the scope of the employment and the limits of the implied authority, the master is liable, however erroneous, mistaken, or

responsible for the wilful wrong of the servant, the language is to be understood as referring to an act of positive and designed injury, not done with a view to the master's service, or for the purpose of executing his orders." *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597 (in *Illinois Cent. R. Co. v. Latham*, 72 Miss. 32, 16 So. 757, the court approved the above quotation "as an admirable statement of the law").

"Before a corporation can be held liable for the torts of its agents, the act complained of must be performed, either directly within the course and scope of the agent's employment, or while acting under the express direction of the corporation itself. It is not necessary that power be given the agent in writing, or by a vote of the corporation authorizing the act; but in the absence of such express authority, there must be evidence of some facts from which the court may fairly and legitimately infer its existence." *Clark v. Chesapeake & P. Tel. Co.*, 42 App. Cas. (D. C.) 444.

"It is undoubtedly the law of this state, under former decisions, that a master, whether corporate or individual, is liable for the torts of the servant or employee, 'done or caused to be done in or about the duties or business assigned to them'; but it is equally clear that this liability is 'confined to abuses perpetrated in the line of duties assigned them.' The act must be, not only 'within the scope of his employment,' but also 'committed

in the accomplishment of objects within the line of his duties, or in and about the business or duties assigned to him by his employer.'" *Palos Coal & Coke Co. v. Venson*, 145 Ala. 664, 39 So. 727.

"Corporations may, and often do, create vice principals, who in their general management of the corporate business so partake of the corporate entity that their acts have the same effect upon corporate responsibility as if done or expressly authorized by the governing board or stockholders, and so corporations may become responsible in cases for the indictable crimes of their agents. But this does not impair the doctrine that the corporation is bound only when its vice principal acts, however improperly, negligently, or maliciously, in the execution of the corporate functions. When he steps wholly aside from his authority, and does an act to gratify personal malignity, or to accomplish another purpose personal to himself and having no relation to the business of the corporation, * * * the corporate master is no longer responsible." *Johnson v. Alabama Fuel & Iron Co.*, 166 Ala. 534, 52 So. 312.

"A railroad company is not liable for a tortious act of its servant perpetrated on a trespasser, unless the servant is acting within the scope of his authority or employment, or by special authority." *Wright v. Georgia Southern & F. R. Co.*, 66 Fla. 510, 63 So. 909 (headnote by the court).

malicious such acts may be; but for acts done beyond that limit the corporation cannot be made liable, unless express authority be shown, or there be subsequent adoption or ratification of the act complained of.”⁶²

Although it is undoubtedly true that the terms “scope of authority” and “course of employment” are not susceptible of exact definition,⁶³ and that there is no fixed and certain rule by which it can

⁶² *Carter v. Howe Mach. Co.*, 51 Md. 290, 34 Am. Rep. 311 (action for malicious prosecution and false imprisonment).

“The reason the master is liable for the act of his servant at all is because the servant is acting in the matter in the master’s stead and for him. Obviously, if the servant is not acting for the master, he cannot be said to be his representative in that act. So, if the servant is charged by his master with the authority to act in his stead in a given matter, the servant’s action or his failure to act, as the case may be, is imputed to the master as if it were his own. This general doctrine must be too well known to require now the citation of authority to support it. But where the servant steps aside from his employment and assumes to act, and does act solely on his own account in a matter which the master has no more connection with than if he were the most complete stranger, it would not be logical or fair to make the master vicariously suffer for it; for in doing that act the servant, so called, was absolutely his own master. * * * In determining whether a particular act is done in the course of the servant’s employment, it is proper to enquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time the injury was inflicted, acting for himself and as his own master pro

tempore, the master is not liable. If the servant stepped aside from his master’s business, for however short a time, to do an act connected with his business, the relation of master and servant is for the time suspended.” *Case v. Steel Coal Co.*, 162 Ky. 68, L. R. A. 1915 D 867, 171 S. W. 993, quoting *Sullivan v. Louisville & N. R. Co.*, 115 Ky. 447, 24 Ky. L. Rep. 2344, 103 Am. St. Rep. 330, 74 S. W. 171.

⁶³ “The question of the liability of the master for the acts of his servant depends altogether upon the fact of whether or not the servant was acting within the scope of his employment. The terms ‘course of employment’ and ‘scope of the authority’ are not susceptible of accurate definition. What acts are within the scope of the employment can be determined by no fixed rule; the authority from the master generally being gatherable from the surrounding circumstances. The master is liable only for the authorized acts of the servant, and the root of his liability for the servant’s acts is his consent, express or implied, thereto. When the master is to be considered as having authorized the wrongful act of the servant, so as to make him liable for his misconduct, is the point of a difficulty. Where authority is conferred to act for another without special limitation, it carries with it, by implication, authority to do all things necessary to its execution; and, when it involves the exercise of the discretion of the servant, or the use of force towards or against another, the use of such discretion or force is

be determined whether the tortious act of the servant was within the scope of his authority and committed in the course of his employment,⁶⁴ "in general terms, it may be said," according to Mr. Mechem,

a part of the thing authorized, and when exercised becomes, as to third persons, the discretion and act of the master, and this although the servant departed from the private instructions of the master, provided he was engaged at the time in doing his master's business, and was acting within the general scope of his employment. It is not the test of the master's liability for the wrongful act of the servant from which injury to a third person has resulted that he expressly authorized the particular act and conduct which occasioned it. In most cases where the master has been held liable for the negligent or tortious act of the servant the servant acted, not only without express authority to do the wrong, but in violation of his duty to the master. It is in general sufficient to make the master responsible that he gave to the servant an authority, or made it his duty to act in respect to the business in which he was engaged when the wrong was committed, and that the act complained of was done in the course of his employment. The master in that case will be deemed to have consented to and authorized the act of the servant, and he will not be excused from liability, although the servant abused his authority, or was reckless in the performance of his duty, or inflicted an unnecessary injury in executing his master's orders. The master who puts the servant in a place of trust or responsibility, or commits to him the management of his business or the care of his property, is justly held responsible when the servant, through lack of judgment or discretion, or from infirmity of temper, or under the influence of passion aroused by the circumstances and the occasion, goes be-

yond the strict line of his duty or authority, and inflicts an unjustifiable injury upon another. *Rounds v. Del., Lack. & West. R. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597. Furthermore, the law under such circumstances will not undertake to make any nice distinctions fixing with precision the line that separates the act of the servant from the act of the individual. When there is doubt, it will be resolved against the master, upon the ground that he set in motion the servant who committed the wrong." *Robards v. P. Bannon Sewer Pipe Co.*, 130 Ky. 380, 18 L. R. A. (N. S.) 923, 132 Am. St. Rep. 394, 113 S. W. 429. See also *Cook v. Michigan Cent. R. R.*, 189 Mich. 456, 155 N. W. 541.

⁶⁴ "There is no definite and fixed rule by which it can be said whether the acts of the servant are within or outside the scope of his employment. Each case must be determined by its own particular facts and circumstances. But there are certain well-settled principles which will assist in determining whether, under the facts and circumstances of the particular case, the servant was acting within the scope of his employment at the time the act complained of was done. The act of the servant for which the master is liable must pertain to something that is incident to the employment for which he is hired, and which it is his duty to perform, or be for the benefit of the master. It is therefore necessary to see in each particular case what was the object, purpose, and end of the employment, and what was the object and purpose of the servant in doing the act complained of. The mere fact that he was in the service generally of the master, or that the servant was in possession of

“that an act is within the course of the employment if (1) it be something fairly and naturally incident to the business, and if (2) it be done while the servant was engaged upon the master's business and be done, although mistakenly or ill-advisedly, with a view to further the master's interests, or from some impulse or emotion which naturally grew out of or was incident to the attempt to perform the master's business, and did not arise wholly from some external, independent and personal motive on the part of the servant to do the act upon his own account.”⁶⁵

facilities afforded by the master in the use of which the injury was done, would not make the act attributable to the master. The act must have been done in the execution of the service for which he was engaged. And if the servant steps aside from the master's business to do an independent act of his own and not connected with his master's business, then the relation of master and servant is for such time, however short, suspended; and the servant while thus acting for a purpose exclusively his own is a stranger to his master, for whose acts he is not liable.” *Sweeden v. Atkinson Improvement Co.*, 93 Ark. 397, 27 L. R. A. (N. S.) 124, 125 S. W. 439.

“Upon the question as to what wrongful acts, committed by an agent, come within the ‘scope or course of the agent's employment,’ the authorities are in hopeless confusion. It is not at all difficult to find conflicting decisions from different courts upon the same, or substantially the same, state of facts. The old rule by which the question was made to turn upon a strict application of legal principles has undergone changes in later decisions, and the question under the modern trend of opinion resolves itself into one of fact, or mixed law and fact. Chief Justice Start, in referring to the subject in the case of *McLaughlin v. Cloquet Tie [& Post] Co.* [119 Minn. 454], 138 N. W. 434, said: ‘While the abstract rule is well settled, some confusion has arisen in applying it

concretely, especially with reference to the meaning of the term ‘the course of and within the scope of his employment.’” No hard and fast definition of the term, applicable to all cases, can be given. Some of the earlier cases in this court seemingly applied the rule with literal exactness; but the tendency of the later cases is to give the rule a more liberal and practical application, especially in cases where the business entrusted to the servant involved a duty owed by the master to the public.” *Burnham v. Elk Laundry Co.*, 121 Minn. 1, 139 N. W. 1069.

“An act done at the office where the business of the company is conducted, and in its name, and by its servants professing to act for it, does not necessarily bind the corporation. The foundation of its liability must arise from the fact that it conferred authority upon the person to do the act, and while all these circumstances would be valuable as evidence of the delegation of power, and in some cases would be conclusive of it, at last the inquiry is narrowed to the question, whether or not the act done was the act of the corporation performed by its agent.” *Southern Exp. Co. v. Fitzner*, 59 Miss. 581, 42 Am. Rep. 379 (action for libel).

⁶⁵ *Meechem on Agency* (2nd Ed.), § 1960. Adopted in *Childers v. Southern Pac. Co.*, 20 N. M. 366, 149 Pac. 307.

Ordinarily, the question whether the act complained of was committed in the furtherance of the master's business, within the scope of the servant's employment, is one of fact to be determined by the jury;⁶⁶ but where "the servant's deviation from the strict course of his employment or duty is slight and not unusual, the court may determine, as a matter of law, that he is still executing the master's business; and, if the deviation is very marked and unusual, it may determine the contrary."⁶⁷

§ 3341. — Liability by reason of ratification or adoption. Although a tort may have been committed by an officer or agent of a corporation without authority and not in the course of his employment, the corporation may become liable therefor by reason of a ratification or adoption of the act. In this respect corporations are subject to the same rule as natural persons.⁶⁸ For example, if a corporation expressly adopts or ratifies a contract made by an officer or agent without authority, or if it impliedly ratifies it by accepting the benefits or by failure to repudiate the contract, it also becomes liable for false and fraudulent representations made by the officer or agent to induce the other party to enter into the contract.⁶⁹ And the

⁶⁶ *Baltimore Consol. Ry. Co. v. Pierce*, 89 Md. 495, 45 L. R. A. 527, 43 Atl. 940; *Daniel v. Petersburg R. Co.*, 117 N. C. 592, 4 L. R. A. (N. S.) 485, 23 S. E. 327; *Chicago, R. I. & P. R. Co. v. Radford*, 36 Okla. 657, 129 Pac. 834. See also *Hopkins Chemical Co. v. Read Drug & Chemical Co. of Baltimore City*, 124 Md. 210, 92 Atl. 478.

⁶⁷ *Baltimore Consol. Ry. Co. v. Pierce*, 89 Md. 495, 45 L. R. A. 527, 43 Atl. 940. See also *Philadelphia & B. & W. R. Co. v. Stumpo*, 112 Md. 571, 77 Atl. 266.

⁶⁸ *Connecticut. Morehouse v. Northrop*, 33 Conn. 380, 89 Am. Dec. 211.

Massachusetts. Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 22 L. R. A. 364, 39 Am. St. Rep. 467, 35 N. E. 776; *Dempsey v. Chambers*, 154 Mass. 330, 13 L. R. A. 219, 26 Am. St. Rep. 249, 28 N. E. 279.

New Jersey. Garrison v. Technic

Electrical Works, 55 N. J. Eq. 708, 37 Atl. 741.

New York. Carr v. National Bank & Loan Co. of Watertown, 167 N. Y. 375, 82 Am. St. Rep. 725, 60 N. E. 649.

Virginia. Owens v. Boyd Land Co., 95 Va. 560, 28 S. E. 950.

England. Eastern Counties Ry. Co. v. Broom, 6 Exch. 314.

"In case of the agent of a corporation, assuming to act in its behalf, committing a remediable wrong to another by some act outside the scope of his authority, if the corporation, with knowledge of the facts, ratifies his conduct, it is liable the same as if such act was done by its authority." *Topolewski v. Plankinton Packing Co.*, 143 Wis. 52, 126 N. W. 554 (headnote by the judge).

⁶⁹ *Colorado. Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509.

Connecticut. Morehouse v. Northrop, 33 Conn. 380, 89 Am. Dec. 211.

same is true of any other act constituting a fraud upon a third person. If it ratifies the act, it assumes responsibility for the fraud.⁷⁰ Although an individual director or trustee or other officer of a corporation may have no authority to act for the corporation in procuring the settlement or payment of a debt due to the corporation, yet, if he does act for it, and in doing so makes fraudulent representations or uses duress and the corporation receives the money, it is liable for the fraud or duress.⁷¹ The fact that the corporation does not know of the fraud when it ratifies the act or contract is immaterial, for its ratification makes the knowledge of the officer or agent its own knowledge.⁷²

In like manner, a corporation may adopt or ratify, and thus become liable for, a wrongful or false arrest and imprisonment or

Minnesota. Second Nat. Bank of St. Paul v. Howe, 40 Minn. 390, 12 Am. St. Rep. 744, 42 N. W. 200.

Mississippi. Walker v. Mobile & O. R. Co., 34 Miss. 245.

New Hampshire. Anderson v. Scott, 70 N. H. 350, 47 Atl. 607.

New Jersey. Garrison v. Technic Electrical Works, 55 N. J. Eq. 708, 37 Atl. 741.

New York. Adams v. Irving Nat. Bank of New York, 116 N. Y. 606, 6 L. R. A. 491, 15 Am. St. Rep. 447, 23 N. E. 7; Talmage v. Sanitary Security Co., 31 App. Div. 498, 52 N. Y. Supp. 139.

Texas. Texas Consol. Compress & Manufacturing Ass'n v. Dublin Compress & Manufacturing Co. (Tex. Civ. App.), 38 S. W. 404.

Virginia. Owens v. Boyd Land Co., 95 Va. 560, 28 S. E. 950; Crump v. United States Min. Co., 7 Gratt. 352, 56 Am. Dec. 116.

England. Lynde v. Anglo-Italian Hemp Spinning Co., [1896] 1 Ch. 178; In re Metropolitan Coal Consumers' Ass'n, [1892] 3 Ch. 1.

If a bank receives a note procured by an officer by means of false and fraudulent representations, it is liable for the fraud, although the officer may have had no authority to act for it in the matter, for in receiving the note it ratifies the transaction, including the

representations made by the officer. Second Nat. Bank of St. Paul v. Howe, 40 Minn. 390, 12 Am. St. Rep. 744, 42 N. W. 200.

⁷⁰ Where a bank has received the proceeds of a sale of bonds held by it for speculative purposes, such sale having been effected by fraud on the part of its managing officer, it cannot escape liability on the ground that the acts of the officer were individual acts and its business of buying and selling bonds was ultra vires. Carr v. National Bank & Loan Co. of Watertown, 167 N. Y. 375, 82 Am. St. Rep. 725, 60 N. E. 649, aff'g 43 N. Y. App. Div. 10, 59 N. Y. Supp. 618.

⁷¹ Adams v. Irving Nat. Bank of New York, 116 N. Y. 606, 6 L. R. A. 491, 15 Am. St. Rep. 447, 23 N. E. 7. In this case an officer of a bank induced a woman to pay money to the bank on account of a claim against her husband, by representing to her that her husband was in danger of arrest and that the arrest might be avoided by her payment. It was held that she could recover back the money paid, as the bank, having received the money in settlement, was estopped to deny the officer's authority to adopt the means he employed to procure its payment.

⁷² See §2254, supra.

malicious prosecution,⁷³ an assault and battery,⁷⁴ or, generally, any other tort; and if it ratifies an act, it becomes liable for personal or other injuries caused by negligence in doing the act.⁷⁵

Although ratification may be established circumstantially,⁷⁶ it can be inferred only from acts which evince the intention to ratify in a clear and unequivocal manner, and not from acts which may be readily and satisfactorily explained without involving any such intention.⁷⁷

⁷³ *Eastern Counties Ry. Co. v. Broom*, 6 Exch. 314.

⁷⁴ See *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631.

⁷⁵ *Nims v. Mt. Hermon Boys' School*, 160 Mass. 177, 22 L. R. A. 364, 39 Am. St. Rep. 467, 35 N. E. 776.

⁷⁶ "Ratification by a corporation of the acts of a person falsely assuming to have authority in the premises, may be established, circumstantially, as by conduct of those intrusted with the governing authority or general management of the corporate affairs clearly showing approval." *Topolewski v. Plankinton Packing Co.*, 143 Wis. 52, 126 N. W. 554 (headnote by the judge).

⁷⁷ *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631. In this case, an action against a sleeping car company for an alleged wilful and malicious assault and battery committed upon the plaintiff by the porter on the defendant's car, which was attached to the train on which the plaintiff was a passenger, when the plaintiff attempted to enter such car with the request that he be allowed to wash his hands therein, the plaintiff contended that even though the defendant could not otherwise be charged with liability for the porter's act, it was liable for such act by reason of its having ratified the same by retaining the porter in its employ after it acquired knowledge of his conduct. In disposing of this contention adversely

to the plaintiff, the court said: "It is incredible that the company should have intended to approve or ratify such conduct as that attributed to the porter. Ratification can only be inferred from acts which evince clearly and unequivocally the intention to ratify, and not from acts which may be readily and satisfactorily explained without involving any such intention. * * * Now, in this case, there were no witnesses to the incident, except the parties thereto. They gave very different accounts of it. The defendant, prompted by its previous knowledge of the porter, believed his story, and did not believe that of plaintiff. It illustrated the sincerity of its conviction by the very fact of retaining the porter, for if, after this incident, the porter had again committed a similar outrage, defendant would undoubtedly have subjected itself to a much more dangerous claim for damages. If it honestly believed that the porter was innocent of the outrageous conduct charged against him, his retention was, under such belief, an act of courageous justice, and certainly presents no element of ratification. Nor is the case affected by the fact that the porter was criminally prosecuted and convicted for assault and battery. His own testimony was not, under the law in force, admissible in that prosecution; and, moreover, he might have been convicted on evidence falling far short of the outrage charged by plaintiff. The porter had been discharged for other causes be-

§ 3342. — Assault and battery. A corporation may be liable for an assault and battery committed by its agent or servant⁷⁸ and is liable therefor when it was committed within the scope of the authority of the agent or servant and in the course of his employment,⁷⁹

fore the trial of this suit; and we think the defendant company cannot be charged with ratification of such an outrage, because, in the conflict between the statements of the parties, it believed its own servant, and, at all events, thought it just to preserve the status quo until the judicial determination of the dispute." See *Toledo, St. L. & W. R. Co. v. Gordon*, 143 Fed. 95, 98, an action against a railroad company for injuries sustained by plaintiff as a result of his being compelled by the conductor on defendant's freight train on which he was riding, apparently as a trespasser, to jump therefrom while it was in motion, in which the court said: "It would, indeed, be a harsh rule—harsh in its effect on all employees—that would hold a railroad company to have ratified the employee's act [so as to be liable for exemplary damages] merely because before trial the employee was not discharged. 'Such rule would put their continued employment in jeopardy every time an accident occurred, not because the employee was shown to have been guilty of wanton conduct, but because the railway company stood in danger that wantonness might be established.'"

In *Southern R. Co. v. Grubles*, 115 Va. 876, 80 S. E. 749, an action against a railroad company for an assault and battery committed by its conductor upon the plaintiff while the latter was a passenger on the defendant's train, the court held that the plaintiff's contention, that the failure of the defendant to discharge the conductor before the trial was a ratification of the latter's act which rendered the defendant liable for exemplary damages, was untenable, and quoted approvingly

the language of the court in *Toledo, St. L. & W. R. Co. v. Gordon*, supra, as above set out.

78 United States. *First Nat. Bank of Carlisle, Pennsylvania v. Graham*, 100 U. S. 699, 25 L. Ed. 750.

Alabama. *Gassenheimer v. Western Ry. of Alabama*, 175 Ala. 319, 40 L. R. A. (N. S.) 998, 57 So. 718.

Illinois. *Haggerty v. Potter*, 111 Ill. App. 433, 434.

Indiana. *Singer Sewing Mach. Co. v. Phipps*, 49 Ind. App. 116, 94 N. E. 793.

Iowa. *White v. International Text-book Co.*, 173 Iowa 192, 155 N. W. 298.

Louisiana. *Matthews v. Otis Mfg. Co.*, 142 La. —, 76 So. 249.

Texas. *Wells Fargo & Co. Express v. Sobel*, 59 Tex. Civ. App. 62, 125 S. W. 925.

"The idea that a corporation cannot be liable for beating because it has no body to be beaten, must be founded on the assumption that no party can inflict an injury which it is not capable of receiving. We confess to a want of respect when such whimsical notions are advanced by grave and learned judges. As well might it be said that a man cannot commit a rape because he cannot be the subject of one." *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353, 374.

79 United States. *Southern Express Co. v. Platten*, 93 Fed. 936.

Connecticut. *Maisenbacker v. Society Concordia*, 71 Conn. 369, 71 Am. St. Rep. 213, 42 Atl. 67.

Florida. *Edwards v. Union Bank*, 1 Branch 136.

Illinois. *St. Louis, A. & C. R. Co. v. Dalby*, 19 Ill. 353.

Louisiana. *Ware v. Barataria & L.*

otherwise, however—unless it owed some special duty to the person

Canal Co., 15 La. 169, 35 Am. Dec. 189.

Massachusetts. Ramsden v. Boston & A. R. Co., 104 Mass. 117, 6 Am. Rep. 200.

New Jersey. New York, L. E. & W. Ry. Co. v. Haring, 47 N. J. L. 137, 54 Am. Rep. 123; Brokaw v. New Jersey R. & Transp. Co., 32 N. J. L. 328, 90 Am. Dec. 659.

Ohio. Passenger R. Co. v. Young, 21 Ohio St. 518, 8 Am. Rep. 78; Atlantic & G. W. Ry. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382.

South Carolina. Palmer v. Charlotte, C. & A. R. Co., 3 S. C. 580, 16 Am. Rep. 750; Redding v. South Carolina R. Co., 3 S. C. 1, 16 Am. Rep. 681.

Wisconsin. Craker v. Chicago & N. W. Ry. Co., 36 Wis. 657, 17 Am. Rep. 504.

England. Eastern Counties Ry. Co. v. Broom, 6 Exch. 314.

Formerly the doctrine was to the contrary. See 1 Kyd, Corp. 71; Orr v. Bank of United States, 1 Ohio 36, 13 Am. Dec. 588.

See, moreover, in connection with this contrary doctrine, Haggerty v. Potter, 111 Ill. App. 433, in which it was held that a corporation is not liable for an assault and battery unless it appears that at the time of the assault it owed some duty to the person assaulted, and that the person committing the assault was acting under its authority.

But compare with this Illinois case, the later one of Brink's Chicago City Exp. Co. v. Brophy, 136 Ill. App. 145, in which it was held that a corporation is liable for an assault and battery committed by one of its servants where the servant at the time of committing the tort was acting in an effort to carry out the corporation's orders.

A railroad company is not liable for

an assault and battery committed by one of its servants upon a person who was on the company's freight train either as a trespasser or by the permission of the conductor unless such wrong was committed by its servant in the scope of his employment. Smith v. Louisville, E. & St. L. R. Co., 124 Ind. 394, 24 N. E. 753.

"To charge a railroad company for the wilful wrong of an employee in forcing a boy from a freight train while in motion, whereby he is injured, it must appear that the act was in the course of the employee's business, and within the scope of his authority; the boy being a trespasser, not a passenger." Bess v. Chesapeake & O. Ry. Co., 35 W. Va. 492, 29 Am. St. Rep. 820, 14 S. E. 234. But see, in connection with this case, Smith v. Savannah, F. & W. Ry. Co., 100 Ga. 96, 27 S. E. 725 (memorandum decision), in which the court held in its headnote that "there being evidence to show that the plaintiff's child was wantonly pushed from a car forming a part of a moving train of the defendant, and seriously injured, and also evidence from which it could have been inferred that the person by whom the child was pushed from the car was at the time in the employment and service of the defendant on that train, the case should have been submitted to the jury. Though the child may have been a trespasser, the company was, under section 3033 of the Code, liable for the injuries he sustained, if they were caused by the wilful act of its employee upon the train; and this is so whether ejecting trespassers therefrom was or was not within the scope of this employee's duties thereon."

"Where the agent begins a quarrel while acting within the scope of his agency, and immediately follows it

injured—⁸⁰ where the act was committed outside of the course of the employment of the agent or servant, and to gratify his own malice.⁸¹ So, it has been held that participation by the superintendent of a cotton mill in the “ducking” in the mill reservoir by the overseers of one whose alleged purpose was to entice away the mill hands will render the mill corporation liable to the one assaulted when such corporation, even granting that it would not have sanctioned the particular act complained of, has placed the matter of the methods

up by a violent assault, the master will be liable, as the law under the circumstances will not undertake to say when in the course of the assault he ceased to act as agent, and acted upon his own responsibility.” *New Ellerslie Fishing Club v. Stewart*, 123 Ky. 8, 9 L. R. A. (N. S.) 475, 93 S. W. 598.

⁸⁰ See § 3356, *infra*.

⁸¹ *California*. *Stephenson v. Southern Pac. Co.*, 93 Cal. 558, 15 L. R. A. 475, 27 Am. St. Rep. 223, 29 Pac. 234.

Missouri. *Snyder v. Hannibal & St. Joseph R. Co.*, 60 Mo. 413.

New Jersey. *Ayerigg's Ex'rs v. New York & E. R. Co.*, 30 N. J. L. 460.

New York. *Mott v. Consumers' Ice Co.*, 73 N. Y. 543; *Rounds v. Delaware, L. & W. R. Co.*, 64 N. Y. 129, 21 Am. Rep. 597.

Ohio. *Little Miami R. Co. v. Wetmore*, 19 Ohio St. 110, 2 Am. Rep. 373.

Where, in an action against a railroad company by one who as a trespasser on defendant's train was, to his injury, forced therefrom by defendant's brakeman while the train was in motion, there is evidence tending to show that defendant's conductor was alone vested with power to determine who should be allowed to ride on the train and who should be removed therefrom, it is error to instruct the jury that “even though the instruction and rules of the company placed the matter of the removal of trespassers, or nonpaying passengers, from the trains under the immediate

charge and discretion of the conductor, and it was the duty of the brakeman to put off such persons only by the direction of the conductor as his superior, the defendant is not relieved from liability simply because, in this instance, the brakeman acted without orders or direction from the conductor. But if the brakeman, not as a part of his duty as an employee of the defendant, but for the gratification of his own feelings, wilfully or maliciously assaulted the plaintiff, and in this assault the plaintiff fell to the ground, then the defendant is not liable. The point you are to observe is this: that as the defendant owed the plaintiff no duty as a common carrier, therefore, unless the brakeman, as an employee of the company engaged in operating the train, acted for the purpose of putting him off, and freeing the train from him as a trespasser, the defendant is not liable for this act,” and to refuse to instruct them that “acts done by an employee while engaged in the service of his employer are not necessarily done in the course of his employment, as the term is used in law, and if an employee, while engaged in the service of his principal to perform a special service, goes beyond or outside of the scope of his employment, and in doing so injures one to whom, like the plaintiff in this case, the employer owes no duty, the employer is not liable.” *Marion v. Chicago, R. I. & P. R. Co.*, 59 Iowa 428, 44 Am. Rep. 687, 13 N. W. 415.

to be employed to prevent interference with its operatives in the hands of such superintendent.⁸²

⁸² *Fields v. Lancaster Cotton Mills*, 77 S. C. 546, 11 L. R. A. (N. S.) 822, 122 Am. St. Rep. 593, 58 S. E. 608. Said the court: "Without evidence of the participation of Skipper, the superintendent of the mill, there might be some question whether the mill would be liable for the wrong committed by the overseers, who had no authority to act for the mill beyond warning such persons as Fields [the plaintiff] to keep off the mill property and to appeal to the law if the warning should be unheeded. But there was a conflict of evidence on the point of Skipper's participation. All the overseers testified the seizure and ducking of the plaintiff was the result of his having drawn a knife on Hope [one of the overseers] without provocation, and they all support Skipper in his statement that he had nothing whatever to do with the assault. Skipper admitted that he had some years before thrown into the water a man who had troubled him in a similar way, and that on this occasion he stood by and saw Hope and others carrying the plaintiff to the reservoir with the avowed purpose of throwing him in. He testified, however, that he had no idea there was any serious intention to carry out the threat. The plaintiff's testimony was to the effect that Skipper did not actually lay hands on him and was a little distance apart when he was cast into the water; but he also testified Skipper was one of the ringleaders of the mob, and when he was pulled out said: 'Next time I come back here he would do me a damn sight worse.' From this statement of the evidence it is manifest the issues of participation by the superintendent and the motive of the assault were for the decision of the jury. The superintendent

of a cotton mill is usually the representative of the mill with respect to the hiring and management of its operatives and other features of its mechanical operations. The evidence on the part of the defendant shows the superintendent, in this instance, was intrusted with the control of its policy and the methods to be employed to prevent interference with the operatives. The Lancaster Cotton Mills [the defendant] cannot, therefore, escape the liability to third persons for any action taken by him with respect to the matters it had placed under his control. It makes no difference that the action was unlawful and that it would not have been sanctioned by the corporation itself. 'The principal is liable for the acts of his agent done in the course of his employment.' * * * There was no error in refusing the motions for nonsuit and for a new trial made on the grounds that there was no evidence of the participation by the Lancaster Cotton Mills in the tort."

Where, although an assault and battery by an agent of a corporation was not one of the duties of his employment, yet it was committed in the course of the performance of his duties and was the result of his compliance with the orders and directions given him relative to the subject-matter of his dispute with the person assaulted, it becomes a jury question whether his tortious act was within the scope of his employment. *Burnham v. Elk Laundry Co.*, 121 Minn. 1, 139 N. W. 1069.

Evidence, in an action against one railroad company by an employee of another for an assault and battery committed upon him by a special agent of the defendant as a result of the plaintiff's attempting to secure for

Where the ejecting of trespassers from a freight train comes within the duties of the brakeman thereon, the railroad company is liable for personal injuries sustained by a trespasser as a result of the brakeman's kicking him from the train on the failure of his co-trespasser to pay the tribute demanded.⁸³

his company information as to the defendant's freight business by a habitual noting of the numbers on defendant's freight cars, etc., held sufficient to justify the jury in finding that, in committing such assault and battery, the special agent was acting in the course of his employment, for the benefit of the defendant, and in the line of his duty. *St. Louis, I. M. & S. R. Co. v. Grant*, 75 Ark. 579, 88 S. W. 580, 1133.

Where the agent of the defendant corporation was sent to the plaintiff's home to foreclose a chattel mortgage, it is a jury question whether he was acting as the corporation's agent when, in the course of his attempt to take forcible possession of the mortgaged property, he committed an assault upon the plaintiff. *Anderson v. International Harvester Co. of America*, 104 Minn. 49, 16 L. R. A. (N. S.) 440, 116 N. W. 101.

In a Kentucky case, a fishing club was held liable for the act of its servant, employed to prevent trespassers from fishing in its waters, in wounding plaintiff while he was on its premises and as a result of the servant's having found him fishing as he was, in fact, entitled to do. *New Ellerslie Fishing Club v. Stewart*, 123 Ky. 8, 9 L. R. A. (N. S.) 475, 93 S. W. 598.

"The master is liable for the act of his servant in assaulting and arresting one whom he erroneously believed to be a trespasser, where he had the authority to eject trespassers from the master's premises, and to arrest them therefor. But objection is made that the servant was not authorized to remove or arrest one who

was not a trespasser, or who was rightfully upon the premises; and that, if he did so, he stepped aside from the scope of his employment, and acted merely on his own account. * * * To adopt such a rule would result in a manifest absurdity. It would be to say, in effect: 'We will protect a real trespasser against the use of excessive force, but we cannot give any protection or redress to one who is not trespassing.' It would put the rights of the guilty above those of the innocent. The idea is apparently a relic of the ancient rule, long since abandoned, that it was *ultra vires* for the corporation to do any wrong, or authorize a tort, and that it could not, therefore, be liable. The question is not as to the [wounded person's] * * * intent or status; but is, rather, as to the watchman's belief or supposition. If he supposed [the one whom he assaulted] * * * to be about to unlawfully board a train, or commit other depredation, he acted within the scope of his employment in dealing with him as such a person, and the master must answer for his mistake." *Childers v. Southern Pac. Co.*, 20 N. M. 366, 149 Pac. 307.

Amended and substituted petition in action against corporation for shooting of plaintiff by defendant's night watchman while plaintiff was "on or near" defendant's premises held good on demurrer. *Robards v. P. Bannon Sewer Pipe Co.*, 130 Ky. 380, 18 L. R. A. (N. S.) 923, 132 Am. St. Rep. 394, 113 S. W. 429.

⁸³ *St. Louis, I. M. & S. R. Co. v. Pell*, 89 Ark. 87, 115 S. W. 957. See also *Barrett v. Minneapolis, St. P. &*

Again, a manufacturing company will be liable to one of its employees upon whom its foreman used excessive force in stopping a fight between such employee and one of his fellows, it being within the scope of the foreman's duties to preserve order in the factory.⁸⁴

S. S. M. R. Co., 106 Minn. 51, 18 L. R. A. (N. S.) 416, 130 Am. St. Rep. 585, 117 N. W. 1047 (distinguishing *Brevig v. Chicago, St. P., M. & O. Ry. Co.*, 64 Minn. 168, 66 N. W. 401), and compare *Illinois Cent. R. Co. v. Latham*, 72 Miss. 32, 16 So. 757.

"The rule that carriers of passengers are liable for the negligent or wrongful acts of their servants and employees does not always depend upon the fact that the carrier owes a duty or is under some obligation to the party injured. Where a person is found upon a train who refuses to pay his fare, the company owes him no duty, and he may be removed; but if in removing him he is wrongfully injured by personal violence, or by being thrown from the train when in motion or the like, he may recover from the company for his injuries. This is no more than the application of the ancient rule that if one person come into the dwelling-house of another without right, after requesting him to depart, and his refusal to comply with the request, he may be removed by gently laying hands upon him and using such force as is reasonably necessary to effect the object. But if excessive force be used the act is a wrongful assault, for which a recovery may be had. The true test by which to determine the liability of the master or employer for the negligent or wrongful acts of the servant or employee, in all this class of cases, is, was the wrongful or negligent act done in the course and scope of the employment of the servant or agent? If it was, the employer is liable. But if the employee does any act out of his employment, as committing an assault with his own hands upon a stranger,

and independent of his employment, the employer is not liable. For example: if an agent, conductor, or other employee should assault a loafer in a waiting-room, in a personal quarrel having no relation to his employment, the company would not be liable in damages." *Johnson v. Chicago, R. I. & P. R. Co.*, 58 Iowa 348, 12 N. W. 329.

A brakeman on a freight train, who pushes a boy, riding as a trespasser on the truss rods under one of the cars, off from such rods in circumstances making his act one of peril to the boy's life, renders the railroad company liable for the injuries actually sustained by the boy as a result thereof. *Thurman v. Louisville & N. R. Co.*, 17 Ky. L. Rep. 1343, 34 S. W. 893.

⁸⁴ *Nettle v. Flour City Ornamental Iron Works*, 126 Minn. 530, 148 N. W. 43.

Where the manager of a corporation, following his discharge of one of his subordinates in consequence of a difference arising between them and while such subordinate is still in the corporation's place of business but is in the act of leaving the same, commits an aggravated assault, which grew out of some difference between them about the subordinate's manner of doing his work and from the temper evoked by the fact and manner of his dismissal, the corporation is liable therefor. *Jebeles-Colias Confectionery Co. v. Booze*, 181 Ala. 456, 62 So. 12.

The local manager of a telephone company demanded of one of the company's operators, who was about to leave its service, that she sign a voucher for the compensation due her, and, upon her refusing to do so, vio-

But a person, who, while walking or standing near a railroad track, was struck by a piece of coal purposely and maliciously thrown at him by the fireman on a passing train, cannot recover from the railroad company for the resultant injuries sustained by him, the act of the fireman not being one within the scope of his employment, it having been committed from a personal motive and not in furthering the interests of the company.⁸⁵

§ 3343. — Conspiracy. Where an officer, agent or servant of a corporation maliciously or wrongfully, but in the course of his employment, enters into a conspiracy to defraud or commit other wrongs against another for the benefit of the corporation, the latter will be liable.⁸⁶ "It is very clear that a corporation can be guilty of a combination or conspiracy with other corporations or persons aimed at and accomplishing the injury of other corporations or persons. It is a mere legal entity, impersonal, and in itself is incapable of so doing; but it is moved by human beings, is operated by human agents, and is thus an active person, not only for damage done in the breach of contracts, but for torts doing others harm. It will not avail either to say that it has no power within the scope of its authority to do wrong, and can do only the lawful things contemplated by the

lently assaulted and beat her. Held, in an action against the company by such operator for such assault and battery, that the tortious act of the manager was not within the scope of his employment, and, therefore, that the company was not liable. *Crelly v. Missouri & K. Tel. Co.*, 84 Kan. 19, 33 L. R. A. (N. S.) 328, 113 Pac. 386.

⁸⁵ *Louisville & N. R. Co. v. Routt*, 25 Ky. L. Rep. 887, 76 S. W. 513.

Nonsuit, in an action by a trespasser on a passenger train for personal injuries sustained as a result of his being caused to fall, while the train was in motion, from his place on the platform on the forward end of the car next to the tender, by being struck by a lump of coal thrown at him by the engineer, held properly refused. *Polatty v. Charleston & W. C. Ry.*, 67 S. C. 391, 100 Am. St. Rep. 750, 45 S. E. 932.

A railroad company is not liable for

the unnecessary and wanton act of its engineer in starting his engine towards a street car which was crossing the railroad track with the intent to frighten the passengers on such car, as a result of which one of such passengers jumped from the car and was injured. *Stephenson v. Southern Pac. Co.*, 93 Cal. 558, 15 L. R. A. 475, 27 Am. St. Rep. 223, 29 Pac. 234.

⁸⁶ *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208; *Buffalo Lubricating Oil Co. v. Standard Oil Co.*, 38 Hun (N. Y.) 637, aff'd 106 N. Y. 669, 12 N. E. 825; *Dodge v. Bradstreet Co.*, 59 How. Pr. (N. Y.) 104; *Zinc Carbonate Co. v. First Nat. Bank*, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229. See also *Aberthaw Const. Co. v. Cameron*, 194 Mass. 208, 120 Am. St. Rep. 542, 80 N. E. 478; *Caffall v. Bandera Tel. Co.*, — Tex. Civ. App. —, 136 S. W. 105.

state in the bestowal of its charter, and that, therefore, so far as its agents make it do wrong, its acts are outside the field of its legal power, ultra vires, and void, not binding the corporation, and thus that no tort binds it. Such was the old common-law rule, but it is completely overruled. * * * That doctrine may do as to contracts, but it cannot plead this doctrine to screen itself from its wrongs done to others against their will and rights."⁸⁷

§ 3344. — Conversion. A corporation is liable for a conversion of property by an officer or agent in the course of his employment.⁸⁸ But where an officer, agent or servant of a corporation converts the

⁸⁷ *West Virginia Transp. Co. v. Standard Oil Co.*, 50 W. Va. 611, 56 L. R. A. 804, 88 Am. St. Rep. 895, 40 S. E. 591.

"We entertain no doubt that an action against a corporation may be maintained to recover damages caused by conspiracy. * * * If actions can be maintained against corporations for malicious prosecution, libel, assault and battery, and other torts, we can perceive no reason for holding that actions may not be maintained against them for conspiracy. It is well settled * * * that the malice and wicked intent needful to sustain such actions may be imputed to corporations." *Buffalo Lubricating Oil Co. v. Acme Oil Co.*, 106 N. Y. 669, 12 N. E. 825.

In *Dorsey Mach. Co. v. McCaffrey*, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208, it was held that, if the directors of a corporation and the holders of the greater number of its shares of stock, knowing it to be insolvent, enter into a scheme to fraudulently increase its capital stock, representing and pretending that it is not indebted, and that the increase is solely for the purpose of enabling it to enlarge its business, and that it is and has been prosperous and successful and thereby induce persons to purchase and pay for the new stock, the corporation, as well as the

guilty directors and stockholders, is answerable for the damages sustained by such purchasers, in an action for the conspiracy and fraud.

In *Rogers v. Vicksburg, S. & P. R. Co.*, 194 Fed. 65, an action for damages against a railroad company, based on the ground, inter alia, that it was a party to a conspiracy to take the life of a certain man who had been lynched by a mob, to carry which mob the company had chartered a special train to the mob's leader, the circuit court of appeals reversed the judgment of the circuit court, entered on a directed verdict for the defendant and remanded the cause with instructions to award a new trial.

⁸⁸ *Fishkill Sav. Institution v. National Bank of Fishkill*, 80 N. Y. 162, 36 Am. Rep. 595; *Beach v. Fulton Bank*, 7 Cow. (N. Y.) 485; *Yarborough v. Bank of England*, 16 East 6.

"The corporation is primarily liable for the conversion or misappropriation of moneys [belonging to third persons] by its employees. The employees of the corporation are its agents within the line of their respective duty. * * * The usual remedy * * * is an action against the corporation for the recovery of the money misappropriated." *Sweet v. Montpelier Sav. Bank & Trust Co.*, 69 Kan. 641, 77 Pac. 538.

property of another when he is not acting for the corporation, or when, although he may assume to act for it, he has no actual or apparent authority to do so, the corporation will not be liable therefor.⁸⁹

§ 3345. — False arrest and imprisonment and malicious prosecution. It would seem not to be open to question that, in a proper case, an action for false arrest and imprisonment⁹⁰ or for malicious prosecution will lie against a corporation,⁹¹ and it has been held that

⁸⁹ *School Dist. v. De Weese*, 100 Fed. 705; *Layman v. Slocomb & Co.*, 7 Pennew. (Del.) 403, 76 Atl. 1094; *Preston v. Marquette County Sav. Bank*, 122 Mich. 696.

A bank is not liable for the misappropriation of money by its cashier, acting as agent for a third party, in his individual capacity, although he may have been sole manager of the bank. *School Dist. v. De Weese*, 100 Fed. 705.

A bank which agreed to make a loan against collateral and thereafter turns the collateral over to one of its officers who made the loan personally and thereafter converted the collateral, is not liable for such conversion. *McKinnon v. Western Development Co.*, 212 Fed. 702. See also *Schumacher v. Greene Cananea Copper Co.*, 117 Minn. 124, 134 N. W. 510.

A corporation sued for conversion in that certain of its employees assisted the owner of mortgaged chattels who was indebted to the corporation in preventing the seizure of such chattels by an agent of the mortgagee is entitled to the general affirmative charge requested by it, the act of its employees being so disconnected and apart from the service which they were employed to render as not to subject it to any liability therefor. *Henderson-Mizell Mercantile Co. v. Chapman & Co.*, 3 Ala. App. 296, 57 So. 82.

⁹⁰ *United States*. *First Nat. Bank of Carlisle, Pennsylvania v. Graham*, 100 U. S. 699, 25 L. Ed. 750.

Arkansas. *Mayfield v. St. Louis, I. M. & S. Ry. Co.*, 97 Ark. 24, 32 L. R. A. (N. S.) 525, 133 S. W. 168.

District of Columbia. *United Cigar Stores Co. v. Young*, 36 App. Cas. 390.

Iowa. *White v. International Text-book Co.*, 173 Iowa 192, 155 N. W. 298.

Minnesota. *Hopkins v. Milaca State Bank*, 120 Minn. 533, 139 N. W. 814; *Peake v. Milaca State Bank*, 120 Minn. 455, Ann. Cas. 1914 B 1284, 139 N. W. 813.

Missouri. *Wehmeyer v. Mulvihill*, 150 Mo. App. 197, 130 S. W. 681.

Wisconsin. See *Topolewski & Plankinton Packing Co.*, 143 Wis. 52, 126 N. W. 554.

⁹¹ *United States*. *First Nat. Bank of Carlisle, Pennsylvania v. Graham*, 100 U. S. 699, 25 L. Ed. 750.

Iowa. *White v. International Text-book Co.*, 173 Iowa 192, 155 N. W. 298.

Massachusetts. *White v. Apsley Rubber Co.*, 194 Mass. 97, 8 L. R. A. (N. S.) 484, 80 N. E. 500.

Minnesota. *Hopkins v. Milaca State Bank*, 120 Minn. 533, 139 N. W. 814; *Peake v. Milaca State Bank*, 120 Minn. 455, Ann. Cas. 1914 B 1284, 139 N. W. 813.

Montana. *Grorud v. Loss*, 48 Mont. 274, 136 Pac. 1069.

New York. *Scott v. Dennett Surpassing Coffee Co.*, 51 App. Div. 321, 64 N. Y. Supp. 1016.

North Carolina. *Minter v. Southern Exp. Co.*, 153 N. C. 507, 69 S. E. 497.

Wisconsin. See *Topolewski v. Plankinton Packing Co.*, 143 Wis. 52, 126 N. W. 554.

a railroad company, or any other corporation, is liable for a false arrest and imprisonment or a malicious prosecution made, caused or instituted by an officer, agent or servant in the course of his employment, although he may have had no authority to cause arrests or imprisonment or to institute criminal prosecutions without probable cause. If he has general authority to make or cause arrests or institute prosecutions for offenses against the corporation, and under color of such authority makes or causes a false arrest or prosecution without probable cause, his act is in the course of his employment, and this is sufficient to render his principal liable; and the malice of the officer, agent or servant in such a case is imputable to the corporation.⁹² And it has also been held that the same is true where an

⁹² **United States.** *Lake Shore & M. S. R. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97; *Harris v. Louisville, N. O. & T. R. Co.*, 35 Fed. 116; *Copley v. Grover & Baker Sew-Mach. Co.*, 2 Woods 494, Fed. Cas. No. 3,213.

Alabama. *Jordan v. Alabama Great Southern R. Co.*, 74 Ala. 85, 49 Am. Rep. 800, overruling *Owsley v. Montgomery & W. P. R. Co.*, 37 Ala. 560.

Illinois. *Springfield Engine & Threshing Co. v. Green*, 25 Ill. App. 106.

Indiana. *Pennsylvania Co. v. Weddle*, 100 Ind. 138; *American Exp. Co. v. Patterson*, 73 Ind. 430.

Kansas. *Atchison, T. & S. F. R. Co. v. Brown*, 57 Kan. 785, 48 Pac. 31; *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609.

Kentucky. *Louisville & N. R. Co. v. Owens*, 164 Ky. 557, 175 S. W. 1039.

Maryland. *Baltimore & Y. Turnpike Road v. Green*, 86 Md. 161, 37 Atl. 642.

Massachusetts. *Krulevitz v. Eastern R. R.*, 140 Mass. 573, 5 N. E. 500; *Murdock v. Boston & A. R. Co.*, 133 Mass. 15, 41 Am. Rep. 57, note, 43 Am. Rep. 480; *Reed v. Home Sav. Bank*, 130 Mass. 443, 39 Am. Rep. 468.

Michigan. *Turner v. Phoenix Ins. Co.*, 55 Mich. 236, 21 N. W. 326.

Mississippi. *Williams v. Planters'*

Ins. Co., 57 Miss. 759, 34 Am. Rep. 494.

Missouri. *Boogher v. Life Ass'n of America*, 75 Mo. 319, 42 Am. Rep. 413, overruling *Childs v. Bank of Missouri*, 17 Mo. 213, and *Gillett v. Missouri Valley R. Co.*, 55 Mo. 315, 17 Am. Rep. 653.

Nevada. *Ricord v. Central Pac. R. Co.*, 15 Nev. 167.

New Jersey. *Vance v. Erie Ry. Co.*, 32 N. J. L. 334, 90 Am. Dec. 665.

New York. *Willard v. Holmes, Booth & Haydens*, 142 N. Y. 492, 37 N. E. 480; *Palmeri v. Manhattan Ry. Co.*, 133 N. Y. 261, 16 L. R. A. 136, 28 Am. St. Rep. 632, 30 N. E. 1001; *Morton v. Metropolitan Life Ins. Co.*, 103 N. Y. 645, 34 Hun 366; *Lynch v. Metropolitan El. Ry. Co.*, 90 N. Y. 77, 43 Am. Rep. 141; *Scott v. Dennett Surpassing Coffee Co.*, 51 App. Div. 321, 64 N. Y. Supp. 1016; *Manasha v. Royal Ben. Society*, 21 Misc. 474, 47 N. Y. Supp. 628, 20 Misc. 732, 46 N. Y. Supp. 1096.

North Carolina. *Hussey v. Norfolk Southern R. Co.*, 98 N. C. 34, 2 Am. St. Rep. 312, 3 S. E. 923.

Oklahoma. *Chicago, R. I. & P. R. Co. v. Holliday*, 30 Okla. 680, 39 L. R. A. (N. S.) 205, 120 Pac. 927.

Tennessee. *Wheless v. Second Nat. Bank*, 1 Baxt. 469, 25 Am. Rep. 783.

England. *Eastern Counties Ry. Co.*

officer, agent or servant of a corporation maliciously or wrongfully, but in the course of his employment, institutes or prosecutes a civil action, attachment or other proceeding, in the name of and for the corporation.⁹³ Of course, where the agent or servant accomplishing a false arrest or imprisonment or instituting a malicious prosecution, is not, at the time, acting within the scope of his authority or in the course of his employment, the corporation will not be liable.⁹⁴ More-

v. Broom, 6 Exch. 314; *Edwards v. Midland Ry. Co.*, 6 Q. B. Div. 287.

Thus where the electric light bulbs of a corporation have been broken by unknown persons and a watchman in the corporation's employ causes the arrest of a person whom he suspects of having broken some of them, he is acting for the benefit of the corporation, and if the arrest is illegal and without probable cause, the corporation will be liable to the person arrested, and the fact that the arrest is actually made by some one other than the watchman who instigated it does not affect the corporation's liability. *Pearson v. Great Southern Lumber Co.*, 134 La. 117, L. R. A. 1916 F 1247, 63 So. 759.

The corporation is liable if the act was authorized or ratified by the corporation. *Farmers' Mut. Fire Ins. Ass'n v. Stewart*, 167 Ind. 544, 79 N. E. 490.

Where, in an action against a corporation for malicious prosecution, it appears that in prosecuting the plaintiff the corporation's agent was not acting in any personal or private capacity but assumed to act in the corporation's interest and in the furtherance of its business in a matter over which he had general supervision and that the corporation's attorney was advised of the agent's contemplated action, and after plaintiff's arrest employed counsel to take charge of the case, the question of the corporation's liability for its agent's act will, at least, be one for the jury.

Lammers v. Mason, 123 Minn. 204, 149 N. W. 359.

⁹³ **Alabama.** *Jefferson County Sav. Bank v. Eborn*, 84 Ala. 529, 4 So. 386.

Connecticut. *Goodspeed v. East Haddam Bank*, 22 Conn. 530, 58 Am. Dec. 439.

Kansas. *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609; *Western News Co. v. Wilmarth*, 33 Kan. 510, 6 Pac. 786.

Michigan. *Wachsmuth v. Merchants' Nat. Bank*, 96 Mich. 426, 21 L. R. A. 278, 56 N. W. 9.

Tennessee. *Wheless v. Second Nat. Bank*, 1 Baxt. 469, 25 Am. Rep. 783.

⁹⁴ **Atchison, T. & S. F. R. Co. v. Brown, 57 Kan. 785, 48 Pac. 31; *Walker v. Culman*, 9 Kan. App. 691, 59 Pac. 606; *Central Ry. Co. v. Brewer*, 78 Md. 394, 27 L. R. A. 63, 28 Atl. 615; *Tolchester Beach Improvement Co. of Kent County v. Steinmeier*, 72 Md. 313, 8 L. R. A. 846, 20 Atl. 188; *Carter v. Howe Mach. Co.*, 51 Md. 290, 34 Am. Rep. 311; *Mulligan v. New York & R. B. Ry. Co.*, 129 N. Y. 506, 14 L. R. A. 791, 26 Am. St. Rep. 539, 29 N. E. 952; *Mali v. Lord*, 39 N. Y. 381, 100 Am. Dec. 448; *Allen v. London & S. W. Ry. Co.*, L. R. 6 Q. B. 65; *Poulton v. London & S. W. Ry. Co.*, L. R. 2 Q. B. 534.**

Thus a railroad company will not be liable for the act of its station cashier in causing the arrest and imprisonment of a former passenger on the company's train, after his arrival at his hotel, on the unfounded charge of having stolen certain of the com-

over, there are courts which take the position that, except perhaps where the arrest and imprisonment or the prosecution was brought about for the purpose of preventing the commission of a crime against the corporation or of nullifying the effect of one actually committed against it, as, for example, by recovering property stolen from it,⁹⁵

pany's money of which the cashier had the custody, where the company has neither expressly authorized the act nor ratified it, such act not coming within the scope of the agent's authority and not being done in the ordinary course of the company's business. *Daniel v. Atlantic Coast Line R. Co.*, 136 N. C. 517, 67 L. R. A. 455, 1 Ann. Cas. 718, 48 S. E. 816.

It seems that want of power in the president-manager of a corporation, sued for malicious prosecution, to bind the corporation in the matter of the institution of the prosecution forming the basis of the action may be proved by the by-laws and minutes of the corporation. *Schwarting v. Van Wie New York Grocery Co.*, 69 N. Y. App. Div. 282, 74 N. Y. Supp. 747. See § 1896 et seq.

95 "There is a marked distinction between an act done for the purpose of protecting the property by preventing a felony or of recovering it back, and an act done for the purpose of punishing the offender for that which has already been done. There is no implied authority in a person having the custody of property to take such steps as he thinks fit to punish a person who he supposes has done something with reference to the property which he has not done. The act of punishing the offender is not anything done with reference to the property. It is done merely for the purpose of vindicating justice. And in this respect there is no difference between a railway company, which is a corporation, and a private individual. If the law were that the defendants are responsible for the act of their booking

clerk in giving the plaintiff into custody on an unfounded charge, every shopkeeper in London would be answerable for any act done by a shopman left in his shop who chose to accuse a person of having attempted to plunder the shop, every merchant would be responsible for a similar act of his clerk, and every gentleman for the act of his butler or coachman." *Allen v. London & S. W. Ry. Co.*, L. R. 6 Q. B. 65 (per Blackburn, J.).

"For us to say that an agent can by his acts subject his principal to liability in damages to any one injured by his said acts, done when he was not about his master's business, and had no express or implied authority to do them, but was merely seeking to avenge a supposed wrong already committed or to vindicate public justice, would be carrying the doctrine of respondeat superior far beyond its acknowledged limits. A servant intrusted with his master's goods may do what is necessary to preserve and protect them, because his authority to do so is clearly implied by the nature of the service; but when the property has been taken from his custody or stolen, and the crime has already been committed, it cannot be said that a criminal prosecution is necessary for its preservation or protection. This may lead to the punishment of the thief or the trespasser, but it certainly will not restore the property, or tend in any degree to preserve or protect it. It is an act clearly without the scope of the agency, and cannot possibly be brought within the limits of the implied authority of the agent. It would seem that so plain a proposi-

such act cannot be deemed to come within the scope of the agent's or servant's authority or to have been committed in the course of his

tion should need neither argument nor authority to support it, but we are abundantly supplied with both in the cases upon the subject. It is not intended to assert that a principal cannot be held responsible for the wilful or malicious acts of the agent, when done within the scope of his authority, but that he is not liable for such acts, unless previously expressly authorized or subsequently ratified, when they are done outside of the course of the agent's employment, and beyond the scope of his authority, as when the agent steps aside from the duties assigned to him by the principle to gratify some personal animosity, or to give vent to some private feeling of his own (*McManus v. Crickett*, 1 East, 106), or, as is forcibly stated by Lord Kenyon in the case cited, quoting in part from Lord Holt: 'No master is chargeable with the acts of his servant but when he acts in the execution of the authority given him. Now, when a servant quits sight of the object for which he is employed, and, without having in view his master's orders, pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be answerable for his acts.' * * * It may * * * be gathered from the books as a general rule, which is clearly applicable to the facts of this case, that if the servant, instead of doing that which he is employed to do, does something else, which he is not employed to do at all, the master cannot be said to do it by his servant, and therefore is not responsible for what he does. It is not sufficient that the act showed that he did it with the intent to benefit or to serve the master. It must be something done in attempting to do what the master has employed the servant

to do. * * * Nor does the question of liability depend on the quality of the act, but rather upon the other question—whether it has been performed in the line of duty, and within the scope of the authority conferred by the master. The facts of this case do not bring it within the principle. There is no ground for saying that what was done by the agent was in the ordinary course of the business of the company, nor that it was for its benefit, except in so far as it is for the benefit of all the citizens of the state that a criminal should be prosecuted, convicted, and punished. If the agent acted from a sense of the duty which rests on every one to give in charge a person who he thinks has committed a felony, his conduct, while commendable, would in no way be connected with the defendant so as to fasten liability upon it." *Daniel v. Atlantic Coast Line R. Co.*, 136 N. C. 517, 67 L. R. A. 455, 1 Ann. Cas. 718, 48 S. E. 816.

"In a case where a station agent for a railway company, having the care, custody, and supervision of the property of his master at the station where he is located, in furtherance of his master's business, while in pursuit of property stolen from his master, while in possession of such agent, and with a specific intent of recovering such stolen property back for his master, procures the issuance and service of a search warrant, by which the dwelling house of an innocent person is wrongfully searched, and the issuance of such warrant having been without probable cause, and with malice, held, that the agent was acting within the scope of his authority, and the master will be held liable in damages for such wrongful search, notwithstanding the master did not di-

employment. In other words, the vindication of the criminal law through the punishment of a wrongdoer is not a duty devolved by the corporation upon its agent or servant.⁹⁶

§ 3346. — Fraud and deceit. It is now thoroughly well settled that the fraud and deceit of the officers and agents of a corporation, in the course of their employment, and for the benefit of the corporation, is imputable to the corporation, although it may have been unauthorized, or even contrary to instructions. This is true, not only when the fraud or deceit is set up by the other party as ground for rescission of a contract into which he was thereby induced to enter,⁹⁷

rectly authorize or afterwards ratify the procurement of such search warrant." *Chicago, R. I. & P. R. Co. v. Holliday*, 30 Okla. 680, 39 L. R. A. (N. S.) 205, 120 Pac. 927 (headnote by the court).

⁹⁶ See the cases cited in the preceding note.

Declaring the theoretical basis of a criminal prosecution to be the protection of society and the vindication of public justice and not the obtaining of personal satisfaction for the wrong committed, and that, therefore, the institution of such a prosecution could not be regarded as coming within the scope or as done in the course of an agent's employment, the court, in *Pressley v. Mobile & G. R. Co.*, 15 Fed. 199, held that a railroad company was not liable to a third person made defendant in a criminal prosecution for larceny based upon depredations on the company's timber lands and instituted by the company's land agent who, it was claimed, acted maliciously and without probable cause.

"Where the corporation is sought to be held liable for the wrongful and malicious act of its agent or servant in putting the criminal law in operation against a party upon a charge of having fraudulently embezzled the money and goods of the company, in order to sustain the right to recover,

it should be made to appear that the agent was expressly authorized to act as he did by the corporation. The doing of such an act could not, in the nature of things, be in the exercise of the ordinary duties of the agent or servant intrusted with the custody of the company's money or goods; and before the corporation can be made liable for such an act, it must be shown either that there was express precedent authority for doing the act, or that the act has been ratified and adopted by the corporation." *Carter v. Howe Mach. Co.*, 51 Md. 290, 34 Am. Rep. 311. See also *Beiswanger v. American Bonding & Trust Co.*, 98 Md. 287, 57 Atl. 202.

⁹⁷ **United States.** *Tyler v. Savage*, 143 U. S. 79, 36 L. Ed. 82.

Alabama. *Montgomery Southern Ry. Co. v. Matthews*, 77 Ala. 357, 54 Am. Rep. 60.

Colorado. *Zang v. Adams*, 23 Colo. 408, 58 Am. St. Rep. 249, 48 Pac. 509.

Maryland. *Fear v. Bartlett*, 81 Md. 435, 32 Atl. 322; *Savage v. Bartlett*, 78 Md. 561, 28 Atl. 414.

Missouri. *Ramsey v. Thompson Mfg. Co.*, 116 Mo. 313, 22 S. W. 719.

New Jersey. *Garrison v. Technic Electrical Works*, 55 N. J. Eq. 708, 37 Atl. 741; *Vreeland v. New Jersey Stone Co.*, 29 N. J. Eq. 188.

New York. *Cragie v. Hadley*, 99

but also where it is relied upon as ground for an action of deceit against the corporation.⁹⁸ A corporation is liable, for example, for false representations made by an officer or agent in selling goods, where he was authorized to sell the goods, although he may not have been authorized to make the false representations,⁹⁹ and although the

N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537; New York Exch. Co. v. De Wolf, 31 N. Y. 273.

North Dakota. Gunderson v. Havana-Clyde Min. Co., 22 N. D. 329, 133 N. W. 554.

Virginia. Virginia Land Co. v. Haupt, 90 Va. 533, 44 Am. St. Rep. 939, 19 S. E. 168; Crump v. United States Min. Co., 7 Gratt. 352, 56 Am. Dec. 116.

Wisconsin. McClellan v. Scott, 24 Wis. 81; Waldo v. Chicago, St. P. & F. R. Co., 14 Wis. 575.

England. New Brunswick & C. Railway & Land Co. v. Conybeare, 9 H. L. Cas. 740; Central Ry. Co. of Venezuela v. Kisch, L. R. 2 H. L. 99; Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc. 157.

In an English case it was said in regard to rescission of a contract for fraud: "Where a person has been drawn into a contract to purchase shares belonging to a company by fraudulent misrepresentations of the directors, and the directors, in the name of the company, seek to enforce that contract, or the person who has been deceived institutes a suit against the company to rescind the contract on the ground of fraud, the misrepresentations are imputable to the company, and the purchaser cannot be held to his contract, because a company cannot retain any benefit which it has obtained through the fraud of its agents." Western Bank of Scotland v. Addie, L. R. 1 H. L. Sc. 157.

⁹⁸ **United States.** Breyfogle v. Walsh, 80 Fed. 172.

Arkansas. Binghampton Trust Co. v. Auten, 68 Ark. 299, 82 Am. St. Rep. 295, 57 S. W. 1105.

Indiana. Dorsey Mach. Co. v. McCaffrey, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208.

New Jersey. Candy v. Globe Rubber Co., 37 N. J. Eq. 175. Contra Kennedy v. McKay, 43 N. J. L. 288, 39 Am. Rep. 581.

New York. Jarvis v. Manhattan Beach Co., 148 N. Y. 652, 31 L. R. A. 776, 51 Am. St. Rep. 727, 43 N. E. 68; Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co., 137 N. Y. 231, 33 Am. St. Rep. 712, 33 N. E. 378; Cragie v. Hadley, 99 N. Y. 131, 52 Am. Rep. 9, 1 N. E. 537.

North Carolina. Peebles v. Patapsco Guano Co., 77 N. C. 233, 24 Am. Rep. 447.

Ohio. Bartholomew v. Bentley, 15 Ohio 659, 45 Am. Dec. 596.

Pennsylvania. Erie City Iron Works v. Barber, 106 Pa. St. 125, 51 Am. Rep. 508.

Wisconsin. Zinc Carbonate Co. v. First Nat. Bank, 103 Wis. 125, 74 Am. St. Rep. 845, 79 N. W. 229.

England. Ranger v. Great Western Ry. Co., 5 H. L. Cas. 72; Barwick v. English Joint Stock Bank, L. R. 2 Exch. 259; Mackay v. Commercial Bank of New Brunswick, L. R. 5 P. C. 394.

A corporation may be liable for making a false return to a writ, as for example, a writ of mandamus. Argent v. Dean & Chapter of St. Paul's, cited in Yarborough v. Bank of England, 16 East 6.

⁹⁹ **Peebles v. Patapsco Guano Co.**, 77 N. C. 233, 24 Am. Rep. 447; **Erie City Iron Works v. Barber**, 106 Pa. St. 125, 51 Am. Rep. 508.

purchaser's personal acquaintance with and reliance upon the officer aided the sale.¹ And it is liable for false and fraudulent representations made by its officers or agents authorized to solicit subscriptions to its capital stock.²

In an action of deceit against a corporation for false and fraudulent representations of its agent in selling property, it was said in a Pennsylvania case: "As a corporation can only speak or act by agent, there is stronger reason for holding it answerable for the acts and representations of the agent done within the ostensible scope of his authority and while transacting the business of the principal, than where the principal is a natural person. However, the same rule applies alike to natural and artificial persons. 'The purchaser can maintain an action of deceit against the innocent principal, when the fraud of the agent has been committed within the scope of his authority, and where the principal has benefited by it. In this respect it makes no difference whether the principal be a corporation or an individual.'"³

But an officer or agent of a corporation may take advantage of his position to perpetrate a fraud upon third persons, acting, not for the corporation, but for his own benefit, and in violation of his duty to the corporation. In such a case he certainly does not act in the course of his employment, but he may act in the apparent course of his employment, and thus deceive the other party. The question then arises whether the corporation or the innocent third person should suffer, both in fact being innocent, and, in answering this question, the courts have differed. Some of the courts hold that where an officer or agent of a corporation perpetrates a fraud upon an innocent third person, but for his own benefit, and not for the benefit of the corporation, the corporation, being without fault in the matter, is not liable,

¹ *Churchill v. St. George Development Co.*, 174 N. Y. App. Div. 1, 160 N. Y. Supp. 357.

² As to fraud in procuring subscriptions to stock generally, see § 610 et seq.

³ *Erie City Iron Works v. Barber*, 106 Pa. St. 125, 51 Am. Rep. 508.

"Strictly speaking," said Lord Cranworth, "a corporation cannot itself be guilty of fraud. But where a corporation is formed for the purpose of carrying on a trading or other speculation for profit, such as forming

a railway, these objects can only be accomplished through the agency of individuals; and there can be no doubt that if the agents employed conduct themselves fraudulently, so that if they had been acting for private employers, the persons for whom they were acting would have been affected by their fraud, the same principles must prevail where the principal under whom the agent acts is a corporation." *Ranger v. Great Western Ry. Co.*, 5 H. L. Cas. 86.

although the officer or agent may have acted in the apparent course of his employment.⁴ The weight of authority, however, in this country at least, is to the contrary, and to the effect that a corporation is liable to innocent third persons, by estoppel, for the fraud and deceit of its officers and agents, acting in the apparent course of their employment, although it did not authorize or know of the fraud or deceit, and although it may have been committed by the officer or agent for his own benefit, and with intent to defraud the corporation.⁵ This doctrine is that, "where the principal has clothed his agent with power to do an act upon the existence of some extrinsic fact, necessarily and peculiarly within the knowledge of the agent, and of the existence of which the act of executing the power is itself a representation, a third person dealing with such agent in entire good faith pursuant to the apparent power, may rely upon the representation, and the principal is estopped from denying its truth to his prejudice."⁶

In accordance with this doctrine, it has been held that a corporation is liable to innocent third persons for the act of its agent, having general authority to issue certificates of stock, for fraudulent issuing certificates for his own benefit;⁷ that a railroad or warehouse com-

⁴ *Friedlander v. Texas & P. R. Co.*, 130 U. S. 416, 32 L. Ed. 991; *British Mut. Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q. B. Div. 714, and other cases specifically referred to in the notes following.

⁵ *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293; *Phillips v. Mercantile Nat. Bank*, 140 N. Y. 556, 37 Am. St. Rep. 596, 35 N. E. 982; *Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co.*, 137 N. Y. 231, 19 L. R. A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; *Bank of Batavia v. New York, L. E. & W. R. Co.*, 106 N. Y. 195, 60 Am. Rep. 440, 12 N. E. 433; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Brooke v. New York, L. E. & W. R. Co.*, 108 Pa. St. 529, 53 Am. Rep. 453, note, 56 Am. Rep. 235, 1 Atl. 206; *City Nat. Bank of Ft. Worth v. Martin*, 70 Tex. 643, 8 Am. St. Rep. 632, 8 S. W. 507; *Washington County State Bank v. Central Bank & Trust Co. of Houston*, — Tex.

Civ. App. —, 168 S. W. 456, and other cases cited in the notes following.

⁶ *Per Davis, J.*, in *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, and *per Finch, J.*, in *Bank of Batavia v. New York, L. E. & W. R. Co.*, 106 N. Y. 195, 60 Am. Rep. 440, 12 N. E. 433.

⁷ *Kentucky*. *American Wire-Nail Co. v. Bayless*, 91 Ky. 94, 15 S. W. 10.

Maryland. *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 17 Am. Rep. 540.

Massachusetts. *Farrington v. South Boston R. Co.*, 150 Mass. 406, 5 L. R. A. 849, 15 Am. St. Rep. 222, 23 N. E. 109; *Allen v. South Boston Co.*, 150 Mass. 200, 5 L. R. A. 716, 15 Am. St. Rep. 185, 22 N. E. 917.

New York. *Jarvis v. Manhattan Beach Co.*, 148 N. Y. 652, 31 L. R. A. 776, 51 Am. St. Rep. 727, 43 N. E. 68; *Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co.*, 137 N. Y. 231, 19 L. R. A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; *New York*

pany is liable for the fraudulent act of its agent, having general authority to issue bills of lading or warehouse receipts upon the receipt of goods, in issuing a bill of lading or warehouse receipt without receiving goods, although he may act for his own benefit,⁸ though a contrary view is held in some decisions;⁹ that a bank is liable for the fraud of its cashier in drawing checks in favor of customers of the bank, without their knowledge, and without intending them to have any interest therein, and then forging their indorsements and delivering the checks to third persons, to be collected for his own benefit;¹⁰ and that a telegraph company is liable for the act of its operator in sending a forged telegram requesting the transmission of money, although he acts for his own benefit.¹¹

In these and similar cases the person claiming to have been defrauded and seeking to hold the corporation liable, must have acted innocently, in good faith, and with ordinary prudence. If he knew that the agent was exceeding his authority and acting fraudulently, clearly he cannot hold the corporation liable. Nor, as a rule, can he hold the corporation liable if he knew that the agent was acting for his

& N. H. R. Co. v. Schuyler, 34 N. Y. 30.

Pennsylvania. In re Kisterbock's Appeal, 127 Pa. St. 601, 14 Am. St. Rep. 868, 18 Atl. 381.

And see § 610 et seq., supra.

But see *Moores v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 28 L. Ed. 385; *British Mut. Banking Co. v. Charnwood Forest Ry. Co.*, 18 Q. B. Div. 714.

Georgia. *Planters' Rice-Mill Co. v. Olmstead*, 78 Ga. 586, 3 S. E. 647.

Illinois. *St. Louis & I. M. R. Co. v. Larned*, 103 Ill. 293.

Kansas. *Wichita Sav. Bank v. Atchison, T. & S. F. R. Co.*, 20 Kan. 519.

Nebraska. *Sioux City & P. R. Co. v. First Nat. Bank of Fremont*, 10 Neb. 556, 35 Am. Rep. 488.

New York. *Bank of Batavia v. New York, L. E. & W. R. Co.*, 106 N. Y. 195, 60 Am. Rep. 440, 12 N. E. 433; *Armour v. Michigan Cent. R. Co.*, 65 N. Y. 111, 22 Am. Rep. 603.

Pennsylvania. *Brooke v. New York,*

L. E. & W. R. Co., 108 Pa. St. 529, 53 Am. Rep. 453, note, 56 Am. Rep. 235, 1 Atl. 206.

United States. *Friedlander v. Texas & P. R. Co.*, 130 U. S. 416, 32 L. Ed. 991; *Pollard v. Vinton*, 105 U. S. 7, 26 L. Ed. 998.

Maryland. See *Baltimore & O. R. Co. v. Wilkens*, 44 Md. 11, 22 Am. Rep. 26.

Minnesota. *National Bank of Commerce v. Chicago, B. & N. R. Co.*, 44 Minn. 224, 9 L. R. A. 263, 20 Am. St. Rep. 556, 46 N. W. 342, 560.

North Carolina. See *Williams v. Wilmington & W. R. Co.*, 93 N. C. 42, 53 Am. Rep. 450.

England. *Grant v. Norway*, 10 C. B. 665; *Cox v. Bruce*, 18 Q. B. Div. 147.

Phillips v. Mercantile Nat. Bank, 140 N. Y. 556, 23 L. R. A. 584, 37 Am. St. Rep. 596, 35 N. E. 982.

McCord v. Western U. Tel. Co., 39 Minn. 181, 1 L. R. A. 143, 12 Am. St. Rep. 636, 39 N. W. 315.

own benefit, or if he was dealing with the agent personally, for this fact is sufficient to put one upon inquiry.¹²

While a corporation is liable for the false representations and other frauds made or committed by an officer or agent in the course of his employment and for the benefit of the corporation, or, by the weight of authority, as has been shown, in the apparent course of his employment, although for his own benefit, it is not liable for false representations or other frauds which are not made or committed by the officer or agent in either the actual or apparent course of his employment, unless ratified by it.¹³ This rule applies when it is sought to hold a corporation liable for false representations made or other frauds committed by an officer in the course of a transaction in which, with the knowledge of the party, he is acting, not for the corporation, but individually, as where he is selling shares of stock owned by him, and makes false and fraudulent representations to effect the sale,¹⁴ or where an officer having authority in the transfer of stock and issue of certificates falsely and fraudulently represents, in dealing with another personally and not as officer of the corporation, that he owns

¹² *Moore v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 28 L. Ed. 385; *Farrington v. South Boston R. Co.*, 150 Mass. 406, 5 L. R. A. 849, 15 Am. St. Rep. 222, 23 N. E. 109; *Allen v. South Boston R. Co.*, 150 Mass. 200, 5 L. R. A. 716, 15 Am. St. Rep. 185, 22 N. E. 917; *Bank of New York Nat. Banking Ass'n v. American Dock & Trust Co.*, 143 N. Y. 559, 38 N. E. 713.

¹³ *Alabama*. *Smith v. Tallassee Branch of Central Plank-Road Co.*, 30 Ala. 650; *Rives v. Montgomery South Plank-Road Co.*, 30 Ala. 92.

Maryland. *Lamm v. Port Deposit Homestead Ass'n*, 49 Md. 233, 33 Am. Rep. 246.

Minnesota. *Browning v. Hinkle*, 48 Minn. 544, 31 Am. St. Rep. 691, 51 N. W. 605; *Second Nat. Bank of St. Paul v. Howe*, 40 Minn. 390, 12 Am. St. Rep. 744, 42 N. W. 200.

New York. *Prosser v. First Nat. Bank*, 106 N. Y. 677, 13 N. E. 287.

Texas. *East Line & R. River R. Co. v. Garrett*, 52 Tex. 133.

Virginia. *Crump v. United States*

Min. Co., 7 Gratt. 352, 56 Am. Dec. 116.

Washington. *Simons v. Cissna*, 52 Wash. 115, 100 Pac. 200.

Wisconsin. *Milwaukee Brick & Cement Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838.

A corporation is not responsible for the false representations of a mere director, who is not authorized to act for it, unless it ratifies his act. *Second Nat. Bank of St. Paul v. Howe*, 40 Minn. 390, 12 Am. St. Rep. 744, 42 N. W. 200; *Milwaukee Brick & Cement Co. v. Schoknecht*, 108 Wis. 457, 84 N. W. 838.

A corporation is not liable for false representations made by an officer in selling stock owned by himself individually, for in such a case he is acting for himself, and not for the corporation. *Prosser v. First Nat. Bank*, 106 N. Y. 677, 13 N. E. 287.

¹⁴ *Manhattan Life Ins. Co. v. Forty-Second St. & G. St. Ferry R. Co.*, 64 Hun (N. Y.) 635, 19 N. Y. Supp. 90, aff'd 139 N. Y. 146, 34 N. E. 776.

stock, and delivers a fictitious certificate fraudulently issued by him.¹⁵ In a New York case, where certificates of stock indorsed in blank were surrendered to the corporation, and placed by it in its safe, with directions to its manager to cancel them, and the manager abstracted them from the safe, and fraudulently issued them for his own purposes to a person who took them in good faith, it was held that the corporation was not liable for his act, in the absence of negligence, as his act was not within either the actual or apparent scope of his authority.¹⁶

When an officer or agent of a bank embezzles, steals or otherwise misappropriates a special deposit, he is not regarded, in so doing, as representing the bank, and therefore the bank is not liable for his act unless it has been negligent, either in selecting or retaining the defaulting officer or agent, or in so conducting its business as to afford him special opportunities to do the wrongful act of which he has been guilty. In other words, whether it is liable or not depends, not upon the fact that the wrongful act was done by its officer or agent, for the act was not in the course of his employment, but upon the question whether it has failed in the particular case to exercise the care which the law requires of bailees under such circumstances.¹⁷

§ 3347. — Libel and slander. It would seem that there is no longer any question that a corporation may be required to respond in dam-

¹⁵ *Moore v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 28 L. Ed. 385; *Manhattan Life Ins. Co. v. Forty-Second St. & G. St. Ferry R. Co.*, 64 Hun (N. Y.) 635, 19 N. Y. Supp. 90, aff'd 139 N. Y. 146, 34 N. E. 776. And see § 2543 et seq., supra.

¹⁶ *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988.

¹⁷ *United States. First Nat. Bank of Carlisle, Pennsylvania v. Graham*, 100 U. S. 699, 25 L. Ed. 750.

Georgia. *Merchants' Nat. Bank of Savannah v. Carhart*, 95 Ga. 394, 32 L. R. A. 775, 51 Am. St. Rep. 95, 22 S. E. 628; *Merchants' Nat. Bank of Savannah v. Guilmartin*, 93 Ga. 503, 44 Am. St. Rep. 182, 21 S. E. 55, 88 Ga. 797, 17 L. R. A. 322, 15 S. E. 831.

Illinois. *Gray v. Merriam*, 148 Ill. 179, 32 L. R. A. 769, 39 Am. St. Rep. 172, 35 N. E. 810, aff'g 46 Ill. App. 387.

Massachusetts. *Smith v. First Nat. Bank in Westfield*, 99 Mass. 605, 97 Am. Dec. 59; *Foster v. Essex Bank*, 17 Mass. 479, 9 Am. Dec. 168.

New York. *Isham v. Post*, 141 N. Y. 100, 23 L. R. A. 90, 38 Am. St. Rep. 766, 35 N. E. 1084; *Pattison v. Syracuse Nat. Bank*, 80 N. Y. 82, 36 Am. Rep. 582; *First Nat. Bank of Lyons v. Ocean Nat. Bank*, 60 N. Y. 278, 19 Am. Rep. 181.

Pennsylvania. *First Nat. Bank of Allentown v. Rex*, 89 Pa. St. 308, 33 Am. Rep. 767; *First Nat. Bank of Carlisle v. Graham*, 79 Pa. St. 106, 21 Am. Rep. 49; *Scott v. National Bank of Chester Valley*, 72 Pa. St. 471, 13 Am. Rep. 711.

Vermont. *Whitney v. First Nat. Bank of Brattleboro*, 55 Vt. 154, 45 Am. Rep. 598.

ages for a libel written and published by its servant,¹⁸ when such writ-

¹⁸ *Philadelphia, W. & B. R. Co. v. Quigley*, 21 How. (U. S.) 202, 16 L. Ed. 73.

To the same effect see the following:

United States. *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 43 L. Ed. 543; *Times Pub. Co. v. Carlisle*, 94 Fed. 762.

California. *Maynard v. Fireman's Fund Ins. Co.*, 47 Cal. 207, 34 Cal. 48, 91 Am. Dec. 672.

Georgia. *Behre v. National Cash Register Co.*, 100 Ga. 213, 62 Am. St. Rep. 320, 27 S. E. 986; *Howe Mach. Co. v. Souder*, 58 Ga. 64.

Iowa. *White v. International Text-book Co.*, 173 Iowa 192, 155 N. W. 298.

Louisiana. *Vinas v. Merchants' Mut. Ins. Co.*, 27 La. Ann. 367.

Massachusetts. *Fogg v. Boston & L. R. Corporation*, 148 Mass. 513, 12 Am. St. Rep. 583, 20 N. E. 109.

Michigan. *Bacon v. Michigan Cent. R. Co.*, 55 Mich. 224, 54 Am. Rep. 372, 21 N. W. 324; *Detroit Daily Post Co. v. Arthur*, 16 Mich. 447.

Minnesota. *Peterson v. Western U. Tel. Co.*, 75 Minn. 368, 43 L. R. A. 581, 74 Am. St. Rep. 502, 77 N. W. 985; *Hewitt v. Pioneer Press Co.*, 23 Minn. 178, 23 Am. Rep. 680; *Aldrich v. Press Printing Co.*, 9 Minn. 133, 86 Am. Dec. 84.

Missouri. *Minter v. Bradstreet Co.*, 174 Mo. 444, 73 S. W. 668; *Johnson v. St. Louis Dispatch Co.*, 65 Mo. 539, 27 Am. Rep. 293, 2 Mo. App. 565.

New Jersey. *Hoboken Prtg. & Pub. Co. v. Kahn*, 59 N. J. L. 218, 59 Am. St. Rep. 585, 35 Atl. 1053; *Evening Journal Ass'n v. McDermott*, 44 N. J. L. 430, 43 Am. Rep. 392; *McDermott v. Evening Journal Ass'n*, 43 N. J. L. 488, 39 Am. Rep. 606.

New York. *Samuels v. Evening Mail Ass'n*, 9 Hun 288.

Ohio. *Union Cent. Life Ins. Co. of Cincinnati v. Mutual Ben. Life Ins. Co. of New Jersey*, 5 Ohio Dec. 521, 6 Am. L. Reg. 382.

Pennsylvania. Compare *Henry v. Pittsburgh & L. E. R. Co.*, 139 Pa. St. 289, 21 Atl. 157.

Tennessee. *Southern Ice Co. v. Black*, 136 Tenn. 391, 189 S. W. 861.

Texas. *Missouri Pac. Ry. Co. v. Richmond*, 73 Tex. 568, 4 L. R. A. 280, 15 Am. St. Rep. 794, 11 S. W. 555; *Missouri Pac. Ry. Co. v. Behee*, 2 Tex. Civ. App. 107, 21 S. W. 384.

England. *Whitfield v. South Eastern Ry. Co.*, El., Bl. & El. 115.

A corporation will be liable on the ordinary principles of agency for a libel published by its superintendent in the course of his employment. *Citizens Life Assur. Co. v. Brown*, L. R. [1904] App. Cas. 423, 426.

While it is true that it is immaterial in an action for a newspaper libel whether the newspaper was published by a corporation or a natural person, it will not be error to refuse so to charge the jury when there is no evidence calling for an instruction to that effect. *Smith v. Sun Prtg. & Pub. Ass'n*, 55 Fed. 240, 248.

A corporation which has transferred its property to trustees under the statute permitting it so to do and permitting the trustees to do business under the corporation's name is not estopped to deny liability for a libel appearing on stationery bearing its name and the date of its incorporation. *Thompson v. American Optical Co.*, 173 N. Y. App. Div. 123, 159 N. Y. Supp. 412.

"Where an officer of a corporation, in the prosecution of its business, dictates to his stenographer a letter, directed and mailed to another agent of the corporation, charging therein the commission of a crime by a third per-

ing and publication by the servant took place while he was engaged

son, and authorizing an investigation of the criminal charge, all being employed by the same corporation and being in the performance of their duties, the stenographer and the agent to whom the letter is mailed are not to be regarded as third persons, in the sense that the dictation and mailing of the letter, the stenographer's knowledge of it, and their reading of it, constitute a publication of a libel." *Central of Georgia R. Co. v. Jones*, 18 Ga. App. 414, 89 S. E. 429 (following *Owen v. J. S. Ogilvie Pub. Co.*, 32 N. Y. App. Div. 465, 53 N. Y. Supp. 1033, in which the court said: "The law is elementary that there can be no libel without a publication of the libelous matter. We may assume that this letter was libelous. Was there a publication of it by the corporation, within the meaning of the law? Ordinarily, when a letter is written and delivered to a third person, with the intent and expectation that it shall be read by such person, and it is actually read, the publication is complete. * * * Has such rule application to the facts of this case? The letter was dictated to the stenographer, and was by her copied out, was signed by the manager, was then inclosed in an envelope, and sent by mail to the address of the plaintiff. It may be that the dictation to the stenographer and her reading of the letter would constitute a publication of the same by the person dictating it, if the relation existing between the manager and the copyist was that of master and servant, and the letter be held not to be privileged. Such, however, was not the relation of these persons. They were both employed by a common master, and were engaged in the performance of duties which their respective employments required. Under such circumstances

we do not think that the stenographer is to be regarded as a third person in the sense that either the dictation or the subsequent reading can be regarded as a publication by the corporation. It was a part of the manager's duty to write letters for the corporation, and it was the duty of the stenographer to take such letter in shorthand, copy it out, and read it for the purpose of correction. The manager could not write and publish a libel alone, and we think he could not charge the corporation with the consequences of this act, where the corporation, in the ordinary conduct of its business, required the action of the manager and the stenographer in the usual course of conducting its correspondence. The act of both was joint, for the corporation cannot be said to have completed the act which it required by the single act of the manager, as the act of both servants was necessary to make the thing complete. The writing and the copying were but parts of one act; i. e. the production of the letter. Under such conditions we think the dictation, copying, and mailing are to be treated as only one act of the corporation; and, as the two servants were required to participate in it, there was no publication of the letter, in the sense in which that term is understood, by delivery to and reading by a third person. There was in fact but one act by the corporation, and those engaged in the performance of it are not to be regarded as third parties, but as common servants engaged in the act. We do not deny but that there can be publication of a libel by a corporation by reading the libelous matter to a servant of such corporation, or delivering it to be read. Where the duties devolved upon such servant are distinct and inde-

in prosecuting the master's business and was acting in the

pendent of the process by which the libel was produced, he might well stand in the attitude of a third person through whom a libel can be published. But such rule may not be applied where the acts of the servants are so intimately related to each other as is disclosed in the present record, and the production is the joint act of both. As there was no other proof of publication aside from the reading by the stenographer, it is insufficient to uphold a finding that the libel was published. Nothing in *Kiene v. Ruff*, 1 Iowa 482, conflicts with this view. That case presented the ordinary question of delivery, by the person writing the libel, of the libelous matter, to a third person to transcribe the same. The delivery for that purpose was held sufficient to constitute a publication, where such person actually transcribed the matter and forwarded the letter. Substantially similar doctrine is contained in *Snyder v. Andrews*, 6 Barb. 43. Such rule is not questioned, but the particular facts of this case remove it from its operation"). But compare *Sun Life Assur. Co. of Canada v. Bailey*, 101 Va. 443, 44 S. E. 692.

A corporation and its servant, "acting together in publishing a libel, are joint publishers thereof, and may be sued jointly or severally, just as in case of other joint tort feorsors. * * * If sued separately, the same rule would apply as in other tort actions, viz. that a judgment against one is not a bar to the action against the other until it is satisfied." *Morse v. Modern Woodmen of America*, — Wis. —, 164 N. W. 829.

The statutes of Georgia define a libel as "a false and malicious defamation of another expressed in print, * * * tending to injure the reputation of an individual, and ex-

posing him to public hatred, contempt, or ridicule." Under this definition, a declaration against a corporation for libel will be good on demurrer when it alleges that the defendant caused to be made of and concerning the plaintiff, who had been its agent and who was then engaged in selling the same kind of goods as it, itself, sold, a newspaper publication, set out and to the effect that he was no longer connected with the company and had not been connected with it since a specified date and that any contracts made by him for the company would be void, and further alleges that such publication was maliciously made with the motive and purpose of falsely holding the plaintiff out to the world as an impostor seeking or undertaking without authority to appear and act as the defendant's agent. *Behre v. National Cash Register Co.*, 100 Ga. 213, 62 Am. St. Rep. 320, 27 S. E. 986. In holding thus the court said: "The words complained of may be literally true * * *. If the words were published in good faith for the purpose of protecting the interest of the defendant, no liability would flow from their publication. They are not libelous per se, but the averment as to the intention with which the defendant caused them to be published, and the effect which they have upon any one reading them, make them libelous. The impression created upon the mind of any one reading this notice is that the plaintiff is seeking to impose himself upon the trading public as the agent of the defendant, and that through that means he is attempting to defraud the persons with whom he comes in contact in connection with the sale of goods of the character sold by the defendant. The distinct allegation being that this was false, and [malice being alleged,] * * * the

course and scope of his employment¹⁹ even though it did not ex-

petition sets forth a cause of action."

That the transmission of a libelous telegram by a telegraph company in its usual course of business and the making of a letter press copy thereof by the delivery boy do not constitute a publication of the same by the company, see *Western U. Tel. Co. v. Cashman*, 149 Fed. 367, 9 L. R. A. (N. S.) 140, 9 Ann. Cas. 693. But the company is liable where its agent, acting within the scope of his employment, maliciously transmits a libelous message addressed to a third person which is received by another agent and delivered to the addressee. *Peterson v. Western U. Tel. Co.*, 75 Minn. 368, 43 L. R. A. 581, 74 Am. St. Rep. 502, 77 N. W. 985.

19 "A corporation may be held liable for a libel published by its officer acting within the scope of his authority." *Hardonecourt v. North Penn Iron Co.*, 225 Pa. 379, 74 Atl. 243.

"The doctrine is now very well settled that a corporation is liable for the torts of its agents within the scope of their employment and in furtherance of the corporate business, and this includes libel." *Morse v. Modern Woodmen of America*, — Wis. —, 164 N. W. 829.

"A corporation is liable in damages for the publication of a libel, as it is for other torts. To establish its liability, the publication must be shown to have been made by its authority, or to have been ratified by it, or to have been made by one of its servants or agents in the scope of his employment and in the course of the business in which he was employed." *Pennsylvania Iron Works Co. v. Voght Mach. Co.*, 29 Ky. L. Rep. 861, 96 S. W. 551. In a subsequent paragraph of its opinion in this case, the court says: "The court * * * instructed the jury that although they might believe

that Wilson was not the agent of the company at the time the [libelous] letter was written, yet if the company subsequently ratified or approved the letter and the statements therein contained, they should find for plaintiff. Of this instruction appellant complains. There is no affirmative evidence in the record of the express ratification of this letter by appellant, but, Wilson having written it within the scope of his employment, appellant, as we have held, was liable for the consequences of its publication, and therefore ratified it by its failure to disapprove or repudiate the letter after obtaining knowledge of its publication, which it did long before the trial took place. Its failure, under the circumstances of this case, to disavow the letter must be taken to be a ratification and approval of its contents." While this paragraph treats of the matter of ratification in a confusing manner and announces a sequitur which cannot be sustained, it also reaffirms the proposition that for a libel published by its agent in the scope of his employment the corporation may be made to respond in damages.

To establish the liability of a corporation for a libel, "the publication must be shown to have been made by its authority, or to have been ratified by it, or to have been made by one of its servants or agents, in the course of the business in which he was employed." *Fogg v. Boston & L. R. Corporation*, 148 Mass. 513, 12 Am. St. Rep. 583, 20 N. E. 109.

"The acts of the managing officers of the corporation in carrying on its affairs and managing its business are considered the acts of the corporation itself" (*Bacon v. Michigan Cent. R. Co.*, 55 Mich. 224, 54 Am. Rep. 372, 21 N. W. 324), and "a corporation

pressly authorize²⁰ or in any way ratify the libel; but, so far from thus doing, actually repudiated it.²¹ Thus a corporation engaged in the publication of a newspaper is liable in an action on the case for a libel published by its officer or agent in the course of his employment, although the publication of libelous articles may be unauthorized, or even contrary to instructions.²² In like manner, a rail-

is responsible in damages for a libel, the publication of which was sanctioned by its manager, in a matter which concerned the business of the company." *Pattison v. Gulf Bay Co.*, 116 La. 963, 114 Am. St. Rep. 570, 41 So. 224 (libelous newspaper interview by manager of corporation).

In *May v. Jones*, 88 Ga. 308, 15 L. R. A. 637, 30 Am. St. Rep. 154, 14 S. E. 552, it was held that "as a general rule, a bank is not responsible for a malicious protest made and published by a notary public rightly employed by it, such notarial act being that of a public officer; and it makes no difference that such notary is also an employee and agent of the bank. In order to render the bank liable, it would at least have to be alleged that it shared maliciously in the production or publication of the libel. An allegation 'that the action of the notary in the matter, he acting under the authority of the bank, is the action of said bank,' is not sufficient to charge the bank as a joint tort-feaser with the notary."

The question of the authority of one who assumes to act on behalf of the defendant corporation, charged with libel "and particularly express malice," cannot be determined by mere inference. *Garrett v. Locke Regulator Co.*, 167 N. Y. Supp. 64.

"If different inferences [as to the authority of the libeling agent] might fairly be drawn from the evidence by reasonable men, then the jury should be permitted to choose for themselves. But if only one inference could be drawn from the evidence, and that is a want of authority, then the question

is a legal one for the court to decide." *Washington Gas Light Co. v. Lansden*, 172 U. S. 534, 43 L. Ed. 543. See also *Hardoncourt v. North Penn Iron Co.*, 225 Pa. 379, 74 Atl. 243.

Peremptory instruction to find for a defendant, sued for a libel perpetrated by its bookkeeper as a joke and outside of the scope of his employment, is proper. *Case v. Steel Coal Co.*, 162 Ky. 68, L. R. A. 1915 D 867, 171 S. W. 993.

²⁰ "In a case for libel by the servant of a corporation, * * * the question of the latter's liability will not turn upon whether it expressly consented to, directed, or authorized the libel. It will be responsible for the libel if it was published by the servant in execution of the authority, express or implied, given by the corporation, or in the performance of the service for which the servant was engaged, or the act was one within the apparent scope of his employment." *Case v. Steel Coal Co.*, 162 Ky. 68, L. R. A. 1915 D 867, 171 S. W. 993.

²¹ A corporation is liable for a malicious libel published by its agent in the course of his employment with a view to the furtherance of its interests notwithstanding it repudiated such libel both to the one libeled and to the one to whom it was addressed, immediately upon the act's being brought to its attention. *Nava v. Northwestern Tel. Exch. Co.*, 112 Minn. 199, 127 N. W. 935.

²² *United States*. *Times Pub. Co. v. Carlisle*, 94 Fed. 762.

Michigan. *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447.

Minnesota. *Hewitt v. Pioneer-Press*

road company, insurance company, or other corporation is liable if its authorized officers or agents, in the course of their employment, and acting for the corporation, publish a libelous statement or report concerning an employee.²³

While it cannot be doubted that a corporation will be liable, in a proper case, for a slander uttered by its servant,²⁴ the courts are not in harmony on the question of the circumstances in which liability will attach or, in other words, on the question of what is "a proper case." Thus some of them, taking the position that the doctrine that a corporation cannot slander because it cannot talk is obsolete²⁵ and that the doctrine of nonliability based on the proposition that there can be no agency in slander has long been exploded,²⁶ hold that a corporation will be liable in an action for slander whenever it would have been had the action been one for libel²⁷ or for a tort of any other

Co., 23 Minn. 178, 23 Am. Rep. 680; Aldrich v. Press Printing Co., 9 Minn. 133, 86 Am. Dec. 84.

Missouri. Johnson v. St. Louis Dispatch Co., 2 Mo. App. 565, aff'd 65 Mo. 539, 27 Am. Rep. 293.

New Jersey. Hoboken Prtg. & Pub. Co. v. Kahn, 59 N. J. L. 218, 59 Am. St. Rep. 585, 35 Atl. 1053; Evening Journal Ass'n v. McDermott, 44 N. J. L. 430, 43 Am. Rep. 392; McDermott v. Evening Journal Ass'n, 43 N. J. L. 488, 39 Am. Rep. 606.

New York. Samuels v. Evening Mail Ass'n, 9 Hun 288.

And see § 2556, supra.

23 United States. Philadelphia, W. & B. R. Co. v. Quigley, 21 How. 202, 16 L. Ed. 73.

California. Maynard v. Fireman's Fund Ins. Co., 47 Cal. 207, 91 Am. Dec. 672, 34 Cal. 48.

Louisiana. Vinas v. Merchants' Mut. Ins. Co., 27 La. Ann. 367.

Massachusetts. Fogg v. Boston & L. R. Corporation, 148 Mass. 513, 12 Am. St. Rep. 583, 20 N. E. 109.

Michigan. Bacon v. Michigan Cent. R. Co., 55 Mich. 224, 54 Am. Rep. 372, 21 N. W. 324.

Texas. Missouri Pac. Ry. Co. v. Richmond, 73 Tex. 568, 4 L. R. A. 280, 15 Am. St. Rep. 794, 11 S. W. 555.

England. Whitfield v. Southeastern Ry. Co., El., Bl. & El. 115.

See also § 3338, supra.

24 United Cigar Stores Co. v. Young, 36 App. Cas. (D. C.) 390; White v. International Textbook Co., 173 Iowa 192, 155 N. W. 298; Hudnell v. Eureka Lumber Co., 133 N. C. 169, 45 S. E. 532.

A corporation can act only through an agent and where it is liable for its agent's slander, it and the agent may be sued therefor in a single action, notwithstanding the general rule that there is no joint liability in slander. Nunnemaker v. Smith's, 96 S. C. 294, 80 S. E. 465.

25 Fensky v. Maryland Casualty Co., 264 Mo. 154, Ann. Cas. 1917 D 963, 174 S. W. 416.

26 Rivers v. Yazoo & M. R. Co., 90 Miss. 196, 9 L. R. A. (N. S.) 931, 43 So. 471. See also Fensky v. Maryland Casualty Co., 264 Mo. 154, Ann. Cas. 1917 D 963, 174 S. W. 416; Southwestern Telegraph & Telephone Co. v. Long, — Tex. Civ. App. —, 183 S. W. 421.

27 "There can be no sound reason for saying that a corporation may be liable for libel (a doctrine long recognized) and yet not liable for slander —unwritten libel or defamation of

kind.²⁸ The difference in the circumstances attending the publication of a libel and those attending the utterance of a slander has been

character. Under the modern rule, the corporate shell will not shield the corporation from the ill effects of the slanderous tongue of its agent, if, at the time, the agent was transacting for the corporation the business of the corporation, and the slander was uttered in the course of such business, and in connection therewith." *Fensky v. Maryland Casualty Co.*, 264 Mo. 154, Ann. Cas. 1917 D 963, 174 S. W. 416 (petition for slander based on statement that "the contract you claim to have with this man was not signed by him, and he is here to tell you so" held good on general demurrer).

"It is settled in this state that a corporation may be guilty of libel, and, conceding the liability of corporations for defamatory words written by its officers or agents, it is impossible to conceive on what ground immunity can be claimed for it for defamatory words spoken by its officers or agents." *Empire Cream Separator Co. v. De Laval Dairy Supply Co.*, 75 N. J. L. 207, 67 Atl. 711.

"Lord Mansfield very accurately said in the case of *Maloney v. Bartlett*, 3 Camp. 210, that 'there appeared to be no well-founded distinction between written and unwritten slander,' and that 'the reasons given in the books for such a distinction were very insufficient.' He further said that the first reason given was that by writing the scandal became more diffused, but that this was casual, for words might be spoken under circumstances which would give them much more publicity and render them much more injurious than if they were committed to paper and shown to third persons. He further said that 'as to another reason, that the writing of scandal shows more malice [by?]

against the defendant, the true foundation of civil actions was some damage sustained by the plaintiff, not the malice which actuated the defendant.' This great judge was eminently correct in holding that no sound distinction can be drawn between the liability for libel and the liability for slander." *Rivers v. Yazoo & M. Val. R. Co.*, 90 Miss. 196, 9 L. R. A. (N. S.) 931, 43 So. 471. See also *Hypes v. Southern R. Co.*, 82 S. C. 315, 21 L. R. A. (N. S.) 873, 17 Ann. Cas. 620, 64 S. E. 395.

A demurrer to declaration, in action against corporation for slander, which did not allege specific authority in the servants to make the statements complained of, nor any facts from which it could be inferred that they were authorized to make them but only, as far as this matter is concerned, that such servants were acting within the scope of their authority, is properly sustained. *Clark v. Chesapeake & P. Tel. Co.*, 42 App. Cas. (D. C.) 444, expressly permitting consideration of "the distinction between libel and slander when imputed to a corporation."

²⁸ *Waters-Pierce Oil Co. v. Bridwell*, 103 Ark. 345, Ann. Cas. 1914 B 837, 147 S. W. 64; *Fensky v. Maryland Casualty Co.*, 264 Mo. 154, Ann. Cas. 1917 D 963, 174 S. W. 416.

"We can see no substantial reason why the same rule which imposes liability upon a corporation when its agent commits an assault, makes a false arrest, institutes a malicious prosecution, commits a malicious trespass, or maliciously causes injury to another, should not also impose liability upon it when the agent slanders another." *Roemer v. Jacob Schmidt Brewing Co.*, 132 Minn. 399, L. R. A. 1916 E 771, 157 N. W. 640.

denied to afford a valid ground for holding the corporation liable in the one case and not liable in the other. Thus it has been said that "To support their conclusion that a different rule should be applied in respect to slander from that applied in respect to libel and other torts, * * * [the] courts [so holding] argue that slanderous words, usually spoken in excitement or anger, are so peculiarly the expression of the personal feeling or opinion of the one who utters them that his principal who has neither authorized nor ratified his statement ought not to be liable therefor. It is difficult to see why a similar argument could not be advanced with equal force to relieve the principal from liability where his agent or servant assaults another, or institutes a malicious prosecution, or commits any wrongful act involving the element of malice; yet it is well settled in this state, and is the general rule, that the principal may be made to respond in damages in such cases, although he neither authorized nor approved the act of his agent or servant."²⁹ In like manner a distinction between the libel and slander based on the greater degree publicity attained in the former case has been held insufficient ground for holding the corporation liable for libel on the one hand and making it immune from the consequences of slander on the other.³⁰ So it

²⁹ *Roemer v. Jacob Schmidt Brewing Co.*, 132 Minn. 399, L. R. A. 1916 E 771, 157 N. W. 640.

"As to the * * * proposition that slander is the voluntary act of the speaker, committed under immediate influence of sudden passion, the same may be said, in some instances, of libel. A slander may be, and in some instances undoubtedly is, uttered with deliberate and preconceived malice, while the publication of a libel may be, and in some instances undoubtedly is, made under the influence of sudden passion. If this distinction should be recognized, it would not be true, as a matter of law, that a corporation could not be held liable for the utterance of a slander, but its liability would depend upon the degree of malice which actuated the agent in uttering the defamatory words. If defamatory words are falsely uttered with malice, it is slander, regardless of whether the

same be done with express or implied malice, and the same is true of libel. It has never been held that a corporation was not liable for a libel if published without deliberation and under the influence of sudden passion. In both libel and slander, express malice may be a material consideration in assessing the damages, but it is immaterial as to fixing liability." *Southwestern Telegraph & Telephone Co. v. Long*, — Tex. Civ. App. —, 183 S. W. 421. Compare, however, *Stewart Dry Goods Co. v. Heuchtker*, 148 Ky. 228, 146 S. W. 423, quoted in note 33, *infra*, this section, and *Southern Ice Co. v. Black*, 136 Tenn. 391, 189 S. W. 861, quoted *infra*, this section.

³⁰ "Another reason which has been suggested for holding the principal liable in libel, but not in slander, is the greater publicity given to the printed matter. This may or may not be true in a given case. A libel may consist in a written statement in a

has been said that "the test [of liability] is whether the slanderous words were spoken by the agent of the company while acting within the scope of his employment and in the actual performance of the duties of his principal touching the matter in question."³¹ On the

letter seen by only one person, while a slander may be uttered in the presence and hearing of a thousand or more people. Here again, as in the case of express or implied malice, the degree of publicity might be taken into consideration in assessing the amount of damage, but not in fixing liability. The damage would be greater to a man of state-wide business or social relations if a libel concerning him was published in a paper of 100,000 circulation than if published in a paper of very limited circulation and confined to a given locality; but the one would be as much a libel as the other. In slander and in libel, neither the extent of the publication nor the degree of malice is a determinative factor." *Southwestern Telegraph & Telephone Co. v. Long*, — Tex. Civ. App. —, 183 S. W. 421.

"The liability of a corporation for malicious libel published by its agent in the course of his employment is generally recognized. * * * We do not regard the distinction between written and unwritten slander to be of sufficient importance to warrant the application of a different rule. The written slander is not always or necessarily more public than the spoken; and if it may indicate more deliberation, and hence warrant more easily the inference of malice, the difference is merely in degree, not in kind. It may otherwise appear that the slander was wilful." *Hypes v. Southern R. Co.*, 82 S. C. 315, 21 L. R. A. (N. S.) 873, 17 Ann. Cas. 620, 64 S. E. 395 (in this case a contract relation existed between the plaintiff and the defendant, the slander was in reference to a matter growing out of such relation, namely, a dispute as to the

correctness of the plaintiff's claim for wages, and the adjustment of such matter was a duty devolving upon the agent making the slanderous utterance).

³¹ *Rivers v. Yazoo & M. R. Co.*, 90 Miss. 196, 9 L. R. A. (N. S.) 931, 43 So. 471. See also *Hudnell v. Eureka Lumber Co.*, 133 N. C. 169, 45 S. E. 532; *Redditt v. Singer Mfg. Co.*, 124 N. C. 100, 32 S. E. 392 (construed in *Hypes v. Southern R. Co.*, 82 S. C. 315, 21 L. R. A. [N. S.] 873, 64 S. E. 395); *Sun Life Assur. Co. of Canada v. Bailey*, 101 Va. 443, 44 S. E. 692; *Aiken v. Caledonian R. Co.*, 50 Scot. Law Rep. 45, 48.

"The law is well settled that a corporation is liable for the slanderous words of its agent if the agent at the time is transacting the business of the corporation, and the slanderous words are spoken in the course of such business and in connection therewith." *Grand Union Tea Co. v. Lord*, 231 Fed. 390, 393.

"That a corporation may be held responsible for a slander uttered by an officer or agent within the scope of his employment is no longer a debatable question." *Payton v. People's Credit Clothing Co.*, 136 Mo. App. 577, 118 S. W. 531.

"The true rule * * * is that a corporation is liable for torts committed by its officers or agents when acting within the actual or implied scope of their employment, or by ratification may become responsible for such acts when committed in excess of their authority. Within the content of this rule a corporation may be held liable for a slander." *Kharas v. Barron C. Collier, Inc.*, 171 N. Y. App. Div. 388, 157 N. Y. Supp. 410, overrul-

other hand, there are courts which, basing, either directly or indi-

ing *Eichner v. Bowery Bank*, 24 N. Y. App. Div. 63, 48 N. Y. Supp. 978.

The test of whether a corporation is liable for slander is whether the one uttering the slander did so in endeavoring to promote the corporation's business within the actual or apparent authority conferred upon him for that purpose. *Rosenberg v. Underwriters Salvage Co.*, 190 Ill. App. 64.

In order for a corporation to be liable for slanderous words spoken by its agent, it must appear that the latter acted within the scope of his employment, and that the slanderous utterance was made while he was engaged in the actual performance of the duties devolving on him as the corporation's agent. *International Text-Book Co. v. Heartt*, 136 Fed. 129, 132.

To establish the liability of a corporation for slander, the utterance "must be shown to have been made by its authority, or ratified by it, or to have been made by one of its servants or agents in the scope of his employment and in the course of the business in which he is employed." *Waters-Pierce Oil Co. v. Bridwell*, 103 Ark. 345, Ann. Cas. 1914B 837, 147 S. W. 64. See also *National Packing Co. v. Boullion*, 105 Ark. 326, 151 S. W. 244. Regardless of the fact that the court, in *Waters-Pierce Oil Co. v. Bridwell*, supra, declares that its conclusion upon the facts of the case is supported by the proper application of the principles announced in *Lindsey v. St. Louis, I. M. & S. R. Co.*, 95 Ark. 534, 129 S. W. 807, it is believed that such case does not in any manner sanction the proposition that the fact that the slanderous utterance was made by the corporation's agent "in the scope of his employment and in the course of the business in which he was employed" may be sufficient

to impose liability therefor on the corporation. Said the court: "Slander is unlike other torts. It is the individual act of him who utters it, and often arises entirely out of his momentary feelings and passions, without forethought on the speaker's part. It is such an act as cannot be anticipated, and for that reason cannot be impliedly authorized in advance. Hence it has been held that the utterance of slanderous words by an agent of a corporation must be ascribed to the personal malice of the agent who uttered them, 'rather than to the act performed in the course of his employment and in aid of the interest of his employer,' and the corporation must be exonerated, 'unless it authorized, approved or ratified the act of the agent in uttering the particular slander.' Mere proof of agency will not be sufficient to prove such authority or ratification." In contrast with this statement of the law the court in *Waters-Pierce Oil Co. v. Bridwell*, supra, said: "In the case before us, there is no evidence of express authority to utter the defamatory words given to the agents by the corporation, nor of any subsequent ratification on the part of the corporation. Of course, the mere utterance of the defamatory language cannot authorize the inference that they were done by the agents in the course of their employment. It is not necessary, however, that there be some evidence of authority, express or implied, given to the agent to make the defamatory statements; but there must be some evidence from which an authority might be implied on the part of the agent to represent the corporation as within the apparent scope of his employment in regard to the defamatory statements. The issue of whether authority to utter

rectly, their view of the matter on an observation made by Mr. Odgers

the slander should be implied becomes one of fact for the jury, where the facts and circumstances in proof would induce a reasonable person to infer that the act is within the scope of the agent's authority; but if only one inference should be drawn from the evidence, and that is a want of authority, the question becomes one of law for the court."

Proof that the employee of a foreign credit clothing company who, it was claimed, called plaintiff "a dirty thief and crook" was the manager of the company's local business, that he had full charge and control thereof, that the other local employees took orders from him alone, that part of his duties consisted of the adjustment and collection of accounts and that the offending words were used by him in the course of a dispute over plaintiff's bill, was held sufficient to sustain the inference that his act in uttering the words was within the general scope of his employment and was not merely the result of his own personal malice. *Payton v. People's Credit Clothing Co.*, 136 Mo. App. 577, 118 S. W. 531.

A demurrer will not lie to the declaration, in an action against a corporation for slander, because it fails to allege that the words complained of were uttered by the authority of the corporation or that the utterances were subsequently ratified by it. *Hopkins Chemical Co. v. Read Drug & Chemical Co. of Baltimore City*, 124 Md. 210, 92 Atl. 478.

A corporation, sued for slander, cannot urge that the complaint, which alleges that the slanderous words were spoken by the defendant, is defective because of the fact that it does not allege that a duly authorized agent of the defendant uttered the words nor that the defendant authorized, insti-

gated or ratified the speaking of such words, the rule being that ultimate and not evidentiary facts are to be pleaded. *Kharas v. Barron C. Collier, Inc.*, 171 N. Y. App. Div. 388, 157 N. Y. Supp. 410. Said the court: "The learned counsel for defendant overlooks the rule that the ultimate facts are to be pleaded, and not the evidence that would tend to substantiate those facts. The plaintiff properly alleged the words were spoken by the defendant. As a corporation can only speak through some person or persons in its employ, the legal inference is that some such person or persons spoke for it. It is a matter of proof on the trial to establish that the person who spoke the words was acting within the scope of his employment, or that the corporation, by ratification of the act of speaking, had adopted and made the words its own."

The word "agent" as used in the rule making a corporation liable for the slanderous utterance of its agent does not refer merely to an officer or to the general manager of the corporation but applies also to an agent of lower authority. *Fensky v. Maryland Casualty Co.*, 264 Mo. 154, Ann. Cas. 1917 D 963, 174 S. W. 416 (disapproving *Payton v. People's Credit Clothing Co.*, 136 Mo. App. 577, 118 S. W. 531, in so far as it is authority to the contrary). In thus holding the court said: "The vast weight of modern authorities places the liability [of a corporation for slander] upon the ground that the language was used by an authorized agent in the line of his employment and in connection with the very thing he was looking after for his corporation. The law draws no distinction between the classes of agents as to whether high or low in authority. The things to be looked to are: (1) Was the per-

in the first edition of his work on libel and slander—which observa-

son an authorized agent of the corporation; and (2) if so, was he acting within the scope of his employment, when he used the slanderous language; and (3) was such language used in the actual performance of his duties, and touching the matter in question? If so, then the corporation is liable, whether such authorized agent be high or low in a class (so he was duly authorized and was acting within the scope of his authority), and is liable'' notwithstanding the slanderous utterance was made without the knowledge or approval of the corporation and was not afterwards ratified by it. But, to the contrary, see *Stewart Dry Goods Co. v. Heuchtker*, 148 Ky. 228, 146 S. W. 423, wherein the court said: "In the case of the president of the corporation, or some like officer having general charge of the affairs of the corporation, we think the utterances of the agent may be regarded as those of the corporation. But that rule cannot be applied to subordinate agents. A verbal slander is the individual act of him who utters it, often arising out of his momentary excitement. It is the voluntary and tortious act of the speaker. There can be no joint utterance, and so two persons are not liable. He alone is liable who spoke the words. Many things are actionable, when printed and published, which are not actionable if published orally, and it seems to us a sound principle that the verbal utterances of an agent of limited powers should be regarded as his personal act, rather than the act of his principal, unless authorized by the principal in fact or ratified by him." See also *Flaherty v. Maxwell Motor Co.*, 187 Mich. 62, 153 N. W. 45.

Where there was no special duty owing by the corporation to the person injured, the liability of the for-

mer "for slander or other malicious torts, by its agents and employees in the course of their employment, depends in its last analysis on whether the acts complained of were authorized or ratified by the company. The test of responsibility established by the better-considered authorities being, 'whether the injury was committed by the authority of the master, expressly conferred or fairly implied from the nature of the employment or the duties incident to it.' When such authority is express, the matter is usually free from difficulty, but the authority may be implied and on a given state of facts admitted or established, frequently is conclusively implied, and responsibility imputed as a matter of law. In other cases, where the act is not clearly within the scope of the servant's employment or incident to his duties, but there is evidence tending to establish that fact, the question may be properly referred to a jury to determine whether the tortious act was authorized. And, again, the absence of authority may be so clear that it becomes the duty of the judge to determine the matter." *Sawyer v. Norfolk & S. R. Co.*, 142 N. C. 1, 115 Am. St. Rep. 716, 9 Ann. Cas. 440, 54 S. E. 793. See also *Hopkins Chemical Co. v. Read Drug & Chemical Co. of Baltimore City*, 124 Md. 210, 92 Atl. 478.

"It has been said that to hold the corporation liable [for slander], the tortious act of the agent, not only must have a direct relation to the performance of some duty pertaining to his employment, but also must have the express or implied sanction of the corporation, or afterwards be ratified by the corporation. But where * * * no express authority is shown, the issue of whether authority to commit

tion to which no authorities were cited is apparently omitted from the later editions of such work—to the effect that “a corporation will not be liable for any slander uttered by an officer, even though he be acting honestly for the benefit of the company, and within the scope of his duties, unless it can be proved that the corporation expressly ordered and directed that officer to say those very words, for a slander is the voluntary and tortious act of the speaker,”³² hold in accordance therewith.³³ In a recent case wherein a corporation was sued by

the wrong should be implied becomes one of fact for the jury, where the facts and circumstances in proof would induce a reasonable person to infer that the act was within the general powers conferred on the agent.” *Payton v. People’s Credit Clothing Co.*, 136 Mo. App. 577, 118 S. W. 531.

³² *Odgers on Libel and Slander* (1st Ed.), p. 368.

³³ Thus in *Behre v. National Cash Register Co.*, 100 Ga. 213, 62 Am. St. Rep. 320, 27 S. E. 986 (cited in *Southern R. Co. v. Chambers*, 126 Ga. 404, 7 L. R. A. [N. S.] 926, 55 S. E. 37 in support of the statement that “a corporation is not liable for damages resulting from speaking false, malicious, and defamatory words by one of its agents, even where, in uttering such words, the speaker was acting for the benefit of the corporation and within the scope of his agency, unless it affirmatively appears that the agent was directed or authorized by the corporation to speak the words in question”), the court held that “there was no error in sustaining the demurrer to so much of the petition as attempted to set forth a cause of action for slander” against the defendant corporation for, “while it is distinctly alleged that the words complained of were uttered by the agent of defendant within the scope of the agency, and in behalf of, and for the interest of, the defendant, it [the petition] failed to allege that the defendant expressly directed or authorized the

agent to speak the words in question,” and paraphrased Mr. Odgers’ statement, which it quoted *inter alia* in its opinion, for its syllabus paragraph on the point. See also, as following the two cases above cited, *Jackson v. Atlantic Coast Line R. Co.*, 8 Ga. App. 495, 69 S. E. 919.

Again in *Stewart Dry Goods Co. v. Heuchtker*, 148 Ky. 228, 146 S. W. 423, the court, citing Mr. Odgers’ work as, *inter alia*, holding to the same effect, adhered to the rule laid down in *Duquesne Distributing Co. v. Greenbaum*, 135 Ky. 182, 24 L. R. A. (N. S.) 955, 21 Ann. Cas. 481, 121 S. W. 1026, which involved the liability of a partnership (and not of a corporation, as stated in *Stewart Dry Goods Co. v. Heuchtker*, *supra*) for slander, to the effect that “when it is sought to charge the master or principal in any state of case with liability for defamatory utterances of the servant or agent, it is not sufficient to aver or prove that the servant or agent at the time was engaged in the service of the master or principal, or acting within the scope of his employment, in the ordinary use of that word. But it must be further averred and shown that the principal or master directed or authorized the agent or servant to speak the actionable words, or afterwards approved or ratified their speaking.”

Still again in *Republic Iron & Steel Co. v. Self*, 192 Ala. 403, 68 So. 328 (decided in 1915), the court made an

one employee who had been slandered by another, the Supreme Court

obiter statement of the law of Alabama on the subject, which statement was practically identical with that of Mr. Odgers, and cited in support thereof *Singer Mfg. Co. v. Taylor*, 150 Ala. 574, 9 L. R. A. (N. S.) 929, 124 Am. St. Rep. 90, 43 So. 210, and *McIntire v. Cudahy Packing Co.*, 179 Ala. 404, 60 So. 848. While the first of these two cases recognizes that "slander is the voluntary and tortious act of the speaker" and quotes, *inter alia*, Mr. Odgers' statement, such case, it is believed, is not authority, so far as actual decision is concerned, for the broad proposition that a corporation will not be liable for "any" slander unless, etc., the court going no further than to hold that, where no contract relation exists between the corporation and the person slandered, "authorization," "approval" or "ratification" of the particular slander is necessary to corporate liability.

In the second of the two cases cited, the court states that "it is well settled in this jurisdiction, as well as others, that a corporation cannot commit slander, and can only become liable for the utterances of its agents by expressly authorizing the slanderous utterance, or by approving or ratifying the said utterance," and quotes a part of the opinion of the court in *Singer Mfg. Co. v. Taylor*, *supra*, including Mr. Odgers' statement as it appears therein.

In *Flaherty v. Maxwell Motor Co.*, 187 Mich. 62, 153 N. W. 45 (decided in 1915), the court declared that "our examination of the cases satisfies us that the great weight of the authorities holds that a corporation is not liable for slander uttered by its servants unless it affirmatively appears that the agent was expressly authorized to speak the words in question

or the corporation subsequently ratified the utterance," and cites *Singer Mfg. Co. v. Taylor*, *supra*, as one of its authorities, quoting that part of the opinion in such case which is itself merely the troublesome quotation from Mr. Odgers' work. See, in this connection, *Kharas v. Barron C. Collier, Inc.*, 171 N. Y. App. Div. 388, 157 N. Y. Supp. 410, which, holding that a corporation is liable for slander and overruling the contrary holding in *Eichner v. Bowery Bank*, 24 N. Y. App. Div. 63, 48 N. Y. Supp. 978, which quoted Mr. Odgers' statement, suggests that the quotation is from an early edition of Mr. Odgers' work and that the statement is omitted from later editions.

In *Southwestern Telegraph & Telephone Co. v. Long*, — Tex. Civ. App. —, 183 S. W. 421, the court observes that "Odgers' statement that a corporation cannot be held liable for slander, because 'slander is the voluntary act of the speaker,' rests upon his own *ipse dixit*. He cites no authority to sustain his text, and none is cited in the notes to the American edition."

The petition in an action against a corporation for slander of title by its president and secretary is defective when it does not allege that the slanderous declaration was made by such officers in their official capacity and by direction of the corporation, or in the apparent scope of their authority as its officers. *Continental Realty Co. v. Little*, 135 Ky. 618, 117 S. W. 310, citing *Odgers on Libel and Slander* (Am. Ed.) 368.

In *Comerford v. West End St. Ry. Co.*, 164 Mass. 13, 41 N. E. 59 (decided in 1895), the court said: "If slanderous words are shown to have been uttered by the authority of a corporation, or to have been ratified

of Tennessee,³⁴ noting the two different lines of decision and citing under each view of the matter certain of the cases supposed to support it,³⁵ declared that the distinction made by some of the cases between the liability of a corporation for libel and its liability for slander "is well founded both in law and in fact. It is a matter of common knowledge that corporations must employ many servants, and that many of them do not weigh their words and are easily provoked to anger. It would be an extreme hardship to hold a corporation liable for the slanderous words spoken by each servant in its employ and who may speak them in connection with the duties which he is employed to perform. To apply the ordinary rule governing the relationship between master and servant, and governing the liability of the master for the torts of his servants, would be to hold the corporation liable for torts which were not contemplated when the contract of employment was made. The same would often be true of private individuals. To hold that the master is liable for slanderous words spoken in the same manner that he is liable for other torts of his servant would be to extend the law of oral slander far beyond what the facts and the contemplation of the parties include. If one employs a servant about his household, it certainly is not contemplated that the servant will slander those with whom he may be brought in contact while performing his duties. We do not say that a corporation or an individual would not be held liable in particular cases for the slanderous words uttered by a servant; but to

by it, the corporation is liable; but, if they are uttered by an agent or servant in the course of the business in which he is employed, it is at least questionable whether the corporation is liable. We are aware of no case in which this has been held"; and in *Kane v. Boston Mut. Life Ins. Co.*, 200 Mass. 265, 86 N. E. 302 (decided in 1908), the question, above suggested, which the court was not called upon to decide, was still apparently regarded as an open one in Massachusetts, the court, which cited, *inter alia*, two of the "Odgers' cases" and also Mr. Odgers' text, § 265, declaring that it did "not mean to throw any doubt" on the statement contained in the last clause of the first sentence above quoted.

³⁴*Southern Ice Co. v. Black*, 136 Tenn. 391, 189 S. W. 861 (judgment for plaintiff reversed and case dismissed).

³⁵It is believed that at least two of the cases, namely *Sawyer v. Norfolk & S. R. Co.*, 142 N. C. 1, 115 Am. St. Rep. 716, 9 Ann. Cas. 440, 54 S. E. 793, and *International Text-Book Co. v. Heartt*, 136 Fed. 129 (see these cases as cited elsewhere in this section), referred to as holding "that a corporation is not liable for oral slander in the broad sense that it is liable for other torts of its servants," are not, when carefully analyzed, authority for the proposition that a rule applies in the one case different from that which applies in the other.

make a case of liability the plaintiff must show either that the master expressly authorized the speaking of the slanderous words, or that it would be necessary to speak them in the course of the performance of the duty assigned to the servant, or that it has been ratified by the master. The precise question presented is the liability of a corporation for damages for oral slander spoken by one servant of another while acting within the scope of his authority and in the interest of the master, but who was not actually authorized to speak the slanderous words. We do not think speaking the slanderous words would fall reasonably within the contemplation of the parties when they made the contract of employment, either that the master impliedly authorized the foreman to speak the words, or that he so agreed to indemnify his other servant against such conduct. It is not like the master's implied agreement to furnish a safe place to work, safe machinery, and the like for which he must respond in damages if he fails in such duty. These duties are parts of the contract of employment, though unexpressed, and are said to be absolute. But the speaking of slanderous words is so often the result of an outbreak of temper, and is always an expression of opinion, that it is usually disconnected from the servant's duties, and cannot reasonably be said to be an unexpressed part of the contract of employment. * * * What we have said, of course, does not apply to a third party to whom the master owes a special duty. It does not apply to the case of a passenger on a public conveyance nor to a customer invited on the premises of the owner, nor to any other one to whom the master actually or impliedly owes a special duty." ³⁶

§ 3348. — Negligence. A corporation is, as a general proposition, liable for the negligence of its officers, agents, or servants acting within the scope of their authority and in the course of their employment to the same extent as a natural person, and, ordinarily, it is no defense for it to show that it has used due care in selecting and supervising them.³⁷ But where the agent or servant guilty of the

³⁶ "There is a line of cases which holds that, where a special contractual relation exists between the plaintiff and defendant, recovery will be allowed for slander committed by a subordinate servant. Such are cases of common carriers in their relation to passengers, and are based upon a breach of duty arising out of the con-

tract, whereby they are bound to protect passengers from insults, indignities, and personal violence." *Flaherty v. Maxwell Motor Co.*, 187 Mich. 62, 153 N. W. 45. See also § 3357, *infra*.

³⁷ This rule has been so frequently applied especially in the case of railroad companies without any question

negligence acts in the premises wholly without the scope of his authority and the course of his employment, the person injured cannot ordinarily hold the corporation in damages.³⁸ Thus it has

as to its correctness that it is scarcely necessary to cite authorities to support it. See, as early cases involving the question, however:

Alabama. Central Railroad & Banking Co. v. Smith, 76 Ala. 572, 52 Am. Rep. 353.

Colorado. Denver, S. P. & P. R. Co. v. Conway, 8 Colo. 1, 54 Am. Rep. 537, 5 Pac. 142.

Delaware. Wilson v. Rockland Mfg. Co., 2 Harr. 67.

Georgia. Macon & A. R. Co. v. Mayes, 49 Ga. 355, 15 Am. Rep. 678.

Illinois. Elmore v. Drainage Com'rs, 135 Ill. 269, 25 Am. St. Rep. 363, 25 N. E. 1010, aff'g 32 Ill. App. 122.

Maine. Brown v. South Kennebec Agr. Society, 47 Me. 275, 74 Am. Dec. 484.

Massachusetts. Nims v. Mt. Hermon Boys' School, 160 Mass. 177, 22 L. R. A. 364, 39 Am. St. Rep. 467, 35 N. E. 776.

Missouri. Hilsdorf v. St. Louis, 45 Mo. 94, 100 Am. Dec. 352.

Ohio. Columbus & H. Coal & Iron Co. v. Tucker, 48 Ohio St. 41, 12 L. R. A. 577, 29 Am. St. Rep. 528, 26 N. E. 630; Dunn v. Brown County Agr. Society, 46 Ohio St. 93, 1 L. R. A. 754, 15 Am. St. Rep. 556, 18 N. E. 496.

Pennsylvania. Lancaster Ave. Improvement Co. v. Rhoads, 116 Pa. St. 377, 2 Am. St. Rep. 608, 9 Atl. 852.

Rhode Island. Butcher v. Providence Gas Co., 12 R. I. 149, 34 Am. Rep. 626.

A corporation organized for the purpose of holding a fair may be liable for personal injuries caused by the negligent construction of seats by an exhibitor. Texas State Fair v. Marti, 30 Tex. Civ. App. 132, 69 S. W. 432. See also Richmond & M. Ry. Co. v.

Moore's Adm'r, 94 Va. 493, 37 L. R. A. 258, 27 S. E. 70 (action against street railroad company for death of child, killed by being struck while in defendant's park, by pole to which was fastened rope, holding balloon during process of inflation).

³⁸ In *McCulligan v. Pennsylvania R. Co.*, 214 Pa. 229, 6 L. R. A. (N. S.) 544, 112 Am. St. Rep. 739, 63 Atl. 792, the court held that the defendant railroad company was not liable for the negligence of a certain hansom driver, the contract between the company and the driver having created the relation of bailor and bailee rather than the relation of master and servant. See also *Ruffner v. Jamison Coal & Coke Co.*, 247 Pa. 34, 92 Atl. 1075, in which the court refers the reader to *McCulligan v. Pennsylvania R. Co.*, supra, for "the characteristics of the relation of master and servant."

A statute making railroad companies liable for the killing of animals on unfenced portions of their tracks, etc., without proof of negligence, unskilfulness or misconduct does not apply to render a railroad company liable for the killing of an animal by one of its engines which was being run at the time by its round-house superintendent and its yardmaster, without authority and at their own instance, as the quickest means of taking the former to the home of a physician whom he desired to summon to attend a sick neighbor. *Cousins v. Hannibal & St. J. R. Co.*, 66 Mo. 572, 575. Said the court: "There can be no controversy about the general rule, that the master is civilly liable for the tortious acts of his servant, when done in the course of his employment, even though the master did not authorize or know of

been held that the operator of a passenger elevator who invites a child into the building in which the elevator is located as his guest and into the elevator for the purpose of giving her a pleasure ride, acts, in so doing, without the scope of his employment, and the corporation, owning the building, is not liable for resultant injuries to the child.³⁹ Where section hands on a railroad have not only not been authorized either expressly or by implication to allow persons other than those of their number to ride on the hand car used on the section, but have been expressly forbidden to do so by the rules of the railroad company and otherwise, and no custom to permit third persons to ride on the hand car is shown to have been acquiesced in by the officers of the company or even to

such acts, or may have disapproved or forbidden them. *Garretzen v. Duencel*, 50 Mo. 107; *Snyder v. Hann. & St. Jo. R. R. Co.*, 60 Mo. 413. The chief difficulty which has arisen in the application of this rule, as was remarked in *Snyder v. Hann. & St. Jo. R. R.*, has been in ascertaining whether the act complained of was committed in the course of the servant's employment. In *Garretzen v. Duencel*, *supra*, it was said: 'In determining whether a particular act is done in the course of a servant's employment, it is proper first to enquire, whether the servant was at the time engaged in serving his master. If the act was done while the servant was at liberty from his service, and pursuing his own ends exclusively, there can then be no question that the master is not responsible, even though the injuries complained of could not have been committed without the facilities offered by the servant's relations to his master.' Two classes of cases have arisen under the rule now being considered, in which the master is not liable for the acts of his servant. The first is where the servant was, at the time the injury was inflicted, engaged in the performance of the service which he had engaged to render, but the act which occasioned the injury did not pertain to the particular

duties of that employment. Thus, if an engineer while running a train should shoot an unoffending man upon the roadside, the injury would be inflicted while the engineer was engaged in serving his master, but the act causing the injury would have no connection with that service, and could not be considered as done in the course of the servant's employment. The other class is, where the servant was not engaged about the business of the master, at the time he did the injury complained of, but was upon business of his own, or another, totally disconnected from the service which he had engaged to render. The case at bar falls within the latter class. * * * [The] whole duty [of the superintendent of the roundhouse] was to keep the engines in order, and properly housed. He had no authority whatever to take them out for any purpose. He had no more right to go upon the main track with one of them than he would have had if he had been an entire stranger to the defendant, and the defendant cannot be held responsible for the injury resulting from such unauthorized use of its property.'

³⁹ *Sweeden v. Atkinson Improvement Co.*, 93 Ark. 397, 27 L. R. A. (N. S.) 124, 125 S. W. 439.

have been known to them, the company will not be liable for personal injuries sustained by a child as a result of his being permitted to ride on the hand car at a time when it was being operated by the temporary foreman, acting under the direction of the regular foreman but outside of the business of the company.⁴⁰ Again, a railroad company will not be liable for injuries to a child resulting from his attempt to follow the direction of the company's servant to get on the caboose of a moving freight train belonging to the company, such direction, given when the child who had been spending the day with such servant on the company's property expressed a desire to go home, not being within the line of the servant's duty nor within the scope of his employment.⁴¹

⁴⁰ *Houston & C. A. & N. Ry. Co. v. Bolling*, 59 Ark. 395, 27 L. R. A. 190, 43 Am. St. Rep. 38, 27 S. W. 492.

In *Robinson v. McNeill*, 18 Wash. 163, 51 Pac. 355, a personal injury action against the receiver of a railroad company, it appeared that the plaintiff with a number of other boys had obtained the loan of a hand car from a section foreman, who had control of it for the purpose of enabling him to discharge his duties in repairing the track, etc., with the idea of using it in going to a swimming place, a mile or more distant, and that while so using it the plaintiff fell from it and sustained the injuries complained of. In holding that the action of the trial court in entering a judgment of nonsuit was proper, the Supreme Court said: "It will be observed that the action was not founded upon any negligent or wrongful act of the defendant's servant in allowing the car to remain exposed and unsecured, so that boys of immature years might be tempted to use it; and also that the car was not being used, at that particular time, in the company's business. It was not shown nor claimed that the section foreman had any authority to loan the car at all, and in fact it may be fairly assumed from the record that it was a violation of his duties to loan it. His act in so

doing was entirely outside of and exceeded the scope of his employment. This being so, under the great weight of the authorities the defendant was not liable for his wrongful act."

⁴¹ *Keating v. Michigan Cent. R. Co.*, 97 Mich. 154, 37 Am. St. Rep. 328, 56 N. W. 346. See also *Schulwitz v. Delta Lumber Co.*, 126 Mich. 559, 85 N. W. 1075, an action for personal injuries sustained by plaintiff, a child, as a result of his attempting to ride on a wagon belonging to the defendant company, which "falls directly within the rule laid down" in *Keating v. Michigan Cent. R. Co.*, *supra*.

The foreman of a railroad bridge gang held to have acted outside of the scope of his employment in ordering the cook on the gang's boarding car, which was attached to a freight train, to throw out an old water cooler, and not to have imposed liability on the railroad company for injuries sustained by a trespasser on its right of way by his being hit by the cooler in its fall. *St. Louis Southwestern R. Co. v. Bryant*, 81 Ark. 368, 99 S. W. 693.

A railroad section gang, failing to extinguish a fire which they build or rekindle on the railroad company's right of way for the purpose of warming the coffee which forms part of

§ 3349. — **Nuisance.** It is a rule "so well settled as not to require the citation of any authorities in its support," that the liabil-

their lunch, do not thereby render the company liable for injury to the property of a third person resulting from the spread of the fire. *Morier v. St. Paul, M. & M. Ry. Co.*, 31 Minn. 351, 47 Am. Rep. 793, 17 N. W. 952. Said the court: "There is no evidence that the defendant was boarding these men, or that it was any part of its duty to prepare or cook their meals. Neither is there anything tending to show that the defendant either knew or authorized the kindling of a fire for any such purpose, either on this or any other occasion. Nor is there any evidence that it was the duty of these section men to exercise any supervision over the right of way, or to extinguish fires that might be ignited on it. So far as the evidence goes, their employment was exclusively in repairing the railroad track. The doctrine of the liability of the master for the wrongful acts of his servants is predicated upon the maxims, 'respondeat superior' and 'qui facit per alium facit per se.' In fact, it rests upon the doctrine of agency. Therefore, the universal test of the master's liability is whether there was authority, express or implied, for doing the act; that is, was it one done in the course and within the scope of the servant's employment? If it be done in the course of and within the scope of the employment, the master will be liable for the act, whether negligent, fraudulent, deceitful, or an act of positive malfeasance. * * * But a master is not liable for every wrong which the servant may commit during the continuance of the employment. The liability can only occur when that which is done is within the real or apparent scope of the master's business. It does not arise when the servant steps outside of his employment to

do an act for himself not connected with his master's business. Beyond the scope of his employment the servant is as much a stranger to his master as any third person. The master is only responsible so long as the servant can be said to be doing the act, in the doing of which he is guilty of negligence, in the course of his employment. A master is not responsible for any act or omission of his servant which is not connected with the business in which he serves him, and does not happen in the course of his employment. And in determining whether a particular act is done in the course of the servant's employment, it is proper first to inquire whether the servant was at the time engaged in serving his master. If the act be done while the servant is at liberty from the service, and pursuing his own ends exclusively, the master is not responsible. If the servant was, at the time when the injury was inflicted, acting for himself, and as his own master, *pro tempore*, the master is not liable. If the servant step aside from his master's business, for however short a time, to do an act not connected with such business, the relation of master and servant is for the time suspended. Such, variously expressed, is the uniform doctrine laid down by all authorities. * * * It would seem to follow, as an inevitable conclusion, from this, that on the facts of this case the act of these section men in building a fire to warm their own dinner was in no sense an act done in the course of and within the scope of their employment, or in the execution of defendant's business. For the time being they had stepped aside from that business, and in building this fire they were engaged exclusively in their own business, as much as they

ity of a corporation for the creation and maintenance of a nuisance is the same as that of individuals for a similar wrong.⁴² Accordingly, if the officers, agents or servants of a corporation, in the course of their employment, create or maintain a nuisance, the corporation is liable, and it cannot escape liability by setting up that they were not authorized to conduct the business or act in such a way as to create a nuisance.⁴³ This is true, for example, where the officers or agents of a corporation so construct or maintain its works as to obstruct a

were when eating their dinner, and were for the time being their own masters as much as when they ate their breakfast that morning or went to bed the night before. The fact that they did it on defendant's right of way is wholly immaterial, in the absence of any evidence that defendant knew of or authorized the act. Had they gone upon the plaintiff's farm and built the fire the case would have been precisely the same. It can no more be said that this act was done in the defendant's business, and within the scope of their employment than would the act of one of these men in lighting his pipe, after eating his dinner, and carelessly throwing the burning match into the grass. See *Williams v. Jones*, 3 Hurl. & C. 256. The fact that the section foreman assisted in or even directed the act does not alter the case. In doing so he was as much his own master and doing his own business as were the section men. Had it appeared that it was part of his duty to look after the premises generally, and extinguish fires that might be ignited on them, his omission to put out the fire might possibly, within the case of *Chapman v. N. Y. P. R. Co.*, 33 N. Y. 369, be considered the negligence of the defendant. But nothing of the kind appears, and the burden is upon plaintiff to prove affirmatively every fact necessary to establish defendant's liability."

⁴² *Baltimore & P. R. Co. v. Fifth Bapt. Church*, 108 U. S. 317, 27 L. Ed. 739.

⁴³ **United States.** See *First Nat. Bank of Carlisle, Pennsylvania v. Graham*, 100 U. S. 699, 25 L. Ed. 750.

Alabama. *Stein v. Burden*, 24 Ala. 130, 60 Am. Dec. 453.

Maine. *Burbank v. Bethel Steam Mill Co.*, 75 Me. 373, 46 Am. Rep. 400.

New Hampshire. *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201.

New Jersey. *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432.

New York. *Cogswell v. New York, N. H. & H. R. Co.*, 103 N. Y. 10, 56 Am. Rep. 6, note, 57 Am. Rep. 701, 8 N. E. 537.

Ohio. *Columbus & H. Coal & Iron Co. v. Tucker*, 48 Ohio St. 41, 12 L. R. A. 577, 29 Am. St. Rep. 528, 26 N. E. 630.

Pennsylvania. *Chestnut Hill & S. H. Turnpike Co. v. Rutter*, 4 Serg. & R. 6, 8 Am. Dec. 675.

Where a person was injured by falling into a ditch dug in a street, it was held that the fact that the ditch was dug by order of one of the directors of a gas company and paid for by the treasurer, did not make the company responsible for its condition, where it did not appear that the director was authorized thereto by the board, and his act had been repudiated, and the ditch partially filled by the company before the accident. *Noblesville Gas & Improvement Co. v. Loehr*, 124 Ind. 79, 24 N. E. 579.

watercourse or the flow of surface water, and thereby overflow the lands of another,⁴⁴ or use an unlicensed steam engine and communicate fire to adjoining premises,⁴⁵ or conduct the business so that the comfort of others is wrongfully interfered with by noises, noxious odors, smoke, dirt, etc.,⁴⁶ or so as to cast refuse into a stream and thereby cause it to be washed down and upon the land of another.⁴⁷

§ 3350. — Trespass. A corporation may be liable for a trespass as to realty⁴⁸ or as to personal property,⁴⁹ and, generally speaking, where an officer or agent in the course of his employment and acting, not for himself but for the corporation, wrongfully enters upon another's land or seizes his goods, etc., the corporation may be required to respond in damages.⁵⁰

⁴⁴ *Eastman v. Amoskeag Mfg. Co.*, 44 N. H. 143, 82 Am. Dec. 201; *Chestnut Hill & S. H. Turnpike Co. v. Rutter*, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675. See also *Hooker v. New Haven & N. Co.*, 14 Conn. 146, 36 Am. Dec. 477; *Rhodes v. Cleveland*, 10 Ohio 159, 36 Am. Dec. 82.

⁴⁵ *Burbank v. Bethel, Steam Mill Co.*, 75 Me. 373, 46 Am. Rep. 400.

⁴⁶ *Baltimore & P. R. Co. v. Fifth Bapt. Church*, 108 U. S. 317, 27 L. Ed. 739; *Pennsylvania R. Co. v. Angel*, 41 N. J. Eq. 316, 56 Am. Rep. 1, 7 Atl. 432.

⁴⁷ *Columbus & H. Coal & Iron Co. v. Tucker*, 48 Ohio St. 41, 12 L. R. A. 577, 29 Am. St. Rep. 528, 26 N. E. 630; *Trevett v. Prison Ass'n of Virginia*, 98 Va. 332, 50 L. R. A. 564, 81 Am. St. Rep. 727, 36 S. E. 373.

⁴⁸ *Foote v. City of Cincinnati*, 9 Ohio 31, 34 Am. Dec. 420; *Chestnut Hill & S. H. Turnpike Co. v. Rutter*, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675; *Maund v. Monmouthshire Canal Co.*, 4 M. & G. 452. See also *Crawfordsville & Wabash R. Co. v. Wright*, 5 Ind. 252; *Hazen v. Boston & M. R. R.*, 2 Gray (Mass.) 574; *White v. City Council of Charleston*, 2 Hill (S. C.) 571; *Main v. Northeastern R. Co.*, 12 Rich. (S. C.) 82, 75 Am. Dec. 725.

A corporation is liable in an action

of ejectment and in trespass for mesne profits. *Dater v. Troy Turnpike & R. Co.*, 2 Hill (N. Y.) 629; *McCready v. Guardians of Poor*, 9 Serg. & R. (Pa.) 94, 11 Am. Dec. 667.

A complaint against a corporation for trespass on property which does not aver through what particular officers, agents or employees the alleged trespass was committed is not for that reason open to objection as being uncertain, plaintiff not being called upon to plead its evidence as, under a contrary holding, it would be required to do. *Commonwealth Co. v. Nunn*, 17 Colo. App. 117, 67 Pac. 342. But see *Perkins v. Maysville Dist. Camp-Meeting Ass'n*, 10 Ky. L. Rep. 781, 10 S. W. 659, in which it was held that plaintiff does not disclose a right of action against a corporation by a petition alleging a trespass upon his close but not alleging by whom or the manner in which the forcible entry was committed.

⁴⁹ *Yarborough v. Bank of England*, 16 East 6; *Maund v. Monmouthshire Canal Co.*, 4 M. & G. 452.

⁵⁰ *Williams v. Fresno Canal & Irrigation Co.*, 96 Cal. 14, 31 Am. St. Rep. 172, 30 Pac. 961; *Chestnut Hill & S. H. Turnpike Co. v. Rutter*, 4 Serg. & R. (Pa.) 6, 8 Am. Dec. 675; *Yarborough v. Bank of England*, 16 East

§ 3351. — **Wrongful death.** It is settled law that, in a proper case, a corporation will be liable in damages for wrongful death. Indeed, under the wrongful death statutes of the several states very generally, if not without exception, corporations are rendered so liable, in certain instances, either by express language or by implication or by construction.⁵¹ But even where as in Georgia the statutes provide that "every person ["person" being construed to include a corporation] shall be liable for torts committed by his servants by command, or in the prosecution or within the scope of his business, whether the same be by negligence, or voluntary," and that "a railroad company shall be liable * * * for damage done by any person in the employment or service of such company, unless the company shall make it appear that their agents were in the exercise of reasonable care and diligence, the presumption in all cases being against the company," it has been held that a railroad company will not be liable for a wilful homicide committed by its servant where the latter, in killing the deceased, acted, not in the prosecution of the company's business and within the scope of his employment, but out of resentment for an insult, fancied or real, to himself.⁵²

8; *Maund v. Monmouthshire Canal Co.*, 4 M. & G. 452.

⁵¹ A statute providing that an action for damages may be brought when the death of any person is caused by the wrongful act, negligence or default of another gives a right of action against a corporation as well as against natural persons. *Southwestern R. Co. v. Paulk*, 24 Ga. 356; *Donaldson v. Mississippi & M. R. Co.*, 18 Iowa 280, 87 Am. Dec. 391; *Chase v. American Steamboat Co.*, 10 R. I. 79; *Fleming v. Texas Loan Agency*, 87 Tex. 238, 26 L. R. A. 250, 27 S. W. 126; *Jacksonville Ice & Electric Co. v. Moses*, — Tex. Civ. App. —, 134 S. W. 379.

Under the Missouri statute a railroad company will be liable for the act of its watchman, whose duty it was to keep trespassers from the company's bridge, in killing a person who was trespassing thereon, where such act was committed in the course of the watchman's employment, even though the act was a wanton and

malicious one and was neither authorized nor approved by the company. *Hoehl v. Wabash R. Co.*, — Mo. —, 24 S. W. 737.

Under a statute which makes a railroad company liable for injury done by any person in its employment and service unless its agents have exercised all ordinary and reasonable care and diligence, such a company will be liable for the wilful killing by its depot agent of a person who is in the depot for the purpose of transacting business with the company through the agent when the company has employed the agent with knowledge of the fact that he was subject to mental aberration. *Christian v. Columbus & R. Ry. Co.*, 79 Ga. 460, 7 S. E. 216.

On the general question whether the insanity of the conductor who wounded a passenger on the train is a defense in an action by such passenger against the carrier, see § 3357, *infra*.

⁵² *Louisville & N. R. Co. v. Hudson*,

§ 3352. — **Torts of special police officers.** What is undoubtedly the general rule on the subject of the liability of a corporation for tortious acts, such as assault and battery, false arrest and imprisonment, malicious prosecution, etc., committed by a police officer in its employ, has been given a very satisfactory enunciation in a case decided by the federal court for the southern district of New York.⁵³ In this case the court said: "Where private parties, even with the consent of the state, employ its police officers to represent them, and do special work for them in protecting and preserving their property and maintaining order on their premises, and such officers are engaged in the performance of their duties to their employers, and are acting within the scope of their powers and duties, they become and are the servants and employees of such private parties and their representatives, and for grossly negligent acts, wantonly, wilfully, and unnecessarily committed by them in the line of their duty, and when engaged in the performance of such duties, to the injury of others, the master or employer is liable. Employers cannot escape responsibility for the grossly negligent, wanton, and wilful acts of persons employed by them, and representing them, and paid by them, by employing constables, marshals, sheriffs, and peace officers of the state, provided such grossly negligent, wilful, wanton, and wrongful acts are done by such representatives where and while acting within the general scope of the authority conferred on them."⁵⁴ Thus it has been held

10 Ga. App. 169, 73 S. E. 30.

A corporation is not liable for the death of a boiler maker resulting from the explosion of a boiler in the corporation's plant, which, as an employee of the vendor of the boiler, the deceased was engaged in repairing at the time, although the act which caused the explosion was that of the corporation's engineer, when such act, although intended as the test which the deceased had been instructed by his employer to make, was either a voluntary one on the part of the engineer or was done at the request of the deceased. *Olive v. Whitney Marble Co.*, 103 N. Y. 292, 8 N. E. 552.

General charge for defendant corporation, sued for the wilful killing, by its general manager, of plaintiff's intestate, held proper, there being no evidence that the homicide did not

spring from a motive personal to the general manager and without any relation to the business of the corporation. *Johnson v. Alabama Fuel & Iron Co.*, 166 Ala. 534, 52 So. 312.

⁵³ *Kusnir v. Pressed Steel Car Co.*, 201 Fed. 146, 150 (action by one of defendant's employees for a wound received at the hands of another of its employees who was a commissioned police officer of the state).

⁵⁴ Continuing, the court said: "To establish a rule to the contrary would lead to the grossest acts of infamy and outrage, and destroy, as it ought, respect for government and courts. The state would not be liable for such acts, and if the employer—that is, the master, who makes the officer his representative for his private purposes—is not, because the wrongdoer is a police officer, such officer may perform

that an action will lie against a railroad company for a false arrest made and a malicious prosecution instituted by a deputy sheriff em-

the work he is employed to do in the most grossly careless, wanton, and wilful manner, fraught with great peril to others, and the injured party must look to the wrongdoer, usually of no pecuniary responsibility, and not the employer, who employed the wrongdoer to do the very acts complained of, but not in a wanton, wilful, and negligent manner, a mode fraught with peril to others. Of course, the employee must be acting in the line of his duty to his master, and within the general scope of his authority, and represent him in that matter." *Kusnir v. Pressed Steel Car Co.*, 201 Fed. 146. (Although the conclusion reached by the court is without doubt the correct one, that portion of its argument which is based on the fact of the servant's lack of financial responsibility would seem to be unsustainable since "the law does not undertake to provide a solvent defendant." *Vermillion v. Woman's College of Due West*, 104 S. C. 197, 88 S. E. 649.)

A corporation will be liable for the tortious act of a person who is appointed a special police officer at its request; is paid by it and is assigned to duty by its superintendent when it would be liable for such act had such person not possessed police power. *Brewster v. Interborough Rapid Transit Co.*, 68 N. Y. Misc. 348, 123 N. Y. Supp. 992. Said the court: "If, by virtue of his designation as a special officer, * * * [such person] became a public official, his duty to the public was thereby increased; but the defendant was not relieved from the same responsibility for his acts that it would be under for the acts of any other of its employees. It would, indeed, be an anomaly if the fact that, because the public power

had been used to designate the employee of the defendant a public officer, the defendant should on this account be relieved of responsibility for the acts which its employee performs in attempting to discharge his duties to it."

"A public [police] officer, specially employed by a common carrier to perform certain duties and services for it, is a servant of such carrier, while acting within the scope of such employment; and, if such servant, in the performance of such duties, wrongfully inflict injury upon a passenger of such carrier, the master is liable therefor, although the injurious act, so done, was wilful and malicious, and prompted by motives and purposes personal to the servant, such as resentment of insults or punishment for other wrongs perpetrated upon himself." *Layne v. Chesapeake & O. R. Co.*, 66 W. Va. 607, 67 S. E. 1103. See also *Moss v. Campbell's Creek R. Co.*, 75 W. Va. 62, 83 S. E. 721.

"The weight of authority seems to be that a corporation is liable for a wrongful assault or unlawful arrest made, or caused to be made, by a detective or peace officer, employed by it in the course of its business as a watchman or detective, although he has been given police powers by the public authorities at the request of his employer." *Southwestern Portland Cement Co. v. Reitzer*, — Tex. Civ. App. —, 135 S. W. 237. See also *Perkins Bros. Co. v. Anderson*, — Tex. Civ. App. —, 155 S. W. 556.

"One in the position of a public police officer might at the same time act as a private servant, and, if a wrong be committed while acting in the latter capacity, the principle of respondeat superior applies." *Ruffner v. Jamison Coal & Coke Co.*, 247 Pa.

ployed by it as a watchman, when such officer acted, in the premises, solely in its interest and in the furtherance of its business.⁵⁵ Again, applying the same rule, it has been held that the fact that the employee of a city transit company, who, at the instance of a third person, arrested and caused to be locked up a passenger on the company's road on a charge of disorderly conduct, had been commissioned as a police officer, will not relieve the company from liability to the passenger for false imprisonment, the act of the employee having been committed in the line of his duty as a servant of the company.⁵⁶

34, 92 Atl. 1075. See also *Hedge v. St. Louis & S. F. R. Co.*, 164 Mo. App. 291, 145 S. W. 115.

A railroad company may, by directing the acts of a city policeman, become liable therefor. *Pounds v. Central of Georgia R. Co.*, 142 Ga. 415, 10 N. C. C. A. 295, 83 S. E. 96.

⁵⁵ *Louisville & N. R. Co. v. Owens*, 164 Ky. 557, 175 S. W. 1039.

Where the special agent or detective of a railroad company procures the wrongful arrest of an intending passenger or, although not expressly ordering or directing it, sets in motion the machinery by which it is made, the company will be liable for the resulting false imprisonment. *Eichengreen v. Louisville & N. R. R.*, 96 Tenn. 229, 31 L. R. A. 702, 54 Am. St. Rep. 833, 34 S. W. 219.

"A principal who selects an agent to detect and arrest offenders is responsible for the acts of the agent committed within the general scope of his employment, although the agent may have done an unlawful act and have arrested an innocent man." *Pennsylvania Co. v. Weddle*, 100 Ind. 138, 141. See also *Harris v. Louisville, N. O. & T. R. Co.*, 35 Fed. 116; *Evansville & T. H. R. Co. v. McKee*, 99 Ind. 519, 50 Am. Rep. 102.

Judgment for plaintiff affirmed in an action for malicious prosecution based on the act of a police officer in defendant railroad company's employ in arresting him, while he was waiting in defendant's public room to take

passage on defendant's train, and taking him before a justice on a charge of disorderly conduct in that he was dropping crumbs from bread or cake, which he was eating, on the seats and floor of the waiting room in violation of one of defendant's rules. *Tufshinsky v. Pittsburgh, C., C. & St. L. R. Co.*, 61 Pa. Super. Ct. 121.

⁵⁶ *Parke v. Fellman*, 145 N. Y. App. Div. 836, 130 N. Y. Supp. 361.

The fact that a street railroad company's conductor possessed police power, confers no immunity on the company for injury resulting from his wrongful discharge of his duty either as the company's servant or under color of his police power. *Georgia R. & Elec. Co. v. Baker*, 1 Ga. App. 832, 58 S. E. 88.

A corporation, sued for false imprisonment, cannot defend on the ground that its servant who caused the imprisonment complained of was, in so doing, exercising the power of a special policeman which had been conferred upon him by the mayor when, under the city charter, the servant's appointment as a special policeman was invalid. *Union Depot & Railroad Co. v. Smith*, 16 Colo. 361, 27 Pac. 329.

Where a railroad company has no notice that an arrest of one of its passengers by officers of the law is illegal, it will not be liable for its failure to interfere with the officers and prevent the arrest nor for stopping the train to allow the officers to

So also, it has been held that the fact that a railroad watchman, who wrongfully wounded and arrested a person whom he erroneously believed to be a trespasser on the railroad company's premises, had police powers was no defense to the company's liability for his unlawful acts, they having been within the scope of his employment and he having committed them in the line of his duty.⁵⁷

On the other hand, "the mere fact that a railroad company pays for the services of a certain police officer, who does nothing but perform the duties of a police officer proper, does not make the company liable" for his acts.⁵⁸ Thus a railroad company will not be liable for

remove the passenger therefrom, nor, in such case, is it under any duty to see that the officers use no more force than is necessary to make the arrest. *Brunswick & W. R. Co. v. Ponder*, 117 Ga. 63, 60 L. R. A. 713, 97 Am. St. Rep. 152, 43 S. E. 430.

⁵⁷ *Childers v. Southern Pac. Co.*, 20 N. M. 366, 149 Pac. 307.

Although a railroad company may be liable for an unlawful arrest by a special police officer on account of the fact that such arrest was instigated by its employees acting within the scope of their employment, it will not be liable for a wanton battery committed by the officer upon the person arrested in taking him to jail when there is no evidence, direct or circumstantial, that the battery was instigated or assented to by the employees bringing about the arrest or that it should reasonably have been anticipated by them. *Finrock v. Northern Cent. R. Co.*, 58 Pa. Super. Ct. 52. A watchman for a railroad company, although also a deputy sheriff, may, it seems, render the company liable for his shooting of a trespasser, where, at the time, he was acting in his capacity as watchman rather than in his capacity as peace officer. See *Conchin v. El Paso & S. W. R. Co.*, 13 Ariz. 259, 28 L. R. A. (N. S.) 88, 108 Pac. 260.

A petition, in an action against a corporation for the death of a person killed by the defendant's "quasi

policeman and peace officer," after failure to accomplish an allegedly illegal arrest, held to disclose a cause of action and not to be subject to an exception of no cause of action. *Gann v. Great Southern Lumber Co.*, 131 La. 400, 59 So. 830.

That an intending passenger on an elevated train tells the special police officer in the employ of the elevated company, who threatens to "smash his head off" unless he stops his pushing on the station platform on which he is waiting for the train, to "go ahead and do it" does not as a matter of law constitute justification for the resulting assault and battery committed by the officer upon such passenger. *Brewster v. Interborough Rapid Transit Co.*, 68 N. Y. Misc. 348, 123 N. Y. Supp. 992.

Provocation for an assault and battery committed by a special police officer in the employ of a railroad company upon a trespasser on the company's property whom he had placed under arrest may be considered, in an action against the company for such assault and battery, in mitigation of punitive damages. *Baltimore & O. R. Co. v. Strube*, 111 Md. 119, 73 Atl. 697.

⁵⁸ *Pounds v. Central of Georgia R. Co.*, 142 Ga. 415, 10 N. C. C. A. 295, 83 S. E. 96. See also, as tending to support this proposition, *Adler v. White City Const. Co.*, 147 Ill. App. 20, distinguishing *Illinois Steel Co. v.*

the unlawful arrest of one of its passengers by a police officer who was appointed such by the municipal authorities and is subject to their orders, notwithstanding the fact that such officer was specially detailed to preserve order at the company's depot and that the company paid his salary.⁵⁹ Moreover, it has been held that even when the officer is one not only paid by the railroad company, but also appointed, as permitted by statute, on its application, it is not liable for his wrongful acts committed while acting by virtue of his office, unless such wrongful acts occurred in the performance of an act which was outside of the public duties of a police officer and which was authorized or ratified by the company.⁶⁰ While the question of the capacity in

Novak, 84 Ill. App. 641, aff'd 184 Ill. 501, 56 N. E. 966, in which latter case it was held that where a person, sworn in by a city police department as a special policeman to protect the property of a certain corporation and eject trespassers therefrom, reports for duty and instructions to the corporation's foremen and acts in pursuance of instructions received from them, he is in law the servant of the corporation, and the latter will be liable for whatever excessive force he uses in the performance of his duties. In affirming the judgment in this case, the Supreme Court of Illinois (Illinois Steel Co. v. Novak, 184 Ill. 501, 56 N. E. 966) stated that the question whether such policeman was the servant of the corporation was one "of fact" which was not open to review by it.

⁵⁹ Bright v. Central of Georgia R. Co., 12 Ga. App. 364, 77 S. E. 372.

"A railway company is not liable in damages for [the] * * * wrongful killing [of a passenger] by a police officer of a municipality, even if such officer was paid by the corporation, where it does not appear that, at the time of the homicide, the officer was performing any service for, or by direction of, the corporation, but was merely in the discharge of such duties as are performed by the police officers of the municipality."

Pounds v. Central of Georgia R. Co., 142 Ga. 415, 10 N. C. C. A. 295, 83 S. E. 96.

⁶⁰ New York, C. & St. L. R. Co. v. Fieback, 87 Ohio St. 254, 43 L. R. A. (N. S.) 1164, 100 N. E. 889 (involving Ohio statute). See also Tolchester Beach Improvement Co. of Kent County v. Steinmeier, 72 Md. 313, 8 L. R. A. 846, 20 Atl. 188 (involving Maryland statute), explained in Philadelphia, B. & W. R. Co. v. Stumpo, 112 Md. 571, 77 Atl. 266; Norfolk & W. R. Co. v. Perdue, 117 Va. 111, 83 S. E. 1058 (involving Virginia statute).

In Pennsylvania R. Co. v. Kelly, 177 Fed. 189, 30 L. R. A. (N. S.) 481, the court stated that the question at issue was: "Is a corporation which pays for the services of a policeman to guard its property and preserve order upon its premises liable for an unprovoked and wholly unjustifiable assault committed by him upon a public street?" and proceeded to answer such question in the negative, emphasis being laid upon the fact that the locus of the assault was a number of feet distant from the corporation's premises. (But that the arrest of plaintiff, in the course of which the personal injuries complained of were inflicted, was not made on the premises of the defendant corporation does not of itself relieve the latter from

which the officer was acting cannot be determined solely with reference to the place at which the tort was committed, as the employer may be liable although it was committed away from the premises for the protection of which the officer was employed,⁶¹ the place at which the tort was committed is considered in ascertaining whether or not the act was in the scope of the officer's employment.⁶² Furthermore, there would seem ordinarily to exist a prima facie presumption that the officer, in committing the tort complained of, was acting in his official capacity as conservator of the peace, rather than in his capacity as servant of the corporation sought to be charged with liability for such tort.⁶³

liability therefor, see *Seibor v. Oregon-Washington R. & Nav. Co.*, 70 Ore. 116, 140 Pac. 629.)

Exception to a nonsuit, in an action against a street railroad company by a passenger for an assault made and false imprisonment caused by one of defendant's conductors who had previously been sworn as a special police officer, overruled, the conductor having committed the tortious acts from a personal motive, under the direction of the city marshal, and at a time when he was off duty and not subject to defendant's orders. *Cordner v. Boston & M. R. R.*, 72 N. H. 413, 57 Atl. 234.

⁶¹ See *Sharp v. Erie R. Co.*, 184 N. Y. 100, 6 Ann. Cas. 250, 76 N. E. 923, quoted *infra*, this section, note 66.

So a railroad company may be liable for an illegal arrest by its special police officer, notwithstanding the fact that such arrest was not made on its premises. *Kastner v. Long Island R. Co.*, 76 N. Y. App. Div. 323, 78 N. Y. Supp. 469. See also *Sharp v. Erie R. Co.*, 184 N. Y. 100, 6 Ann. Cas. 250, 76 N. E. 923, *rev'g* 90 N. Y. App. Div. 502, 85 N. Y. Supp. 553; *Seibor v. Oregon-Washington R. & Nav. Co.*, 70 Ore. 116, 140 Pac. 629.

⁶² *Pennsylvania R. Co. v. Kelly*, 177 Fed. 189, 30 L. R. A. (N. S.) 481, holding the employer not liable for an unprovoked and unjustifiable assault

which was not committed upon its premises but upon a public highway leading up to the premises. To the same effect, see *Philadelphia, B. & W. R. Co. v. Stumpo*, 112 Md. 571, 77 Atl. 266; holding the company not liable for an assault made by the officer on a public street.

⁶³ "The public authorities in the present case appointed deputy sheriffs, with the same powers and duties as they would exercise in any other place. When acting purely in their capacity as police officers, the defendant is not responsible for their acts. Only when the defendant, through its authorized agent, has employed or directed such police officers to act for it, does it become responsible. * * * If this police officer acted, in his alleged attack upon the plaintiff, solely in his capacity as an officer, and not by and under the direction of the conductor of the car, the defendant is not responsible for his act. When a disorderly person is arrested by a police officer, the presumption is that the officer is acting in an official capacity, and not as an agent for the party who by law is required to pay him." *Foster v. Grand Rapids Ry. Co.*, 140 Mich. 689, 104 N. W. 380.

"A policeman, who is appointed and commissioned by the governor, under sections 3427 and 3428, Revised Statutes (General Code, §§ 9150 and

Although this presumption is merely one of fact and rebuttable,⁶⁴

9151), although his appointment was upon the application of a railroad company and his salary is paid by such company, is a 'public officer,' deriving his authority directly from the state; and his acts will be presumed to have been performed in his capacity as such officer until such presumption is overcome by sufficient evidence." *New York, C. & St. L. R. Co. v. Fieback*, 87 Ohio St. 254, 43 L. R. A. (N. S.) 1164, 100 N. E. 889.

A special police officer, appointed and commissioned, under the West Virginia statute, at the instance of a railroad company and paid by such company is, nevertheless, *prima facie* a public officer for whose wrongful acts the company is not liable. *Moss v. Campbell's Creek R. Co.*, 75 W. Va. 62, 83 S. E. 721; *Layne v. Chesapeake & O. R. Co.*, 66 W. Va. 607, 67 S. E. 1103; *McKain v. Baltimore & O. R. Co.*, 65 W. Va. 233, 23 L. R. A. (N. S.) 289, 131 Am. St. Rep. 964, 17 Ann. Cas. 634, 64 S. E. 18.

Railroad policemen, becoming such under the New Jersey statute (Gen. St. p. 2671), although appointed on the application of the railroad company, paid by it and subject to be divested of their powers by its act, are state officers, charged with the performance of public duties, and "for the proper discharge of their official duties, as well as for the proper exercise of their official powers, they were responsible, not to the * * * company, but to the state," and hence in order to render the company liable for an unlawful arrest made by such a policeman and for the subsequent criminal prosecution maliciously instituted by him, it must be proven that such acts were instigated by the company, or by some of its officers or employees—that what the policeman did was done by him as an

agent of the company and not solely of his own volition as a peace officer. *Tucker v. Erie R. Co.*, 69 N. J. L. 19, 54 Atl. 557 (apparently under the decision in this case, which is sought to be explained and distinguished in *Taylor v. New York & L. B. R. Co.*, 80 N. J. L. 282, 39 L. R. A. (N. S.) 122, 78 Atl. 169, "instigation" by the company is not established by evidence that the arrest, made by the company's policeman on the company's right of way, and the prosecution, subsequently instituted by him, were based on a charge that the accused had stolen the brass journals from some freight cars which were standing on the company's tracks).

The California statute (Stats. 1901, p. 666, § 1), however, expressly provides that "the [railroad or steamboat] company designating such person or persons [for appointment as a special police officer or as special police officers] shall be responsible civilly for any abuse of his or their authority" (see *Redgate v. Southern Pac. Co.*, 24 Cal. App. 573, 141 Pac. 1191), and the Massachusetts statute (Stat. 1898, c. 282), by its express terms, makes "the corporation or person applying for an appointment [of a special police officer] under this [2nd] section * * * liable for the official misconduct of the officer appointed on such application, as for the torts of any servant or agent in the employ of such corporation or person." See *Armstrong v. Stair*, 217 Mass. 534, 105 N. E. 442; *Horgan v. Boston El. R. Co.*, 208 Mass. 287, 94 N. E. 386.

⁶⁴ "It is no uncommon thing for corporations * * * to employ duly-appointed police officers to watch their property; and if such an officer so employed make an arrest for disor-

it has, nevertheless, the effect of requiring the plaintiff to prove that

derly conduct, the presumption is that he acted in his official capacity as the agent of the state, and not as the agent of his employer. Being an officer whose duties are prescribed by law, it should be presumed, until the contrary is made to appear, that his employment contemplates only the exercise of such powers as the law confers upon him. * * * The presumption is, however, one of fact, and it may be shown that in making the arrest he acted under orders of his employer, in which event the employer would be liable for the unlawful acts of the officer." *Brill v. Eddy*, 115 Mo. 596, 22 S. W. 488.

The presumption that, in arresting a trespasser on railroad property, a policeman, appointed by the governor under the Pennsylvania act "empowering railroads to employ police force" (approved February 27, 1865, P. L. 225) and not otherwise holding any position under the company, acted solely in his capacity as a peace officer, may be rebutted by evidence that he was, at the time of making the arrest, engaged in special service for the company, such as guarding its property or enforcing obedience to its rules, and that the arrest was within the scope of such special service, or by evidence that the arrest was instigated by the company or by some of its officers or employees acting within the scope of their employment. *Finfrock v. Northern Cent. R. Co.*, 58 Pa. Super. Ct. 52, holding that *Higby v. Pennsylvania R. Co.*, 209 Pa. 452, 58 Atl. 858, "does not decide that every police officer appointed under the Act of 1865 must by virtue of such appointment be deemed the employee, agent, or servant of the railroad company upon whose application he was appointed," and that "the same is true of *Duggan v. B.*

& O. R. R. Co., 159 Pa. 248, and *Berryman v. Penna. & R. R. Co.*, 228 Pa. 621."

In *Southern R. Co. v. Grubbs*, 115 Va. 876, 80 S. E. 749, an action against a railroad company for an assault and battery committed by its conductor, who was, under the statute, a peace officer of the state, upon plaintiff while the latter was, as he claimed, a passenger on defendant's train, the court held that it was proper to refuse defendant's instruction which, "in effect, told the jury that the conductor could alone determine in what capacity he acted in making the alleged assault on the plaintiff, whether as conductor or conservator of the peace, and that he, having testified that he acted in his character as conservator of the peace, without countervailing evidence, they must find for the defendant, the prima facie presumption of the law being that the conductor did act in his capacity as a conservator of the peace," and also the one whereby "the jury were told, not only that a conductor was a conservator of the peace, but that the defendant company was not liable for any act of his, as such, even though he exceeded his authority and his act was unlawful." In thus holding, the court said: "The effect of these instructions was to make the mere claim of the conductor that he was acting as a conservator of the peace conclusive of the case, as a presumption of the law, without regard to whether the facts and circumstances of the case justified his course of conduct. In other words, the contention is that, being a conservator of the peace he is thereby taken out of the control of the company, and out of the sphere of the company's responsibility for his acts, provided he chooses to assume to act under the

the doctrine of respondeat superior applies.⁶⁵ As a general proposi-

guise of a conservator of the peace, without any reference to the question whether or not he was, in good faith, justified in assuming that role. The functions of a conductor are primarily as a representative of the railroad company, and his duty to the passenger is the same as that of the company. His duties as a conservator of the peace are merely incidental to his office of conductor. Neither he nor his company can make use of his incidental functions as a conservator of the peace as a pretext to shield themselves from liability for his wrongful and oppressive acts as conductor. The instructions under consideration would afford railroad companies a ready means of escape from all responsibility to passengers who were wrongfully maltreated by conductors. It is a question for the jury to determine, upon all the facts and circumstances of the case, whether or not the conductor was, in fact and in good faith, acting in the capacity of a conservator of the peace, and not in his capacity of conductor; and if it is relied on to shield the company from liability, the company must show the necessity and good faith of the transaction."

In *Berryman v. Pennsylvania R. Co.*, 228 Pa. 621, 30 L. R. A. (N. S.) 1049, 77 Atl. 1011, an action against a railroad company by one who had been a passenger on its train for an assault and battery, by shooting, committed upon him by a special policeman in defendant's employ when plaintiff, after having arrived at his destination and having left the train, was some 15 feet therefrom but still on defendant's station platform over which he had been passing until addressed by the policeman, who had been riding on the train in the same car with plaintiff but who had

alighted from it after plaintiff had left it, the court held that the defendant was entitled to a peremptory instruction in its favor, the only inference arising from the evidence being "that the assault was a malicious one to gratify private vengeance of the assailant, disassociated with any duty [the policeman] * * * owed to his employer," and there being, at the time, no contract relation between the plaintiff and the defendant whereby the duty of protection was imposed upon the latter. Arguing to this last point, the court said: "The fact, that [the assault and battery] * * * was committed at the defendant company's station is of no importance. Plaintiff had been a passenger, but that relationship ceased when he alighted at his destination and had so far proceeded on his way as to be out of danger from the movement of the train, or further necessity of relation with the servants of the company. The defendant company thereafter owed him no special duty, no contract relation existing between them."

⁶⁵ The plaintiff has the burden of proving authority, express or implied, in the officer to commit the act for and on behalf of the company. *Layne v. Chesapeake & O. R. Co.*, 66 W. Va. 607, 67 S. E. 1103.

In *Philadelphia, B. & W. R. Co. v. Stumpo*, 112 Md. 571, 77 Atl. 266, an action against a railroad company for an assault and battery committed upon the plaintiff by the defendant's special policeman in the course of his arrest of plaintiff on a public street on a charge of carrying a concealed weapon, the Court of Appeals of Maryland observed that "if a policeman, appointed under our statute, at the instance of a corporation, does make an arrest on the premises of the

tion, it is a question for the jury, under the evidence, in which of his two capacities the officer acted;⁶⁶ but when there is no

corporation, or in protecting its property, it may well be required to assume the burden of showing that it was not within the scope of his employment; but when he arrests one who has done nothing of which the company can complain—the arrest being on a public street of a town, and not on the premises of the company—the plaintiff must show that such an act was done by the authority of the company, express or implied, and was within the scope of his employment.”

Where, in an action by an intending passenger against an elevated railroad company for an assault and battery committed upon him while he was on the platform of defendant's station waiting to board a car after having paid his fare, it appears that the one making the assault was appointed a special police officer upon the application of the defendant, which application stated that it was necessary that such an officer be appointed “to maintain order on station platforms and for the protection of life and property,” that the defendant paid for the officer's shield and cap and also paid him his salary, and that he was assigned to the station upon the platform of which the assault occurred by defendant's superintendent, it will be error to exclude plaintiff's evidence which would show in greater detail the directions that defendant's superintendent had given the officer and more precisely what the latter's duties were. *Brewster v. Interborough Rapid Transit Co.*, 68 N. Y. Misc. 348, 123 N. Y. Supp. 992.

⁶⁶ *Southern R. Co. v. Grubbs*, 115 Va. 876, 80 S. E. 749.

“Ordinarily, the question as to whether the wrongful acts were those of the officer or of the corporation is one of fact, and should be submitted

to the jury.” *Southwestern Portland Cement Co. v. Reitzer*, — Tex. Civ. App. —, 135 S. W. 237. See also *Perkins Bros. Co. v. Anderson*, — Tex. Civ. App. —, 155 S. W. 556.

Where there is conflicting evidence as to the employment, the nature and extent of the service, and other matters pertaining to the authority or lack of authority in the officer to act on behalf of the corporation, the jury must determine whether or not the latter is liable. *Layne v. Chesapeake & O. R. Co.*, 66 W. Va. 607, 67 S. E. 1103.

“When there is a fair dispute on the facts, the question of the exact capacity occupied by the offender, at the time of the injury, is for the jury.” *Ruffner v. Jamison Coal & Coke Co.*, 247 Pa. 34, 92 Atl. 1075.

Sharp v. Erie R. Co., 184 N. Y. 100, 6 Ann. Cas. 250, 76 N. E. 923, was an action against a railroad company for the death of a boy at the hands of defendant's special police officer who pursued him, as he ran from defendant's train on which he had been stealing a ride and from which he had jumped while the train was moving through defendant's yard on a warning by third persons that there were detectives in such yard, and shot him when both of them were beyond the boundaries of defendant's premises. A nonsuit granted the defendant by the trial court was affirmed by the Appellate Division (90 N. Y. App. Div. 502, 85 N. Y. Supp. 553). This nonsuit the Court of Appeals held was error. It appeared that the officer was paid a salary by the defendant and that “his duties were to protect the company's interests on the right of way; to keep tramps from trains and look after robberies that might occur at stations and on freight cars in the yards and on the tracks and in

controversy as to the relation which the officer bore, in connection

the station, and look after persons in an intoxicated condition on the company's property, and generally to look after crimes committed against the railroad company on the right of way. It was part of his duty to drive off and keep off trespassers from the company's property. His duty was not limited to keeping trespassers off the trains where it was to the company's interest to keep them out of the yard. That was largely committed to his discretion." Addressing itself to the defendant's proposition that, since there was no conflict in the testimony nor any dispute about the facts, the question of the defendant's liability was one of law for the court, and there was nothing for the jury to pass on, which proposition was sustained by the courts below, the Court of Appeals said: "It is argued that the moment [the officer] * * * passed beyond the boundaries of the defendant's premises onto the adjoining lot where the deceased was killed he was no longer acting as the defendant's servant, but was pursuing and seeking to arrest the boy who had committed or was engaged in the commission of a crime. It will be noted that the pursuit commenced when the deceased jumped from the car and was continuous until the shooting occurred. So the question is whether, at the time that [the officer] * * * fired the fatal shot, he was acting as the defendant's servant or as a public officer; and, further, whether that question was one of law for the court, or of fact for the jury. * * * Did [the officer] * * * at the moment that he fired the fatal shot, put off his character as a servant of the defendant and put on another and different character, namely, the powers and duties of a public officer? Does the fact that he crossed the

boundary line of the defendant's premises in pursuit of the boy make the question one of law? If it be a question of law, the principle would be the same whether he had passed the boundary line by the distance of 2 feet instead of 50. It is obvious that there is no rule or principle of law to determine such a question, and hence it belonged to the jury. * * * A railroad company employing a servant who happens to be a public officer acquires no immunity from such employment. Constables and policemen are often employed by corporations in the same capacity as * * * was [the officer here involved]. It is not beyond the province of a jury in such a case to find that the official acts of the employee are to be used for the benefit of the defendant and in protection of its interests or property. And, hence, in such a case the character of the servant's act is to be determined in the same way and upon the same principles as if he was not a public officer at all. If he acts maliciously or in pursuit of some purpose of his own, the defendant is not bound by his conduct, but if, while acting within the general scope of his employment, he simply disregards his master's orders or exceeds his powers, the master will be responsible for his conduct. There was no proof in this case that [the one doing the shooting] * * * was a public officer, except his own statement given upon the examination of the defendant's counsel. It seems that the plaintiff's counsel called him as a witness to prove the facts resulting in the shooting of the boy, and upon the defendant's cross-examination he testified to his official character without producing any written or record evidence of the fact. The rule in such cases seems to be that where one of the parties to an

with the commission of the tort, to the corporation,⁶⁷ or when the facts

action calls his opponent as a witness and proves by him facts tending to sustain his case, and such witness in his own behalf afterwards gives an explanation of the circumstances which, if true, repels the idea of liability on the part of the defendant, and, though such explanation is not disputed by other evidence, this does not authorize the court to take the case from the jury; it is for them to determine what degree of faith is to be given to the explanatory testimony. * * * [The officer here involved] was undoubtedly an interested witness. He testified to facts necessary to the plaintiff's case, and then testified to facts in the nature of an excuse for his own conduct; and, although the excuse was not affected by any other evidence, still his credibility was for the jury. * * * It follows, that it was for the jury to determine whether [the officer] * * * acted within the scope of his employment, or whether, being a public officer, he acted in that capacity alone." (See also, in this connection, *Scibor v. Oregon-Washington R. & Nav. Co.*, 70 Ore. 116, 140 Pac. 629, in which the defendant was held liable for personal injuries sustained by plaintiff notwithstanding the fact that the arrest, in the course of which they were inflicted, was made away from its premises.)

In *Duggan v. Baltimore & O. R. Co.*, 159 Pa. St. 248, 39 Am. St. Rep. 672, 28 Atl. 182, an action against a railroad company for the wrongful arrest of plaintiff, while he was a passenger on defendant's train, and for his subsequent wrongful imprisonment, it appeared that the acts complained of had been committed by a police officer to whom the baggageman at defendant's station had handed a telegram, sent by a detective in defend-

ant's employ and addressed to the conductor of the train on which plaintiff was riding, which ordered the arrest of a man of a certain description who had boarded the train at the point of plaintiff's embarkation, and that the conductor pointed out the plaintiff as the man who had taken the train at such point, and, declaring that he would not delay his train, ordered the policeman to take such man if he wanted him. The court held that the question of defendant's liability might "turn on either of two grounds: First. Was [the detective] * * * the agent of defendant in ordering the arrest, and had he such authority, actual or apparent, as justified the conductor in obeying his telegraphed order?" and "secondly. Was the defendant made liable by the action of the conductor?" and, further, that, under the evidence, these matters were for the determination of the jury.

Evidence held to make it a jury question whether a special police officer was acting within the scope of his employment by a railroad company or solely under his commission as a public officer in assaulting and wounding a trespasser on the company's property. *Baltimore & O. B. Co. v. Strube*, 111 Md. 119, 73 Atl. 697; *Baltimore & O. R. Co. v. Deck*, 102 Md. 669, 62 Atl. 958.

Directed verdict for defendant railroad company, sued for the death of plaintiff's intestate which resulted from his having been shot while in defendant's freight yards, by defendant's special officer or night watchman whom it was claimed by defendant acted purely in self-defense, held error. *Cook v. Michigan Cent. R. Co.*, 189 Mich. 456, 155 N. W. 541.

⁶⁷ *Layne v. Chesapeake & O. R. Co.*, 66 W. Va. 607, 67 S. E. 1103.

in evidence are such that but one conclusion could reasonably be drawn therefrom,⁶⁸ it will not be error for the court to determine the liability of the corporation as a matter of law.⁶⁹

§ 3353. Joint and several liability of corporation and agent or servant. Where the character of an agent's tort whereby a third person is injured and the circumstances in which it is committed are such as to create a liability flowing not only from the agent to the injured person but also from the corporate principal to such person, it may be generally stated that this liability gives a right of action not only against the corporation but also against the guilty agent or servant himself.⁷⁰ When this is the case, it is generally held that the liability of the corporation and its agent or servant is joint as well as several⁷¹ and that they may be sued in a single action⁷² at least

⁶⁸ *Southwestern Portland Cement Co. v. Reitzer*, — Tex. Civ. App. —, 135 S. W. 237.

⁶⁹ Defendant railroad company, sued for an assault and battery committed upon plaintiff by the company's special policeman in the course of his arrest of plaintiff on a public street on a charge of carrying a concealed weapon, held entitled to a peremptory instruction in its favor on the ground that there was no evidence legally sufficient to show that the policeman was at the time of the arrest acting for the company and within the scope of his employment. *Philadelphia B. & W. R. Co. v. Stumpo*, 112 Md. 571, 77 Atl. 266.

Refusal to take off a compulsory nonsuit in an action against a corporation for an assault and battery committed by deputy constables, appointed, under the Pennsylvania Act of May 9, 1889 (P. L. 156), on the petition of the required number of taxpayers, but paid by the corporation, held not error. *Ruffner v. Jamison Coal & Coke Co.*, 247 Pa. 34, 92 Atl. 1075.

⁷⁰ See 1 Mechem on Agency (2nd Ed.), § 1451 et seq.

⁷¹ So a corporation and its servant

are jointly as well as severally liable for the tortious act of the servant committed within the scope of his employment. *Schumpert v. Southern R. Co.*, 65 S. C. 332, 95 Am. St. Rep. 802, 43 S. E. 813. See also *Riser v. Southern Ry. Co.*, 67 S. C. 419, 46 S. E. 47; *Gardner v. Southern R. Co.*, 65 S. C. 341, 43 S. E. 816.

In *Atkinson v. American School of Osteopathy*, 240 Mo. 338, 144 S. W. 816, an action against a school of osteopathy and one of the instructors therein for personal injuries sustained by plaintiff in the course of treatment given her by the instructor while she was a student in such school, to which treatment she was entitled under her contract with the school, the defendants did not question the assertion that "the defendant [instructor] * * * treated the plaintiff as the agent and employee of his codefendant [the school] * * * , so that corporation [the school] would be jointly liable with him for damages resulting from [his] * * * negligence."

⁷² *Southern R. Co. v. Grizzle*, 124 Ga. 735, 110 Am. St. Rep. 191, 53 S. E. 244; *Indiana Nitroglycerin & Torpedo Co. v. Lippincott Glass Co.* (Ind. App.), 72 N. E. 183; *Mayberry v.*

where the common-law distinction between trespass and trespass on the case has been abolished.⁷³

Northern Pac. R. Co., 100 Minn. 79, 12 L. R. A. (N. S.) 675, 10 Ann. Cas. 754, 110 N. W. 356; *McHugh v. Northern Pac. R. Co.*, 32 Wash. 30, 72 Pac. 450. See also *Alabama Great Southern R. Co. v. Thompson*, 200 U. S. 206, 50 L. Ed. 441, 4 Ann. Cas. 1147; *Dowell v. Chicago, R. I. & P. R. Co.*, 83 Kan. 562, 112 Pac. 136; *McGinnis v. Chicago, R. I. & P. R. Co.*, 200 Mo. 347, 9 L. R. A. (N. S.) 880, 118 Am. St. Rep. 661, 9 Ann. Cas. 656, 98 S. W. 590.

⁷³ In *New Ellerslie Fishing Club v. Stewart*, 123 Ky. 8, 9 L. R. A. (N. S.) 475, 93 S. W. 598, in which plaintiff sued, jointly, a corporation and one of the corporation's servants for a wound received at the hands of the latter, the Kentucky Court of Appeals held that the action of the trial court in overruling defendants' motion to require plaintiff to elect against which of the defendants he would prosecute his action, was not error. Concerning the defendants' proposition that the action could not be maintained against them jointly, the court said: "This contention might be well taken if the common-law system of pleading prevailed in this state, as the action against the servant who committed the injury would be in trespass, while the action against the corporation for the wrongful act of its agent would be in case; but the common-law procedure has been superseded by the Code, and it is now well settled that a joint action may be prosecuted against the servant and master, or the corporation and its employee, for a tort of the servant or agent whilst acting within the scope of his employment." See also *Cincinnati, N. O. & T. P. R. Co. v. Cook's Adm'r*, 113 Ky. 161, 67 S. W. 383; *Illinois Cent. R. Co. v. Houchins*, 28 Ky. L. Rep. 499, 89 S.

W. 530, 532; *Illinois Cent. R. Co. v. Coley*, 28 Ky. L. Rep. 336, 89 S. W. 234.

"Exceptions * * * raise the question whether the master and servant are liable as joint tortfeasors for the tort of the servant committed within the scope of his employment and while in the master's service.

* * * Appellants do not dispute the proposition that the master is liable for the negligence of the servant within the scope of his employment, nor do they dispute that the servant is also liable for his own tort. The contention is that there is no joint liability unless the master directs or is present, actively co-operating with the servant in the commission of the tort. There is undoubtedly some authority for this view. * * * The leading case for such view is *Parsons v. Winchell*, 5 Cush. 592, 52 Am. Dec. 745, wherein the court held that master and servant are not jointly liable for servant's negligence in the master's absence in so driving a team as to cause an injury to another. In the view of that court, 'the act of a servant is not the act of the master, even in legal intendment or effect, unless the master previously directs or subsequently adopts it. In other cases he is liable for the acts of his servant, when liable at all, not as if the acts were done by himself, but because the law makes him answerable therefor.' The principal reason assigned for this view is that, if master and servant were made jointly liable, the master could not call on the servant for contribution in case he should satisfy the execution. But as it appears in the note to the case cited in 52 Am. Dec. 748, the Massachusetts court, in *Hewett v. Swift*, 3 Allen 425, held that a joint action in

On this subject, Mr. Mechem, in his work on Agency, has said: "Although the principal or master may be liable for the torts of his servant or agent within the rules laid down in the preceding sections, it is also true * * * that the agent or servant is himself liable, in a great variety of cases, to the person injured by his misconduct. Whether these two liabilities can be enforced in a joint action depends upon a variety of considerations. If the principal or master is present or participating in the wrongful act, he and his servant or agent may undoubtedly be joined as wrongdoers. The same would doubtless be true also where, though not personally present, he directs the particular act or subsequently ratifies it. * * * Where, however, there was no direction, ratification or participation on the part of the principal, and it is sought to charge him simply upon the doctrine of respondeat superior, the question whether a joint action can be maintained against the principal and the agent to recover for

the nature of trespass would lie against a corporation and its servant for personal injury inflicted by the latter in discharging duties imposed by the corporation. *Parsons v. Winchell* was an action on the case, and *Hewett v. Swift* was in trespass under common-law pleadings, which made a distinction between the remedies for injuries with force and injuries without force. All such distinctions are abolished under the Code. With reference to the matter of contribution which is suggested as presenting a difficulty in the way of holding the master and servant jointly liable, Mr. Cooley, in his work on Torts, at pages 144, 145 [3rd Ed. pp. 254, 255], after stating the general rule as to contribution between wrongdoers, says: 'But there are some exceptions to the general rule, which rest upon reasons at least forcible as those which support the rule itself. They are of cases where, although the law holds all the parties liable as wrongdoers to the injured party, yet as between themselves some of them may not be wrongdoers at all, and their equity to require the others to respond for all the damages may be complete. There

are many such cases where the wrongs are unintentional, or where the party, by reason of some relation, is made chargeable with the conduct of others. A case in point is where a railroad company is made to pay damages for an injury caused by the carelessness of one of its servants. Here the injured party may justly hold both the company and its servants to responsibility; but the actual wrong, so far as it is one in morals, is on the part of the servant alone, and the company is holden only through its obligation to be accountable for the action of those to whom it intrusts its business. As between the company and its servant, the latter alone is the wrongdoer, and in calling upon him for indemnity the company bases no claim upon its own misfeasance or default, but upon that of the servant himself.' Furthermore, the reason assigned in the Massachusetts case that the act of the servant is not the act of the master, even in legal intendment or effect, unless the master directs or adopts it, is not consistent with the liability of the master for the acts of the servant, as held in this state. * * * By legal intendment and effect the act of a serv-

the agent's negligence is involved in some dispute. It is held in some cases that a joint action cannot be maintained.⁷⁴ The liability of the agent is based upon his actual wrongdoing: the liability of the principal arises merely from the policy of the law. Liabilities based upon such radically different theories as these cannot, it is held in these cases, be enforced in one action. The weight of authority, however, is clearly the other way, and permits the principal and the agent to be joined in the same action at the option of the plaintiff. * * * Where the master is joined with the servant in an action based wholly upon the servant's negligence or misconduct, the master cannot be held unless there is a cause of action against the servant, and the acquittal of the servant must lead to the discharge of the master also. So, where the master is sued alone in such a case, he may show in justification that the servant could not have been held liable, and in that event the master would ordinarily be exonerated. And after a judg-

ant within the scope of his agency is the act of the master. In such case there is a legal identification of the master and servant. In the case of a railroad corporation, which owes important duties to the public or those affected by its operation, and which cannot act, except through agents, there is the strongest reason for holding that with respect to acts done in its service by the agents within the scope of their employment, the corporation is present acting through its agents. 'Qui facit per alium, facit per se.' The servant is liable because of his own misfeasance or wrongful act in breach of his duty to so use that which he controlled as not to injure another. The master is liable because he acts by his servant, and is, therefore, bound to see that no one suffers legal injury through the servant's wrongful act done in the master's service within the scope of the agency. Both are liable jointly, because from the relation of master and servant they are united or identified in the same tortious act resulting in the same injury. Some of the cases, in discussing the liability of the servant to a third person, make a distinction be-

tween nonfeasance and misfeasance of the servant, but all agree that the servant is liable for his acts of misfeasance. Inasmuch as the acts of the servant in this case were clearly misfeasance, no occasion arises here for noticing the distinction. Among the authorities that may be cited in support of the view that master and servant are jointly liable for the misfeasance of the servant acting within the scope of the agency are Cooley on Torts, 142 [3rd Ed. p. 252]; Wright v. Wilcox, 19 Wend. 343, 32 Am. Dec. 507, reaffirmed in Phelps v. Wait, 30 N. Y. 78; Greenberg v. Whitcomb Lumber Co., 90 Wis. 225, 63 N. W. 93, reported also in 48 Am. St. Rep. 911, and in 28 L. R. A. 439, where the cases pro and con are cited in the notes at page 441; Winston's Adm'r v. Illinois Central R. R. Co., 65 S. W. 13, 55 L. R. A. 603." Schumpert v. Southern R. Co., 65 S. C. 332, 95 Am. St. Rep. 802, 43 S. E. 813.

⁷⁴ Citing Bailey v. Bussing, 37 Conn. 349; McNemar v. Cohn, 115 Ill. App. 31; Campbell v. Portland Sugar Co., 62 Me. 552, 16 Am. Rep. 503; Mulchey v. Methodist Religious Society, 125 Mass. 487; Parsons v. Winchell, 5 Cush.

ment upon the merits in favor of the agent, the principal can not be held." ⁷⁵

§ 3354. Exemplary damages—In general. In the words of the leading authority on the law of damages,⁷⁶ "there is * * * a marked difference legally, as there is practically, between a tort committed with and without malice; between a wrong done in the assertion of a supposed right and one wantonly committed; one unattended with any incidents of insult and one with such concomitants. Such vicious accompaniments increase the injury and render additional damages necessary to adequate compensation."⁷⁷ And, as the author

(Mass.) 592, 52 Am. Dec. 745; Clark v. Fry, 8 Ohio St. 358, 72 Am. Dec. 590; and stating that "case for deceit in the nature of a conspiracy can not be maintained against principal and agent jointly, for the unauthorized fraudulent acts of the agent alone. Page v. Parker, 40 N. H. 47."

⁷⁵ 2 Mechem on Agency (2nd Ed.), §§ 2010-2012.

⁷⁶ Sutherland on Damages (4th Ed.), § 390. For an exhaustive and critical treatment of the subject of the liability of corporations for exemplary damages—a treatment of the subject which does not come within the scope of this work—see § 390 et seq. of the work above cited. See also 2 Mechem on Agency (2nd Ed.), § 2013 et seq.

For a very elaborate and interesting discussion of the doctrine of exemplary damages, see Fay v. Parker, 53 N. H. 342, 16 Am. Rep. 270, decided in 1873, wherein the court held that such damages could not be awarded in an action for assault and battery, the wrongdoer being subject to punishment under the criminal law.

⁷⁷ "Punitive damages have now come * * * to be generally, though not universally, regarded, not only as punishment for wrong, but as vindication of private right. This is the basis upon which they are now placed in this state." Beaudrot v. Southern R. Co., 69 S. C. 160, 48 S. E. 106.

In Milwaukee & St. P. Ry. Co. v. Arms, 91 U. S. 489, 23 L. Ed. 374, the Supreme Court of the United States, after stating that "the doctrine is too well settled now to be shaken, that exemplary damages may in certain cases be recovered," said: "As the question of intention is always material in an action of tort, and as the circumstances which characterize the transaction are, therefore, proper to be weighed by the jury in fixing the compensation of the injured party, it may well be considered whether the doctrine of exemplary damages cannot be reconciled with the idea that compensation alone is the measure of redress. But jurists have chosen to place this doctrine on the ground, not that the sufferer is to be recompensed, but that the offender is to be punished; and, although the soundness of it has been questioned by some text-writers and courts, it must be accepted as the general rule in England and in most of the states of this country. * * * It has also received the sanction of this court. Discussed and recognized in Day v. Woodworth, 13 How. 371, it was more accurately stated in R. R. Co. v. Quigley, 21 How. 213, 22 L. Ed. 77." See also Detroit Daily Post Co. v. McArthur, 16 Mich. 447.

"It is generally considered, by courts and text-book writers, that punitive damages are awarded as a

shows some of the courts have held, that such damages are proper as a punishment of the wrongdoer and as a warning and deterrent to him and others. Additional damages of this character are variously termed "exemplary," "punitive," or "vindictive" damages, or "smart money."⁷⁸ Since a corporation may, in contemplation of law, be actuated by malice, etc., the state of mind as well as the conduct of its officers and agents being imputable to it, it follows that a corporation may, in a proper case, be held liable, like a natural person, for exemplary damages.⁷⁹ In other words, there is nothing in the nature of a corporation to prevent such damages from being awarded

civil punishment inflicted upon the wrongdoer, rather than as indemnity to the injured party, although, as he will be the beneficiary of the punishment inflicted, it might with much propriety be said that they are allowed by way of remuneration for the aggravated wrong done." *Louisville & N. R. Co. v. Roth*, 130 Ky. 759, 114 S. W. 264.³

⁷⁸ That these terms are interchangeable, see:

United States. *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97.

Delaware. *Farrow v. Hoffecker*, 7 Pennw. 223, 79 Atl. 920.

Kentucky. *Doerhoefer v. Shewmaker*, 29 Ky. L. Rep. 1193, 97 S. W. 7.

New York. *Craven v. Bloomingdale*, 171 N. Y. 439, 64 N. E. 169.

Pennsylvania. *Springer v. J. H. Somers Fuel Co.*, 196 Pa. St. 156, 46 Atl. 370.

⁷⁹ "It is a well-established principle of jurisprudence that corporations may be held liable for torts involving a wrong intention, * * * and exemplary damages may be recovered against them for the wrongful acts of their servants and agents done in the course of their employment, in all cases and to the same extent that natural persons committing like wrongs would be held liable. In such cases the malice and fraud of the authorized agents are imputable to the

corporations for which they acted. This principle is too well settled to require argument, and the authorities sustaining it are numerous and well-nigh unanimous." *Wheeler & Wilson Mfg. Co. v. Boyce*, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609.

"It is argued that a corporation cannot be supposed to act wilfully or maliciously, and that therefore the damages cannot go beyond the point of actual compensation. This reasoning is too metaphysical to be applied in testing the civil liability of a corporation. Practically, there is a human intelligence and volition which controls the affairs of a corporation, just like those of an individual, and which may act wilfully, maliciously, or recklessly, thus laying the basis for exemplary damages; and therefore whatever rule of damages would apply in a suit against a natural person ought to apply in a suit against a corporation. Any discrimination in that regard would shock the public sense of impartial justice, and would be an unjustifiable innovation. The instructions governing subordinate employees and agents may be devised in such utter disregard of the rights of others, that obedience to them will result in palpable oppression and gross wrong to individuals. Whether it was so here was a question for the jury." *Jeffersonville R. Co. v. Rogers*, 28 Ind. 1, 92 Am. Dec. 276.

against it.⁸⁰ Although, as Mr. Mechem shows in his work on Agency,

80 United States. Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 37 L. Ed. 97; Denver & R. G. Ry. Co. v. Harris, 122 U. S. 597, 30 L. Ed. 1146; Times Pub. Co. v. Carlisle, 94 Fed. 762.

Alabama. Alabama Great Southern R. Co. v. Sellers, 93 Ala. 9, 30 Am. St. Rep. 17, 9 So. 375; Jefferson County Sav. Bank v. Eborn, 84 Ala. 529, 4 So. 386; Louisville & N. R. Co. v. Whitman, 79 Ala. 328.

California. Lowe v. Yolo County Consol. Water Co., 157 Cal. 503, 108 Pac. 297.

Colorado. Western U. Tel. Co. v. Eyser, 2 Colo. 141.

Connecticut. Maisenbacker v. Society Concordia, 71 Conn. 369, 71 Am. St. Rep. 213, 42 Atl. 67.

Georgia. Gasway v. Atlantic & W. P. R. Co., 58 Ga. 216.

Illinois. Singer Mfg. Co. v. Holdfoft, 86 Ill. 455, 29 Am. Rep. 43; New York Life Ins. Co. v. People, 95 Ill. App. 136, aff'd 195 Ill. 430, 63 N. E. 264.

Indiana. Louisville, N. A. & C. Ry. Co. v. Wolfe, 128 Ind. 347, 25 Am. St. Rep. 436, 27 N. E. 606; Jeffersonville R. Co. v. Rogers, 38 Ind. 116, 10 Am. Rep. 103; Jeffersonville R. Co. v. Rogers, 28 Ind. 1, 92 Am. Dec. 276; Baltimore & O. S. W. R. Co. v. Davis, 44 Ind. App. 375, 89 N. E. 403.

Kansas. West v. Western U. Tel. Co., 39 Kan. 93, 7 Am. St. Rep. 530, 17 Pac. 807; Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609.

Kentucky. Louisville & N. R. Co. v. Roth, 130 Ky. 759, 114 S. W. 264; Memphis & C. Packet Co. v. Nagel, 97 Ky. 9, 29 S. W. 743.

Maine. Goddard v. Grand Trunk Ry. Co., 57 Me. 202, 2 Am. Rep. 39.

Maryland. Philadelphia, W. & B. R. Co. v. Larkin, 47 Md. 155, 28 Am.

Rep. 442; Baltimore & Y: Turnpike Road v. Boone, 45 Md. 344.

Minnesota. Anderson v. International Harvester Co. of America, 104 Minn. 49, 16 L. R. A. (N. S.) 440, 116 N. W. 101; Peterson v. Western U. Tel. Co., 75 Minn. 368, 43 L. R. A. 581, 74 Am. St. Rep. 502, 77 N. W. 985.

Mississippi. Pullman Palace Car Co. v. Lawrence, 74 Miss. 782, 22 So. 53; New Orleans, J. & G. N. R. Co. v. Bailey, 40 Miss. 395.

Missouri. Doss v. Missouri, K. & T. R. Co., 59 Mo. 27, 21 Am. Rep. 371.

New Hampshire. Hopkins v. Atlantic & St. L. R. Co., 36 N. H. 9, 72 Am. Dec. 287.

New Jersey. Hoboken Prtg. & Pub. Co. v. Kahn, 59 N. J. L. 218, 59 Am. St. Rep. 585, 35 Atl. 1053.

New York. Cleghorn v. New York Cent. & H. River R. Co., 56 N. Y. 44, 15 Am. Rep. 375; Kastner v. Long Island R. Co., 76 App. Div. 323, 78 N. Y. Supp. 469.

Ohio. Atlantic & G. W. Ry. Co. v. Dunn, 19 Ohio St. 162, 2 Am. Rep. 382; Pittsburgh, Ft. W. & C. R. Co. v. Slusser, 19 Ohio St. 157.

South Carolina. Palmer v. Charlotte, C. & A. R. Co., 3 S. C. 580, 16 Am. Rep. 750.

Tennessee. Haley v. Mobile & O. R. Co., 7 Baxt. 239; Louisville & N. R. Co. v. Garrett, 8 Lea 438, 41 Am. Rep. 640.

Texas. Missouri Pac. Ry. Co. v. Richmond, 73 Tex. 568, 4 L. R. A. 280, 15 Am. St. Rep. 794, 11 S. W. 555; International & G. N. R. Co. v. Garcia, 70 Tex. 207, 7 S. W. 802; International & G. N. R. Co. v. Telephone & Telegraph Co., 69 Tex. 277, 5 Am. St. Rep. 45, 5 S. W. 517; Galveston, H. & S. A. Ry. Co. v. Donahoe, 56 Tex. 162; Hays v. Houston & G. N. R. Co., 46 Tex. 272.

Virginia. Norfolk & W. R. Co. v.

there are cases in which it has been thought that the awarding of exemplary damages might be justified in actions against corporations when it could not be in the case of a natural person, there are, as he further shows, other cases which have repudiated such a distinction,⁸¹ and while a corporation may undoubtedly be liable for exemplary damages in a proper case, such a case, it would seem, cannot arise, generally speaking, when exemplary damages could not have been imposed had the defendant been a natural person instead of a corporation.⁸² Adopting the view that exemplary damages are awarded,

Anderson, 90 Va. 1, 44 Am. St. Rep. 884, 17 S. E. 757.

Wisconsin. Bass v. Chicago, & N. W. Ry. Co., 42 Wis. 654, 24 Am. Rep. 437.

See also Sutherland on Damages (4th Ed.), § 408.

By express provision of the Constitution of Texas (Const. 1876, art 16, § 26) "every * * * corporation * * * that may commit a homicide, through wilful act, or omission, or gross neglect, shall be responsible, in exemplary damages, to the surviving husband, widow, heirs of his or her body, or such of them as there may be, without regard to any criminal proceeding that may or may not be had in relation to the homicide."

In Illinois Cent. R. Co. v. Hammer, 72 Ill. 347, 353, the court said: "A private corporation cannot be liable to punitive damages merely for gross negligence of its servants. If the company employs incompetent, drunken or reckless servants, knowing them to be such, or, having employed them without such knowledge, retains them after learning the fact, or after full opportunity to learn it, the company would no doubt be liable. Or if its servants, whilst in the employment of the company, and engaged in carrying on the business of the company, should wilfully or wantonly produce injury to others, then the company would no doubt be liable to such damages. With its servants, a mere omission of duty, although grossly

negligent, should not be sufficient, but some intention to inflict the injury, or a reckless, wanton disregard for the safety of others, should appear, to warrant punitive damages." See also Chicago Union Traction Co. v. Lauth, 216 Ill. 176, 181, 74 N. E. 738.

Under the Indiana rule, a corporation is not liable for exemplary damages when it may be prosecuted criminally for the act which forms the basis of the civil action. Louisville, N. A. & C. Ry. Co. v. Wolfe, 128 Ind. 347, 25 Am. St. Rep. 436, 27 N. E. 606; Wabash Ptg. & Pub. Co. v. Crumrine, 123 Ind. 89, 21 N. E. 904; Indianapolis Bleaching Co. v. McMillan, — Ind. App. —, 113 N. E. 1019; Baltimore & O. S. W. R. Co. v. Davis, 44 Ind. App. 375, 89 N. E. 403; Louisville, N. A. & C. Ry. Co. v. Goben, 15 Ind. App. 123, 43 N. E. 890, 42 N. E. 1116. But where the corporation is not subject to criminal prosecution for the act constituting the basis of a civil action against it, the fact that its agent who actually committed the act may be criminally prosecuted therefor does not render the corporation immune from liability for exemplary damages. Indianapolis Bleaching Co. v. McMillan, — Ind. App. —, 113 N. E. 1019.

⁸¹ 2 Mechem on Agency (2nd Ed.), § 2015.

⁸² Gulf, C. & S. F. Ry. Co. v. Moore, 69 Tex. 157, 6 S. W. 631; Hays v. Houston Great Northern R. Co., 46 Tex. 272, 280.

not by way of compensation to the sufferer, but by way of punishment of the wrongdoer, and as an example or warning to others, and that they can only be awarded against one who has participated in the offense, a principal, although he is liable to make compensation for injuries done or inflicted by his agent within the scope of his employment, cannot be held liable for exemplary or punitive damages merely by reason of wanton, oppressive or malicious intent upon the part of the agent, but in order that the principal may be liable, there must have been some participation by him in the commission of the tort.⁸³ Applying this doctrine to corporations, it has been held that where the managing officers or officer of a corporation, as the directors, the president or vice president, etc., commit a tort themselves, while acting for the corporation and within the scope of their authority, with wantonness, oppressiveness or malice, or if they authorize or ratify such a tort by a subordinate agent, or if they employ or retain a subordinate agent or servant, knowing that he is incompetent or unfit, and he commits such a tort because of his incompetency or unfitness, in either case the malice, wantonness or oppression is imputable to the corporation, and exemplary damages may be given against it.⁸⁴

⁸³ *Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97.

"A corporation, like a natural person, may be held liable in exemplary or punitive damages for an act by an agent within the scope of his employment, providing the criminal intent necessary to warrant the imposition of such damages is brought home to the corporation." *Moore v. Atchison, T. & S. F. R. Co.*, 26 Okla. 682, 110 Pac. 1059 (headnote by the court).

⁸⁴ *United States. Lake Shore & M. S. Ry. Co. v. Prentice*, 147 U. S. 101, 37 L. Ed. 97; *Denver & R. G. Ry. Co. v. Harris*, 122 U. S. 597, 30 L. Ed. 1146; *Milwaukee & St. P. Ry. Co. v. Arms*, 91 U. S. 489, 23 L. Ed. 374.

Connecticut. Merrills v. Tariff Mfg. Co., 10 Conn. 384, 27 Am. Dec. 682.

Kansas. Wheeler & Wilson Mfg. Co. v. Boyce, 36 Kan. 350, 59 Am. Rep. 571, 13 Pac. 609.

New York. Cleghorn v. New York Cent. & H. River R. Co., 56 N. Y. 44, 15 Am. Rep. 375; *Caldwell v. New*

Jersey Steamboat Co., 47 N. Y. 282.

Wisconsin. Bass v. Chicago & N. W. Ry. Co., 42 Wis. 654, 24 Am. Rep. 437.

England. See Bell v. Midland Ry. Co., 10 C. B. (N. S.) 287.

As supporting particularly the proposition that authorization or ratification is necessary, see:

United States. Bank of Palo Alto v. Pacific Postal Tel. Cable Co., 103 Fed. 841, 847; *McGehee v. McCarley*, 91 Fed. 462, 465; *Pittsburgh, C., C. & St. L. Ry. Co. v. Russ*, 57 Fed. 822, 826.

Missouri. Perkins v. Missouri, K. & T. R. Co., 55 Mo. 201, 214.

Texas. Gulf, C. & S. F. Ry. Co. v. Reed, 80 Tex. 362, 26 Am. St. Rep. 749, 15 S. W. 1105; *Mutual Life Ins. Co. v. Hargus* (Tex. Civ. App.), 99 S. W. 580.

Virginia. Sun Life Assur. Co. of Canada v. Bailey, 101 Va. 443, 44 S. Fl. 692.

Wisconsin. Rueping v. Chicago &

When the wanton, wilful and malicious acts complained of were

N. W. R. Co., 116 Wis. 625, 96 Am. St. Rep. 1013, 93 N. W. 843; Vassau v. Madison Elec. Ry. Co., 106 Wis. 301, 82 N. W. 152; Robinson v. Superior Rapid-Transit Ry. Co., 94 Wis. 345, 34 L. R. A. 205, 59 Am. St. Rep. 897, 68 N. W. 961.

On the question of when the act may be deemed to have been ratified, it has been said that "in case of railway corporations the rule is that to amount to ratification the adoption or confirmation of the wrongful act of the servant must be shown to be by some chief officer, vice-principal, or alter ego (as he is sometimes called) of the company, who must be proven to possess under and for the company sufficient authority and discretion to act and speak for the company, as if it were, figuratively speaking, bodily present in the persons of its managers, speaking and acting for itself and on its own responsibility. * * * Mere silence, unless required to speak and act, or even satisfaction at the commission of the wrong, unaccompanied by some act of adoption, will not amount to ratification. Cooley, Torts, p. 127. Nor will the retention of the guilty servant of itself render the principal liable for the original tort on the ground of ratification; certainly not in the absence of proof of his incompetency, or that his continued employment by the company has reference to and is connected with the acts of the servant in the matter about which complaint is made. Railway Co. v. McDonald, 75 Tex. 41, 12 S. W. Rep. 860; Dillingham v. Russell [73 Tex. 47, 11 S. W. 139]." Gulf, C. & S. F. Ry. Co. v. Reed, 80 Tex. 362, 26 Am. St. Rep. 749, 15 S. W. 1105. Further on the question of the continued employment of the guilty servant as evidence of ratification, see § 3359, *infra*.

In Edelmenn v. St. Louis Transfer Co., 3 Mo. App. 503, 508, the court stated that "it is true, as said in Perkins v. Missouri, Kansas & Texas R. R. Co., 55 Mo. 214, that slight acts of ratification may be sufficient; but the mere omission to act, when action might compromise the legal rights of a party, is not sufficient. In such cases there is no legal obligation upon the person to act, and, where there is none, inaction cannot ratify." Prior to this the court had said: "The fact that the defendant did not discharge its driver [who had committed the negligent act complained of] after learning of the accident had no tendency to prove a ratification by defendant of his act. To hold the defendant liable for vindictive damages by virtue of a ratification, the plaintiff must at least prove some affirmative act. Mere negation, or absence of action, cannot operate as a ratification in any such case as the present. The fallacy lies in assuming that there was some obligation on the defendant to act, and to conclude itself by its action. If it discharged the driver on account of the accident, this would be taken as evidence of its liability; else, it would be argued, why discharge him? If, on the contrary, there is no discharge, a ratification is inferred. This would be to reduce parties to a dilemma to which the law does not drive them. The law can make no distinction between cases which are plain and those which are not plain. An investigation may completely alter the aspect of the case; and it is the right of a party charged to have the investigation made under the safeguards provided by law. The defendant was entitled to stand on its legal rights, and the plaintiff to stand on his legal remedies."

committed by the governing officers of the corporation, the corporation will be held to have "participated" in their commission so as to come within the rule requiring the principal to be *particeps criminis*.⁸⁵ Otherwise, "to make the master liable in any case to exemplary damages for the fraud, malice, gross negligence, or oppression of the servant, it should be alleged and proved that the acts of the servant which constitute the fraud, malice, gross negligence, or oppression were committed by direction of the master, or that the master has ratified and adopted such acts as his own, or that the master has been guilty of negligence in the selection and employment of the servant

The exemplary-damages headnotes to *Sullivan v. Oregon Ry. & Nav. Co.*, 12 Ore. 392, 53 Am. Rep. 364, 7 Pac. 508, in the three reports in which the case appears would seem not to be justified by the case as reported. At the time the case was decided, the Oregon Supreme Court consisted of three Justices, namely, Waldo (C. J.), Thayer and Lord. Justice Thayer, in his opinion in the case, discusses the liability of the defendant for exemplary damages as his "last point." Justice Lord concurs with Justice Thayer "except as to the last point discussed," and Chief Justice Waldo dissents. It would therefore seem that Justice Thayer's statements on the subject of exemplary damages, including the one expressive of his opinion that "the rule upon the subject laid down in *Cleghorn v. New York Cent. & H. R. R. Co.*, 56 N. Y. 44, [is] the correct one, which makes the master liable for such damages when he is chargeable with gross neglect in the employment or retention in his services of an incompetent servant, knowing at the time of his unsuitability, or that he authorized or ratified the act of the servant in the particular case," represent merely his personal views and not those of the court as a whole nor even those of a majority thereof.

⁸⁵ *Bishop v. Readsboro Chair Mfg. Co.*, 85 Vt. 141, 36 L. R. A. (N. S.)

1171, Ann. Cas. 1914 B 1163, 81 Atl. 454, distinguishing *Willetts v. Village of St. Albans*, 69 Vt. 330, 38 Atl. 72, and *Wells v. Boston & M. R. R.*, 82 Vt. 108, 137 Am. St. Rep. 987, 71 Atl. 1103. See also *Denver & R. G. Ry. Co.*, 122 U. S. 597, 30 L. Ed. 1146.

"Whatever the true rule may be * * * where it is sought to charge a corporation with exemplary damages on account of the malicious acts of its subordinate agents, there can be no room for controversy that where * * * the officers actually wielding the whole executive power of the corporation participated in and directed all that was planned and done, their malicious, wanton, or oppressive intent may be treated as the intent of the corporation itself, for which it is liable to answer in exemplary damages." *Bingham v. Lipman, Wolfe & Co.*, 40 Ore. 363, 67 Pac. 98.

In *Wendelken v. New York, S. & W. R. Co.*, 88 N. J. L. 270, 86 Atl. 377, it is said that the New Jersey decisions "seem to distinguish between the act of a subordinate servant, for which exemplary damages may not be recovered unless express or implied authority or ratification can be brought home to the corporation itself, and the tortious act of an executive which by reason of his executive character will be presumed, if within the scope of his general duties, to be the act of the company itself."

whose acts constitute the fraud, malice, gross negligence, or oppression complained of.”⁸⁶ On this subject, the Supreme Court of Rhode Island has said: “In cases where punitive or exemplary damages have been assessed, it has been done upon evidence of such wilfulness, recklessness, or wickedness on the part of the party at fault as amounted to criminality, which for the good of society and warning to the individual ought to be punished. If in such cases, or in any case of a civil nature, it is the policy of the law to visit upon the offender such exemplary damages as will operate as punishment and teach the lesson of caution to prevent a repetition of criminality; yet we do not see how such damages can be allowed, where the principal is prosecuted for the tortious act of his servant, unless there is proof in the cause to implicate the principal and make him particeps criminis of his agent’s act. No man should be punished for that of which he is not guilty. Cases may arise in which the principal is deeply involved in the servant’s guilt or fault—cases in which the conduct of the principal in reference to the act of his agent is such as to amount to a ratification. In all such cases the principal is particeps criminis, if not the principal offender; and whatever damages might properly be visited upon him who commits the act might be very properly inflicted upon one who thus criminally participates in it.

⁸⁶ *International & G. N. R. Co. v. Garcia*, 70 Tex. 207, 7 S. W. 802. See also *International & G. N. Ry. Co. v. McDonald*, 75 Tex. 41, 12 S. W. 860; *Dillingham v. Anthony*, 73 Tex. 47, 3 L. R. A. 634, 15 Am. St. Rep. 753, 11 S. W. 139; *Galveston, H. & S. A. R. Co. v. Donahoe*, 56 Tex. 162, 167; *Hays v. Houston Great Northern R. Co.*, 46 Tex. 272, 284.

“Punitive damages are not allowable, generally, against a corporation for the malicious act of its agent within the scope of his authority or otherwise; its liability is limited, in any case, to actual damages, in the absence of authority to commit the wrong with its malicious characteristic, or subsequent ratification of its commission with knowledge of the facts.” *Topolewski v. Plankinton Packing Co.*, 143 Wis. 52, 126 N. W. 554 (headnote by the judge).

“The principal must respond in full

compensatory damages for injury wantonly caused by an agent in the line of his employment, but not for exemplary damages, unless the wrongful act in question was authorized or ratified by the principal.” *Toledo, St. L. & W. R. Co. v. Gordon*, 143 Fed. 95, 98. See also *McGhee v. McCarley*, 91 Fed. 462, 465.

Exemplary “damages are not recoverable in this state against a master for the wrongful act or negligence of his servant unless he has authorized the misconduct or ratified it, or unless it is committed after the unfitness of the servant has become known to the master.” *Kastner v. Long Island R. Co.*, 76 N. Y. App. Div. 323, 78 N. Y. Supp. 469. See also *Rowe v. Brooklyn Heights R. Co.*, 71 N. Y. App. Div. 474, 75 N. Y. Supp. 893; *Muckle v. Rochester Ry. Co.*, 79 Hun (N. Y.) 32, 29 N. Y. Supp. 732.

But where the proof does not implicate the principal, and however wicked the servant may have been the principal neither expressly nor impliedly authorizes or ratifies the act, and the criminality of it is as much against him as against any other member of society, we think it is quite enough that he shall be liable in compensatory damages for the injury sustained in consequence of the wrongful act of a person acting as his servant."⁸⁷ But where the managing officers of a corporation employ or retain a subordinate agent or servant without knowledge or reason to know that he is incompetent or unfit, and he commits a wanton, oppressive or malicious tort in the course of his employment, without authority from or ratification by them, it would seem that the wantonness, oppressiveness or malice of such agent or servant is not imputable to the corporation, and that it is not liable for exemplary damages. It was so held in a case in the Supreme Court of the United States, where it was sought to hold a railroad company liable for a wanton, oppressive and malicious assault committed by its conductor,⁸⁸ and there are other cases to substantially the same effect.⁸⁹ The doctrine and distinction above stated are supported by what is, undoubtedly, the weight of authority, numerically considered, but there are cases in which the wantonness or malice of subordinate agents and servants of a corporation in the course of their employment has been imputed to the corporation, although it was not authorized or ratified by the managing officers of the corporation, and although it did not appear that there was any negligence or misconduct on their part in employing

⁸⁷ Hagan v. Providence & W. R. Co., 3 R. I. 88, 62 Am. Dec. 377.

"Where the act of the servant amounts to a crime, or is of a wilful and malicious character, the law prima facie presumes that the perpetration of the wrong was not authorized before or sanctioned afterwards by the principal, and this presumption continues until repelled by proof to the contrary." Gulf, C. & S. F. Ry. Co. v. Reed, 80 Tex. 362, 26 Am St. Rep. 749, 15 S. W. 1105.

⁸⁸ Lake Shore & M. S. Ry. Co. v. Prentice, 147 U. S. 101, 37 L. Ed. 97, explaining and distinguishing Denver & R. G. Ry. Co. v. Harris, 122 U. S. 597, 30 L. Ed. 1146. But see § 3359, *infra*.

⁸⁹ Michigan. Detroit Daily Post Co. v. McArthur, 16 Mich. 447.

Missouri. Perkins v. Missouri, K. & T. R. Co., 55 Mo. 201.

New York. Cleghorn v. New York Cent. & H. River R. Co., 56 N. Y. 44, 15 Am. Rep. 375; Kutner v. Fargo, 20 Misc. 207, 45 N. Y. Supp. 753.

Rhode Island. Hogan v. Providence & W. R. Co., 3 R. I. 88, 62 Am. Dec. 377.

Texas. Houston & T. Cent. Ry. Co. v. Cowser, 57 Tex. 293; Hayes v. Houston & G. N. R. Co., 46 Tex. 272; Arkansas Const. Co. v. Eugene, 20 Tex. Civ. App. 601, 50 S. W. 736.

or retaining the agent or servant.⁹⁰ Thus, the Supreme Court of Alabama has said: "The right of trespassers and contributorily negligent persons to recover for the wanton, wilful, or intentional wrongs of brakemen, flagmen, and other employees of similar grade,—committed, of course, within the scope of their employment, and in the accomplishment of objects within the line of their duties,—and to have the jury embrace in the verdict both exemplary [compensatory?] and punitive damages, if they see fit to do so, is no longer open to question in this state. We are not disposed to reopen it; and, if it were a new question with us, we should be much more inclined to the conclusion at which this court has arrived than the view taken by some courts of marked ability, namely, that, while corporations cannot be mulcted in punitive damages for the wilfulness of such inferior employees as trainmen, they are responsible in such damages for the wilful misconduct of such general executive officers as their presidents, general managers, etc. We do not conceive that there is any sound reason for the distinction. The president of a railway corporation is no more or less its agent than a brakeman on one of its trains. His agency is broader, but it is not boundless, and a matter which lies beyond its limits is as thoroughly beyond his powers as any matter beyond the very much smaller circle of a brakeman's duties; and, e converso, a brakeman is as fully authorized to act for the company, within the range of his employment, as the president is within the limits of his office. It can no more be said that the corporation has impliedly authorized or sanctioned the wilful wrong of its president, in the accomplishment of some end within his authority, than that a similar wrong by a brakeman, to an authorized end, is the wrong of the corporate entity. There is just the same and no more reason, in our opinion, for inflicting punishment on the corporation for the wilful misconduct of the one as of the other, and such punishment is no more vicarious in the one case than in the other. That punishment may be imposed on corporations for the wilful or wanton misconduct, within the general scope of their duties, of their chief executive officers, is well established, and not questioned in this case. We feel that

⁹⁰ *Hopkins v. Atlantic & St. L. R. Co.*, 36 N. H. 9, 72 Am. Dec. 287; *Atlantic & G. W. Ry. Co. v. Dunn*, 19 Ohio St. 162, 590, 2 Am. Rep. 382.

A corporation may be liable for vindictive damages for the wrongful act of its agent, perpetrated by him while

ostensibly discharging duties within the scope of the corporate purposes. *Singer Mfg. Co. v. Holdfoht*, 86 Ill. 455, 459, 29 Am. Rep. 43. See also *Aygarn v. Rogers Grain Co.*, 141 Ill. App. 402.

we stand upon the same principles, and are moved by the same considerations to the same conclusion, in respect of the wilfulness, wantonness, and the like of brakemen and flagmen, while acting within the scope of their employment, and to the accomplishment of the legitimate ends thereof.”⁹¹

§ 3355. — For what torts awarded. Without attempting further than has been done in the preceding section and will be done in the notes to this section to define what will constitute a “proper case,” it may be said generally that in a proper case a corporation will be liable for exemplary damages for, inter alia, an assault and battery⁹² and for false imprisonment.⁹³ So a trespass on land,⁹⁴ or the obstruction of a public highway may render it liable for such damages.⁹⁵ Again, exemplary damages may upon occasion be recov-

⁹¹ *Mobile & O. R. Co. v. Seales*, 100 Ala. 368, 13 So. 917.

⁹² A railroad company may be liable—and for punitive damages—for an assault and battery committed by its brakeman upon a trespasser on its train whom the brakeman was seeking to eject therefrom. *Alabama Great Southern R. Co. v. Frazier*, 93 Ala. 45, 30 Am. St. Rep. 28, 9 So. 303.

Where a railroad brakeman; instructed by the conductor of the train to put off of the train a trespasser riding on the trucks of one of the cars, fires a pistol from a position close to the trespasser and as a result the latter falls from the trucks and has both of his legs crushed, to the point that amputation is required, by the wheels of the train, it will be a question for the jury whether the railroad company is liable for exemplary damages, and, if it is, in what amount they shall be assessed. *Mobile & O. R. Co. v. Seales*, 100 Ala. 368, 13 So. 917.

⁹³ *Jackson v. American Telephone & Telegraph Co.*, 139 N. C. 347, 70 L. R. A. 738, 51 S. E. 1015.

⁹⁴ *Ex parte Birmingham Realty Co.*, 183 Ala. 444, 63 So. 67.

In an action against a telephone

company for a trespass on plaintiff's land committed by digging holes and erecting poles thereon, it was held that under the pleadings and evidence plaintiff “was entitled to a peremptory instruction for the actual damage done his property by the action of [defendant's] * * * agents and servants, and also to an instruction that if the trespass was done in a high-handed, malicious, and oppressive manner, he was entitled to recover punitive damages.” *Johns v. Cumberland Telephone & Telegraph Co.*, 25 Ky. L. Rep. 2074, 80 S. W. 165. For a case arising out of a similar cause of action in which it was held that the evidence failed to show that plaintiff was entitled to exemplary damages, see *Southwestern Telegraph & Telephone Co. v. Whiteman*, 36 Tex. Civ. App. 163, 81 S. W. 76.

⁹⁵ Where a corporation, in such a manner and for such a period of time as argues a culpable indifference to the rights of the public and a willingness to subject travelers on the highway to a long and vexatious delay, wilfully and unnecessarily obstructs a public highway by leaving standing across the road a railroad train operated by it, the refusal of the court,

ered in an action for injuries due to the negligence of its agent or servant.⁹⁶ The uttering of a slander⁹⁷ or the publication of a libel⁹⁸

in an action against the corporation by a traveler on the highway for injuries resulting from the defendant's obstruction thereof, to instruct the jury, as requested by the defendant, that it cannot award punitive damages to the plaintiff is not error. *Tutwiler Coal, Coke & Iron Co. v. Nail*, 141 Ala. 374, 37 So. 634.

⁹⁶ In *South Covington & C. St. R. Co. v. Cleveland*, 30 Ky. L. Rep. 1072, 11 L. R. A. (N. S.) 853, 100 S. W. 283, the court held that, under the evidence, the substantial rights of the defendant street railroad company, sued for personal injuries sustained by the plaintiff as a result of the gross negligence of defendant's motorman in running his car against the vehicle in which plaintiff was riding, and for damage to such vehicle, were not prejudiced by an instruction which authorized the jury to award punitive damages. But see *Fell v. Northern Pac. R. Co.*, 44 Fed. 248, 252, in which the court said: "The [defendant's] contention is that [in order to justify an award of exemplary damages] the act complained of must have been that of the principal, and not of the mere agent or servant. It is insisted that that fact must be shown, or it must appear that the act of the servant was authorized or ratified by the principal. The rule contended for by defendant's counsel has been laid down in a great number of decided cases, but the rule has been criticised and abandoned in other cases. There was evidence in this case from which the jury were justified in finding that there was wilful misconduct on the part of the conductor [on defendant's freight train] in ejecting plaintiff [a trespasser] from the train, and that he manifested a reckless indifference to the rights of the plaintiff, and the

consequences that might result to him in ejecting him from the platform of the car while the train was moving rapidly, and in a dark night, knowing not how or where he would strike or fall. He was in the employ of the defendant, and in charge of its train, and was acting within the scope of his authority. The defendant's employment afforded the conductor the means or opportunity, which he used, while so employed, in committing a wilful injury, and his wilful misconduct must be attributable to the company for which he acted, though it did not authorize the wrongful act or ratify it. Upon the facts and circumstances of this case, I think the learned judge was justified in instructing the jury that they were at liberty to allow exemplary damages." *Fell v. Northern Pac. R. Co.*, 44 Fed. 248, 252.

⁹⁷ *Roemer v. Jacob Schmidt Brewing Co.*, 132 Minn. 399, L. R. A. 1916 E 771, 157 N. W. 640.

⁹⁸ *Pennsylvania Iron Works Co. v. Voght Mach. Co.*, 29 Ky. L. Rep. 861, 96 S. W. 551. See also *Courier-Journal Co. v. Sallee*, 104 Ky. 335, 47 S. W. 226, and further, as being of persuasive force, *Cooper v. Sun Ptg. & Pub. Ass'n*, 57 Fed. 566; *Childers v. San Jose Mercury Ptg. & Pub. Co.*, 105 Cal. 284, 45 Am. St. Rep. 40, 38 Pac. 903; *O'Malley v. Illinois Pub. & Ptg. Co.*, 194 Ill. App. 544; *Evening News Ass'n v. Tryon*, 42 Mich. 549, 36 Am. Rep. 450, 4 N. W. 267; *Hewitt v. Pioneer-Press Co.*, 23 Minn. 178, 23 Am. Rep. 680; *Warner v. Press Pub. Co.*, 132 N. Y. 181, 30 N. E. 393; *Houston Chronicle Pub. Co. v. Quinn*, — Tex. Civ. App. —, 184 S. W. 669.

In *Allen v. News Pub. Co.*, 81 Wis. 120, 50 N. W. 1093, an action against a corporation for a newspaper libel on plaintiff's deceased husband, the

by its servant or agent also furnish instances in which a corporation

court, in affirming the judgment on the verdict for plaintiff by which verdict she was awarded exemplary as well as compensatory damages; said: "The court instructed the jury that they were at liberty to award exemplary damages if they found for plaintiff, and found also that the publication was prompted by actual malice or ill will on the part of defendant towards the plaintiff. It is now claimed that such damages are not recoverable, because such malice or ill will is not charged in the complaint. If such is the rule, which, to say the least, is very doubtful, we think malice is sufficiently charged in the complaint. It charges that the publication is false, scandalous, and defamatory; that the editor of the Daily Review [in which it appeared] maliciously composed it for publication, and the defendant published it. The defendant is a corporation, and must act through agents. The editor of the Review was its authorized agent to compose articles for, and to publish the same in, the Review. The act of the editor in respect to this publication was the act of the corporation, and his malice is the malice of the corporation. So, on any theory of the law, the malice of defendant is sufficiently averred. The testimony supports the award of exemplary damages. We perceive no valid reason for disturbing the judgment."

In New Jersey it has been held that "where the libelous [newspaper] article contained charges of dishonest, fraudulent, and criminal conduct, and, upon a retraction being demanded, a second article was published which might be construed as containing a covert and evasive reiteration of the original charges, it was not error to refuse to charge that no punitive damages could be

awarded." (Headnote by the court.) *Hoboken Prtg. & Pub. Co. v. Kahn*, 59 N. J. L. 218, 59 Am. St. Rep. 585, 35 Atl. 1053 (distinguished in *Peterson v. Middlesex & Somerset Traction Co.*, 71 N. J. L. 296, 59 Atl. 456, an action for the wrongful ejection, etc., of a passenger on a trolley car). In the course of its opinion, the court said: "A corporation engaged in publishing a newspaper obviously must act by selected agents. Its directors or managers cannot formally pass on each publication, or determine what is to be admitted therein. Such determination is necessarily committed to its agents. In making such determination, they are acting within the scope of their employment. The intent with which they publish must be imputed to the corporation which employs them to make the publications of the newspaper. If the intent is malicious, the corporation must be liable therefor, as it is for other tortious acts of its agents, done within the scope of their authority, and for the purposes for which the corporation was created and the agents were employed."

In *Detroit Daily Post Co. v. McArthur*, 16 Mich. 447, the court, after stating that "while the term exemplary or vindictive damages has become so fixed in the law that it may be difficult to get rid of it, yet it should not be allowed to be used so as to mislead, and we think the only proper application of damages beyond those to person, property or reputation, is to make reparation for the injury to the feelings of the person injured," and, further, that "the injury to the feelings is only allowed to be considered in those torts which consist of some voluntary act, or very gross neglect, and practically depends very closely on the degree of fault

has been subjected to liability for exemplary damages. Likewise, a

evinced by all the circumstances," said: "It will at once be perceived that where different persons or agencies have concurred in producing an injurious result, although all may be responsible for some damages for injured feeling, as well as for the more substantial mischiefs of another sort, yet they may stand in very different positions of moral wrong. There is no doubt of the duty of every publisher to see at all hazards that no libel appears in his paper. Every publisher is, therefore, liable not only for the estimated damages to credit and reputation, and such special damages as may appear, but also for such damages on account of injured feeling as must unavoidably be inferred from such a libel, published in a paper of such a position and circulation. But no further damages than these should be given, if he has taken such precautions as he reasonably could to prevent such an abuse of his columns. When it appears that the mischief has been done in spite of precautions, he ought to have all the allowance in his favor which such carefulness would justify, in instigation of that portion of the damages which is awarded on account of injured feelings. The employment of competent editors, the supervision by proper persons of all that is to be inserted, and the establishment and habitual enforcement of such rules as would probably exclude improper items, would reduce the blameworthiness of a publisher to a minimum, for any libel inserted without his privity or approval, and should confine his liability to such damages as include no redress for wounded feeling beyond what is inevitable from the nature of the libel. And no amount of express malice in his employees should aggravate damages against him, when he

has thus purged himself from active blame. If, on the other hand, it should appear from the frequent recurrence of similar libels, or from other proof tending to show a want of solicitude for the proper conduct of his paper, that the publisher was reckless of consequences, then he would be liable to increased damages, simply because by his own fault he had deserved them. By such recklessness he encourages fault or carelessness in his agents, and becomes in a manner in complicity with their misconduct. * * * We have no means of judging whether the verdict of the jury [in favor of the plaintiff] was based upon any idea of the personal fault of the publishers * * *. But there is room for the ground taken by plaintiffs in error [a corporation], that the charge of the court left it in the power of the jury to hold them in all respects identified with the faults of their agents. Upon this ground we think the charge must be regarded as calculated to mislead the jury, and we must, therefore, award a new trial."

One sued for a newspaper libel is not entitled to predicate error on the fact that under the charge of the court the jury were permitted to award exemplary damages, where the evidence shows that information of the falsity of the statements contained in the libelous article had been brought home to the reporter before the article was published. *Hatt v. Evening News Ass'n*, 94 Mich. 114, 53 N. W. 952.

Under the Indiana rule that exemplary damages cannot be awarded when the wrongdoer may be punished for his act under the criminal law, such damages cannot be imposed upon a newspaper corporation, guilty of a libel, when, under the statute, such

corporation may be liable for such damages for a wrongful attachment.⁹⁹

II. BREACH OF SPECIAL DUTY

§ 3356. **In general.** The nature of the relation existing between the principal and one injured by the agent's tort may be such as to impose on the principal some special duty to the third person which will largely enter into, if not control, the determination of the question whether the principal is liable for the tort. As expressed by Mr. Mechem:¹ "It is not infrequently said that where the principal

corporation is subject to a criminal prosecution therefor. *Wabash Prtg. & Pub. Co. v. Crumrine*, 123 Ind. 89, 21 N. E. 904.

A telegraph company is liable for punitive damages to the addressee of a libelous message maliciously transmitted over its wires by its agent acting within the scope of his employment. *Peterson v. Western U. Tel. Co.*, 75 Minn. 368, 43 L. R. A. 581, 74 Am. St. Rep. 502, 77 N. W. 985.

⁹⁹ *Jefferson County Sav. Bank v. Eborn*, 84 Ala. 529, 4 So. 386. See also, as being of persuasive force, *Union Mill Co. v. Prenzler*, 100 Iowa 540, 69 N. W. 876 (no claim of non-liability on account of attachment plaintiff's corporate character appears to have been made); *Hurlbut, Hess & Co.*, 85 Iowa 606, 52 N. W. 510; *Western News Co. v. Wilmarth*, 33 Kan. 510, 6 Pac. 786 (liability of defendant recognized without any specific reference to its corporate character).

A petition in an action for malicious attachment which alleges, in effect, that the attachment was maliciously sued out and caused to be levied upon plaintiff's property by the attachment plaintiff, a corporation, and that the corporation, in so doing, acted through its agents, but that the malicious acts were those of the corporation, is sufficient to admit proof of facts showing the corporation's liability for exemplary damages, and authorizes a

charge under which the jury are permitted to award such damages, provided the facts warrant the submission of the issue. *Emerson, Talcott & Co. v. Skidmore*, 7 Tex. Civ. App. 641, 25 S. W. 671.

The New Jersey Court of Errors and Appeals has held that the issuance of an attachment for a debt which the attachment plaintiff, a corporation, must be held to have known had no existence in fact, the seizure by the officer, under the writ, of the household goods and wearing apparel of the wife of the alleged debtor, the subsequent assent of the corporation's executive officers to the seizure of such property, their refusal to release it, and their subsequent assumption of authority over it, justify an award of punitive damages in an action of trespass brought by the wife against the corporation. *Carey v. D. Wolff & Co.*, 72 N. J. L. 510, 63 Atl. 270.

Exemplary damages may be awarded against a foreign corporation for a wrongful and malicious attachment, sued out without probable cause, upon a showing that its manager, at whose instance the attachment issued, represented it in its corporate capacity in proceeding as he did. *Emerson, Talcott & Co. v. Skidmore*, 7 Tex. Civ. App. 641, 25 S. W. 671.

¹ Mechem on Agency (2nd Ed.), § 1931.

or master owes to the plaintiff the performance of some specific and positive duty, and confides the performance of this duty to a servant or agent, he will be responsible to the plaintiff if the duty be not performed by such servant or agent; and in such a case, the fact that the servant or agent acted wantonly, wilfully or maliciously, will, instead of tending to exonerate the principal or master, only serve to aggravate the injury. The gist of the complaint is that the duty has not been performed, and this is the fact, while to this wrong of nonperformance, there is added the aggravating circumstance that the nonperformance was wanton, wilful or malicious." This theory finds frequent exemplification in cases where injury has been caused a servant through the breach by a master of a nondelegable duty owed the servant as to furnishing proper equipment and a safe place to work.²

"The courts which hold that a corporation is not liable for a slander uttered by its agent unless it had expressly authorized or approved such utterance, concede, as a thoroughly established modification of that rule, that where the relation between the corporation and the person aggrieved created a duty on the part of the corporation to see that such person did not suffer injury or indignity, as in the case of carrier and passenger, merchant and customer, and the like, it is liable for defamatory statements made by its agent or servant, even if made contrary to express instructions." *Roemer v. Jacob Schmidt Brewing Co.*, 132 Minn. 399, L. R. A. 1916 E 771, 157 N. W. 640.

Thus, it has been held that a corporation operating a theater will be liable for slanderous words addressed by an actor in its employ to one, witnessing the performance, who had paid for his admission to the theater, the slander constituting a breach of the duty imposed upon the corporation by the contract between it and the person slandered. *Interstate Amusement Co. v. Martin*, 8 Ala. App. 481, 62 So. 404.

²See *Mechem on Agency* (2nd Ed.), § 1932.

As to duty of charitable corporations to select suitable physicians and nurses, see § 3363, *infra*.

A railroad company will be liable for the slander of its division superintendent, whose duty it was to adjust disputed claims for wages, in stating in the course of an interview with plaintiff, one of the company's engineers, relative to a wage claim by him that "I am going to stop you fellows from stealing from the company" and in calling plaintiff a thief.

Again it has been said that a telephone company is under the same obligation to protect its female operators from insult and slander by its manager in the conduct of its business as a railroad company is to protect its passengers from insult and slander by its conductor, and where the manager of a telephone office has authority to discharge the operators and to prevent improper persons from loitering in the office and, in discharging an operator for alleged immorality and again in ordering her from the office, he slanders her, the telephone company will be liable for his slanderous utterances. *Southwestern Telegraph & Telephone Co. v. Long*, — Tex. Civ. App. —, 183 S. W. 421. See, however, as opposed

§ 3357. Carriers of passengers—In general. Pursuant to the breach of duty rule stated in the preceding section, a corporation may be liable for an unauthorized tort committed by an agent or servant, although not committed for the benefit of the corporation, nor in the course or apparent course of the agent's or servant's employment, where the tort constitutes a violation of a special duty which the corporation owes, by virtue of a contract, to the person against whom it is committed. For example, a corporation engaged in the carriage of passengers is under a duty to protect a passenger from assaults and other wrongs, and this duty is intrusted to its conductor and other agents and servants. As a leading authority on the law of carriers has said:³ "From the moment the relation commences, * * * the passenger is, in a great measure, under the protection of the carrier, even from the violent conduct of other passengers, or of strangers who may be temporarily upon his conveyance; but, as against the assaults and violence of his servants, the passenger has the right to claim an absolute protection, and the carrier will undoubtedly be held responsible for any unnecessary personal abuse or violence of which they may be guilty in their treatment of the passenger whilst engaged in the discharge of their assigned and appropriate duties, although such abuse may consist in an assault or battery upon the person of the passenger, and may be wholly unauthorized by the carrier and prompted by the vindictive feelings of the servant towards the passenger. And it is undoubtedly well settled law that, when an assault or battery by the carrier's servant occurs upon the carrier's vehicle, the carrier may be held responsible, even when the servant has seemingly departed from the line of his duty, and has committed the assault or the personal violence upon the passenger aside from and under circumstances wholly unconnected with the discharge of such duty; and that the fact of his being in the employment of the carrier, and engaged in the prosecution of his business upon his vessel⁴ or vehicle, will make the malicious and unauthorized attack of the servant upon the passenger a breach of duty for which the carrier himself may be held liable."⁵ Although there may be a difference of opinion

to this case in principle, *Aiken v. Caledonian R. Co.*, 50 Scot. Law Rep. 45.

³ 2 Hutchinson on Carriers (3rd Ed.), § 1093.

⁴ As, later in the same section (§ 1093), the author shows, the rule applies in the case of carriers by

water as well as in that of carriers by land.

⁵ Quoted approvingly in *St. Louis, I. M. & S. R. Co. v. Dowgiallo*, 82 Ark. 289, 101 S. W. 412, the holding in which is set out in *Pine Bluff & A. R. R. Co. v. Washington*, 116 Ark. 179, 172 S. W. 872. In *St. Louis, I. M.*

as to the degree of care required of the carrier; as to the language which properly describes the carrier's duty; as to what servants of the carrier may by their conduct violate this duty, and as to what conduct actually is a violation thereof,⁶ the fact remains that the courts

& S. R. Co. v. Dowgiallo, *supra*, the court declared that "it is unnecessary for us to define the limits of this doctrine [of the liability of a carrier for injuries sustained by a passenger as a result of the tortious conduct of its servant] in its application to all the servants of the carrier. It is sufficient to say that it applies to a brakeman on a passenger train, whose duty it is to go through the train, with opportunities to come in personal contact with passengers, and who has duties to perform with reference to the comfort or safety of the passengers. The carrier, in intrusting such duties to servants, is bound to see that the passenger is not wilfully assaulted and harmed by the servant. * * * Authorities are abundant that railroad companies are liable for wrongful assaults upon passengers committed by brakemen, as well as conductors."

6 "The law seems to be now well settled that the carrier is obliged to protect his passenger from violence and insult, from whatever source arising. He is not regarded as an insurer of his passenger's safety against every possible source of danger; but he is bound to use all such reasonable precautions as human judgment and foresight are capable of to make his passenger's journey safe and comfortable. He must not only protect his passenger against the violence and insults of strangers and co-passengers, but, a fortiori, against the violence and insults of his own servants. If this duty to the passenger is not performed, if this protection is not furnished, but, on the contrary, the passenger is assaulted and insulted, through the negligence or the

wilful misconduct of the carrier's servant, the carrier is necessarily responsible." *Goddard v. Grand Trunk Ry. of Canada*, 57 Me. 202, 2 Am. Rep. 39.

"A carrier is an absolute guarantor of the safety of its passengers against the assaults of its employees while it is performing its contract of carriage." *Zeccardi v. Yonkers R. Co.*, 190 N. Y. 389, 17 L. R. A. (N. S.) 770, 83 N. E. 31. See also *Miller v. Brooklyn Heights R. Co.*, 124 N. Y. App. Div. 537, 108 N. Y. Supp. 960.

A railroad company is an insurer of the safety of its passengers against intentional ill treatment from those of its agents and servants whose duties relate to the comfort and safety of, and require them to come in contact with, the passengers. *St. Louis, I. M. & S. R. Co. v. Tukey*, 119 Ark. 28, L. R. A. 1915 E 320, 175 S. W. 403.

"A carrier of passengers is an insurer of the safety of the passenger against wilful assaults by, and intentional ill treatment from, its servants and agents in charge of the train * * *. It is so responsible for such conduct upon the part of any servant, whether in charge of the train or not, the performance of whose duties relate to the comfort or safety of the passengers, and furnish opportunity, or require him to come in personal contact with them." *Moore v. Louisiana & A. R. Co.*, 99 Ark. 233, 34 L. R. A. (N. S.) 299, 137 S. W. 826.

"Carriers of passengers, it is true, are not absolute insurers of the safety of their passengers against injury and ill treatment from other passengers. * * * Such is not the rule, however, in case of injury resulting to

generally do not regard "authorization," "scope of employment," "line of duty," and "ratification" as playing the important part in the determination of the carrier's liability for a legal wrong suffered by a passenger as a result of the nonfeasance, malfeasance or misfeasance of the carrier's servant or servants that they would play were

the passenger from the misconduct of its servants; it being an insurer of the safety of the passenger against wilful assaults and intentional ill treatment of its servants, for whose acts it is responsible." *St. Louis, I. M. & S. R. Co. v. Jackson*, 118 Ark. 391, L. R. A. 1915 E 668, 177 S. W. 33 (consolidated actions by two different passengers—one of whom sued for injuries sustained as the result of an attack by the porter on the train, and the other for injuries sustained as a result of his being hit by a revolver shot fired at the porter by the passenger whom he was assaulting).

"It is no doubt true that if the violence [on the part of the brakeman] could not have been foreseen or prevented by the highest degree of care, the carrier would be absolved from liability." *Louisville & N. R. Co. v. Kelly*, 92 Ind. 371, 47 Am. Rep. 149. But that a carrier is not an insurer of the safety of its passengers even against the assaults of each and every one of its employees, see *Southern R. Co. v. Crone*, 51 Ind. App. 300, 99 N. E. 762. See also, in connection with the case last cited, *Owens v. Wilmington & W. R. Co.*, 126 N. C. 139, 78 Am. St. Rep. 642, 35 S. E. 259.

"While the relationship of passenger and carrier continues, the carrier is held to a very high degree of care in protecting its passengers not only from the wrongs and injuries of its servants, but of strangers also." *Turk v. Norfolk & W. R. Co.*, 75 W. Va. 623, 84 S. E. 569.

"A railroad company, as a common carrier of passengers, is bound to use extraordinary care not only to carry its passengers safely, but also to pro-

tect them during the carriage from assault or injury from its agents in charge of the train and from others. By its contract the railroad company assumes the obligation to protect the passenger against any negligent or wilful misconduct of its servants while performing the carriage; it also assumes the obligation to exercise diligence and care in protecting its passengers while in transit from violence or wrongful misconduct of others on the train. The conductor has control not only over the movements of the train, but over persons on it, and has authority to compel the observance of the rules of the company by all persons on the train. He has therefore the power, under ordinary circumstances, to protect them from violence or wrongful injury from others, and the law makes the company liable for an injury to a passenger resulting from a negligent failure to exercise such power. It is therefore liable for any wrongful arrest of a passenger made or procured by its servants in charge of the train; and it is also liable for an illegal arrest of the passenger made by others which in the exercise of due diligence it could have prevented." *Mayfield v. St. Louis, I. M. & S. R. Co.*, 97 Ark. 24, 32 L. R. A. (N. S.) 525, 133 S. W. 163. (For the holding of this case relative to the carrier's liability for a wrongful arrest made by an officer of the law, see § 3358, *infra*.)

See generally on the subject of the liability of carriers to their passengers, *Hutchinson on Carriers* (3rd Ed.), and 3 *Sutherland on Damages* (4th Ed.), §§ 934-956.

it not for the contract relation which existed between the carrier and the injured passenger when the tort was committed.⁷ While, per-

⁷ When the injurious disturbance of the passenger is by the act of the carrier's own servant who is engaged in its service, and to whom is committed some part of its duty with respect to the custody and safe carriage of its passengers, "the carrier's liability is not grounded on the theory of negligence nor upon the assumption that the act is within the scope of the servant's authority or within the line of his employment, but rather upon the theory of the breach of an absolute duty resting on the carrier to see that its passengers are not injured by the servants to whose care or custody they have been committed or exposed." *Nashville, C. & St. L. Ry. v. Crosby*, 183 Ala. 237, 62 So. 889.

"One of the prime duties resting upon a railroad company is to protect its passengers from assaults and injuries by its servants; nor does the question of its liability for a breach of this duty depend upon whether or not the servant, in the performance of the act, is within the scope of his employment." *Indianapolis Union R. Co. v. Cooper*, 6 Ind. App. 202, 33 N. E. 219. See also *Baltimore & O. S. W. R. Co. v. Davis*, 44 Ind. App. 375, 89 N. E. 403.

"Unquestionably a railway company owes a passenger the absolute duty to protect him from insult or injury at the hands of one of its servants, without reference to whether the insult or injury was connected with the performance of an act within the scope of the servant's employment." *Bright v. Central of Georgia R. Co.*, 12 Ga. App. 364, 77 S. E. 372.

"Is defendant [carrier] liable for the assault made by its engineer upon the plaintiff, a passenger? Whether this wrongful act was done by the engineer while acting within the scope

of his employment is of no moment. The doctrine of respondeat superior is not involved. Its general principle is that a master is liable for the act of his servant done in the course of his employment about his master's business; but he is not liable for an act done outside of his employment, nor for the wanton violation of the law by him. * * * The liability of defendant here rests upon the obligation on the carrier not only to carry his passengers safely, but to protect them from ill treatment from other passengers, intruders, or employees." *White v. Norfolk & S. R. Co.*, 115 N. C. 631, 44 Am. St. Rep. 489, 20 S. E. 191.

"No matter what the motive is which incites the servant of the carrier to commit an unlawful or improper act towards the passenger during the existence of the relation of carrier and passenger, the carrier is liable for the act, and its natural and legitimate consequences." *Dwinelle v. New York Cent. & H. River R. Co.*, 120 N. Y. 117, 8 L. R. A. 224, 17 Am. St. Rep. 611, 24 N. E. 319. See also *Brewster v. Interborough Rapid Transit Co.*, 68 N. Y. Misc. 348, 123 N. Y. Supp. 992.

The rule that the master is not liable for an injury resulting from the wilful and malicious acts of his agent, not done in the course of such agent's employment does not apply when the master is a common carrier and the person injured was its passenger. *Houston & T. C. R. Co. v. Washington* (Tex. Civ. App.), 30 S. W. 719.

The fact that a personal grudge cherished by the carrier's brakeman caused the commission by such brakeman of the assault and battery, upon a passenger, which is complained of, will not relieve the carrier from lia-

haps, the scope of such duty is not subject to a definition which would be accepted by all of the courts without exception, there can be no doubt that there is a duty, of greater or less extent, of preventing the tortious injuring of those who sustain the passenger relation to it which the law of to-day devolves upon the carrier, declaring that a breach of such duty, without more, will render the carrier liable to the passenger injured.⁸ It would seem that some of the courts will not hold the carrier liable upon this theory for the torts of those of its servants who had no direct part in executing the contract⁹ for

bility therefor. *Winston v. Lusk*, 186 Mo. App. 381, 172 S. W. 76 (action against receivers of railroad company), quoting, in disposing of defendants' contention to the contrary, *O'Brien v. St. Louis Transit Co.*, 185 Mo. 263, 105 Am. St. Rep. 592, 84 S. W. 939, an action for the death of a passenger who was fatally shot by the conductor on defendant's street car in concluding on the sidewalk an altercation originating on the car.

In *Pacelli v. People's R. Co.*, 5 Boyce (Del.) 343, 93 Atl. 560, however, the court states the rule of liability as follows: "Street railway companies are responsible to their passengers for the unlawful acts of their servants employed in running their cars, when such wrongful acts are committed in connection with their employment and spring from or grow immediately out of such employment."

⁸ "This duty is not confined to the case of a passenger on a train or car but extends to the relation so long as it continues, at all times and places. * * * Nevertheless, the measure of care varies according to time and place; and, while a very high degree of care may be required of the carrier with respect to passengers while actually on its trains or cars, only ordinary care is required as to passengers waiting at its stations, at least under ordinary conditions as they exist in this country." *Nashville, C. & St. L. Ry. v. Crosby*, 183

Ala. 237, 62 So. 889.

Defendant railroad company held liable for the death of a passenger resulting from shock caused by his being shot by the company's agent as he was leaving the company's premises after a dispute over the matter of his baggage. *Daniel v. Petersburg R. Co.*, 117 N. C. 592, 4 L. R. A. (N. S.) 485, 23 S. E. 327.

The Supreme Court of Pennsylvania, apparently, would not make the duty of the carrier to protect its passengers from violence as inclusive as would the courts of some of the other states. See *Berryman v. Pennsylvania R. Co.*, 228 Pa. 621, 30 L. R. A. (N. S.) 1049, 77 Atl. 1011.

⁹ In *Southern R. Co. v. Crone*, 51 Ind. App. 300, 99 N. E. 762, the court, which earlier in its opinion had recognized the rule that a carrier is not an insurer of the safety of the passengers on its trains, held that it was error to instruct the jury "that the law places upon the railroad company the burden of safely and properly carrying its passengers, and, if it intrusts this duty to its servants, the law holds the company responsible for the manner in which such servants execute it, and the company is obliged to protect its passengers from violence from its servants." In so holding, the court said: "It is contended by appellee [appellant—the railroad company] that 'to say it is obliged to protect its passengers from the violence

transportation, nor for the torts of strangers,¹⁰ but, however this may be, there is great unanimity in charging the carrier, as for a breach of its legal duty, with liability for torts committed by those of its servants upon whom the passenger's safety and security in transit directly depends.¹¹ So also there is authority for the proposi-

of its servants,' not only introduces a conflicting theory into this case, but such statement is not the law under many conditions and circumstances. From this clause of the instruction we think the jury may have understood that appellant, under the law, was required to insure the safety and protection of its passengers from the assault of all its servants, regardless of whether they were in charge of such train or had anything to do with its control or operation. In other words, the jury may have understood from this instruction that if an employee of appellant serving it in a capacity entirely remote from the operation or control of its passenger trains, but riding as a passenger on such train, should assault one of the other passengers, that appellant would be liable for such assault, even though each of appellant's servants in charge of such train exercised the highest degree of care and caution, and did everything in their power to anticipate and prevent such assault. We do not think this is the law. It is true this instruction has a qualified approval of the Supreme Court in the case of Louisville & Nashville R. R. Co. v. Kelly, 92 Ind. 371, 47 Am. Rep. 149, where it is said: 'It is sometimes proper to give a general statement of the duty of carriers, and when the statement is a correct one, even though not strictly necessary under the evidence, there is no material error.' Judge Elliott in approving the instruction recognizes that there may be exceptions to the general rule declared therein, and that, if the violence could not have been prevented by the highest degree of care, the carrier

would be absolved from liability, but stated that as a general rule, the announcement was correct and could not be deemed erroneous in the particular case in which it was given. The evidence in this case shows that [the agent committing the assault] * * * was not one of the regular trainmen in charge of such passenger train, and, even if the issue tendered by the complaint had authorized the announcement of the general rule contained in the instruction, we think the evidence is such as to suggest that harm might result to appellant from announcing the same without indicating the exceptions to the rule or otherwise limiting or qualifying the instruction. But, as we have already indicated, the theory of this complaint is that the defendant by its agents committed the assault. This being the theory of the complaint, the general rule contained in the instruction was inapplicable to the issues tendered, and in our judgment prejudicial to appellant."

¹⁰ A street railroad company is not guilty of negligence, as to its passengers, in attempting to operate its cars during a strike of its employees unless the conditions are such that it ought to know or reasonably to anticipate that it cannot do so and, at the same time, by the exercise of the utmost care on its part protect such passengers from violence. *Fewings v. Mendenhall*, 83 Minn. 237, 55 L. R. A. 713, 86 N. W. 96.

¹¹ "The grounds of the carrier's liability may be briefly stated thus: The law requires the common carrier of passengers to exercise the highest degree of care that human judgment and foresight are capable of, to make

tion that a carrier will be liable for tortious injury sustained by a passenger at the hands of a fellow passenger or of a stranger,¹² pro-

his passengers' journey safe. Whoever engages in the business impliedly promises that his passenger shall have this degree of care. In other words, the carrier is conclusively presumed to have promised to do what, under the circumstances, the law requires him to do. We say conclusively presumed, for the law will not allow the carrier by notice or special contract even to deprive his passenger of this degree of care. If the passenger does not have such care, but on the contrary is unlawfully assaulted and insulted by one of the very persons to whom his conveyance is intrusted, the carrier's implied promise is broken, and his legal duty is left unperformed, and he is necessarily responsible to the passenger for the damages he thereby sustains. The passenger's remedy may be either in assumpsit or tort, at his election. In the one case, he relies upon a breach of the carrier's common-law duty in support of his action; in the other, upon a breach of his implied promise. The form of the action is important only upon the question of damages. In actions of assumpsit, the damages are generally limited to compensation. In actions of tort, the jury are allowed greater latitude, and, in proper cases, may give exemplary damages." *Goddard v. Grand Trunk Ry. of Canada*, 57 Me. 202, 2 Am. Rep. 39.

"Where the relation of passenger and carrier exists, a stringent rule of liability for the tortious acts of the latter's agents prevails. A passenger is entitled to protection against violence, abuse, or an assault and battery upon his person by the agents of the carrier, though such acts may be unauthorized by the carrier and prompted by vindictiveness on the part of the agent or servant." *Wright*

v. Georgia Southern & F. R. Co., 66 Fla. 510, 63 So. 909 (headnote by the court).

"The obligation of a carrier of passengers is to carry them safely and protect them from insult and injury, and a fortiori, from injury at the hands of its own officers and employees." *Alexander v. New Orleans Railway & Light Co.*, 129 La. 959, 57 So. 283 (headnote by the court).

12 "It is the duty of common carriers to protect their passengers against violence or improper conduct, whether on the part of its own servants or of other passengers or strangers." *Nashville, C. & St. L. Ry. v. Crosby*, 183 Ala. 237, 62 So. 889.

"Unwarrantable assaults upon passengers by the carrier's servants are breaches of the contract of carriage, and as such impose liability upon the carrier. The principles of law applicable to the relations of master and servant do not fully define the rights, duties, and obligations between the carriers and their passenger. They are not merely citizens, bearing only towards each other the relation which one citizen bears to another. The carrier agrees to carry for hire, the passenger from one place to another, and is responsible for any breach of the obligation thus assumed, in ill usage of the passenger by himself or employee. Passengers do not only contract for room and transportation, but for good treatment, and it is the duty of the owner to use due care and exertion to protect them from any degree of violence, abuse, or ill treatment from other passengers, or the carrier's servants, or other persons coming on board during the trip. The principal in this class of cases is liable for the misconduct of the employee when it occasions injury to the pas-

vided such injury could have been foreseen or reasonably anticipated by its servants and could have been prevented or rendered less severe¹³

senger, whether arising from malice or neglect." *Pendleton v. Kinsley*, 3 Cliff. 416, Fed. Cas. No. 10,922. See also *International & G. N. R. Co. v. Kentle*, 2 Willson Civ. Cas. Ct. App. (Tex.) § 303, 16 Am. & Eng. R. R. Cas. 337, 340.

"It has been steadily held to be the duty of a carrier of passengers to protect them, in so far as this can be done by the exercise of a high degree of care, from the violence and insults of other passengers and strangers, and to protect them from the violence and insults of the carrier's own servants; and the inquiry whether this duty arises from contract or from the nature of the employment becomes unimportant, except that the duty goes with the carrier's contract, however made, whereby the relation of carrier and passenger is established." *Dillingham v. Anthony*, 73 Tex. 47, 3 L. R. A. 634, 15 Am. St. Rep. 753, 11 S. W. 139 (action by passenger, against receivers of a railroad company, for assault and battery).

"While in this state there seems to be no express authority as to the duty of the carrier to afford protection to the passengers against the assaults of his fellow passengers or strangers, we still have the decisions of other courts in regard to it, which, although comparatively recent, strenuously commend themselves to our consideration, as well by their right reasoning and plain sense of justice as by the high character of the tribunals from which they emanate. According to the uniform tendency of these adjudications which we admit as authorities, the carrier owes to the passenger the duty of protecting him from the violence and assaults of his fellow passengers or intruders, and will be held responsible for his own or his servant's neglect in

this particular, when by the exercise of proper care, the acts of violence might have been foreseen and prevented; and while not required to furnish a police force sufficient to overcome all force, when unexpectedly and suddenly offered, it is his duty to provide ready help sufficient to protect the passenger against assaults from every quarter which might reasonably be expected to occur under the circumstances of the case and the condition of the parties." *Britton v. Atlanta & C. Air-Line Ry. Co.*, 88 N. C. 536, 544, 43 Am. Rep. 749 (assault and battery by white male stranger and passengers on colored female passenger seated, lawfully, in white coach). See also *Owens v. Wilmington & W. R. Co.*, 126 N. C. 139, 78 Am. St. Rep. 642, 35 S. E. 259.

In *Daniel v. Petersburg R. Co.*, 117 N. C. 592, 4 L. R. A. (N. S.) 485, 23 S. E. 327, it was said that "passengers are entitled to protection from the carrier's agents, against assaults or insults from their own employees, from other passengers or persons on the train, whether such persons are rightfully on the train or not."

¹³ "The carrier's liability for failure to protect from the misconduct of others than its own servants arises only when the wrong is actually foreseen or is of such a character and perpetrated under such circumstances as that it might reasonably have been anticipated or naturally expected to occur. * * * It is of course a corollary to this rule of liability that the injurious misconduct complained of could have been foreseen in time to permit of its effective prevention." *Nashville, C. & St. L. Ry. v. Crosby*, 183 Ala. 237, 62 So. 889. See also *Southern R. Co. v. Hanby*, 183 Ala. 255, 62 So. 871; *Montgomery Traction*

if the servants had exerted themselves in the proper manner to do so.

Co. v. Whatley, 152 Ala. 101, 126 Am. St. Rep. 17, 44 So. 538; Fewings v. Mendenhall, 83 Minn. 237, 55 L. R. A. 713, 86 N. W. 96; Britton v. Atlanta & C. Air-Line Ry. Co., 88 N. C. 536, 43 Am. Rep. 749.

In New Orleans, St. L. & C. R. Co. v. Burke, 53 Miss. 200, 24 Am. Rep. 689, the court said: "We conclude * * * that the undoubted power which is vested in railroad officials to preserve peace and good order on their trains, and, if necessary for this purpose, to eject therefrom turbulent and disorderly persons, carries with it the absolute duty to exercise the power, when called upon so to do in a proper case by the other passengers; that a failure to discharge this duty stands, to some extent, upon the same footing as the omission to perform any other official duty, and, upon the maxim respondeat superior, renders the corporation liable. The announcement of this doctrine for the first time, in its practical application in the jurisprudence of the state, admonishes us that it should be stated with its proper limitations and restrictions. It is first to be observed that the liability of the carrier arises, not from the fact that the passenger has been injured, but from the failure of the officials to afford protection. It will be necessary, therefore, in each case to bring home to the conductor knowledge or opportunity to know that the injury was threatened, and to show that by his prompt intervention he could have prevented or mitigated it. It must be remembered, also, that the power at his disposal consists of the train hands and the willing passengers; that he can never be expected to accomplish anything more than is possible with this force; and that all that can be required of him, at last, is a fair and honest effort

to prevent the wrong."

In Connell's Ex'rs v. Chesapeake & O. Ry. Co., 93 Va. 44, 32 L. R. A. 792, 57 Am. St. Rep. 786, 24 S. E. 467, plaintiffs, as executors, sued for the death of their deceased who was murdered by being shot while occupying a berth in a Pullman coach, charging negligence on the part of the defendants, the railroad company and the Pullman Palace-Car Company, in failing "to observe such care and to take such precautions as would effectually protect a passenger asleep, in the nighttime, upon a Pullman coach, constituting a part of the train of the Chesapeake & Ohio Railway Company, from an assault made upon him by some unknown person, a passenger or intruder, as the declaration alleges, who was permitted to enter the Pullman car with intent to commit murder or robbery, and who did inflict upon the plaintiffs' testator injuries from which he died." It was not averred, however, "that the defendants or their employees knew that any danger impended over the testator of the plaintiffs in error, or that there was any circumstance to arouse their suspicion, however watchful and alert they may have been." On writ of error, the Supreme Court of Virginia affirmed the judgment sustaining the demurrers to plaintiffs' amended declaration, and in the course of its opinion said: "Under no circumstances is a carrier of passengers for hire held as an insurer of their safety, though the highest degree of care and diligence in guarding their safety is required, and the slightest imputation of negligence against which human care and skill can provide will make them responsible for any defect in machinery, or for any negligence upon the part of their servants; but the negligence complained of must

So a carrier must respond in damages to a passenger who is as-

stand as the proximate cause of the injury sustained,—that is, it must be the direct and efficient cause of the injury. * * * When * * * a sleeping-car company receives a passenger, and he retires to rest, it may well be assumed to anticipate and be required to guard and protect him against a crime which is likely to occur whenever the temptation and the opportunity are presented [e. g. robbery, cases involving which had been cited by counsel for plaintiffs in error]. It cannot be deemed to have anticipated nor be expected to guard and protect him against a crime so horrid, and happily so rare, as that of murder. There is no causal connection between the negligence pleaded and the injury sustained. In a peaceful community, in a law-abiding and Christian land, a car of the defendant company is invaded in the nighttime by an assassin, and an innocent man falls a victim to his murderous assault. Can it be said that, in leaving a door ajar, in permitting a stranger or passenger to enter, the defendants were guilty of negligence, when to hold them negligent would be to say that they should have expected the tragedy which gave rise to this action? To do so would be to require of them more than human foresight as to the minds and motives of men, and make them, indeed, insurers of the safety of passengers, while under their care, against all dangers, however remotely connected with their acts of omission or commission. This view does not seem to have prevailed in those cases in which injuries to the person, and not to the property, of passengers, have been the subject of investigation. * * * As we have seen, the responsibility of the carrier does not flow directly from the injuries sustained, but rests upon the prin-

ciple that it is the duty of railroad and sleeping-car companies to convey their passengers and guests in comfort and safety; and, while not directly responsible to a passenger for a wrong inflicted by an intruder or stranger or fellow passenger, they are responsible for such injury if it appear that the companies knew, or ought to have known, that danger existed or was reasonably to be apprehended, and that they could, by the use of the agencies at their disposal, have prevented the mischief. It is better that the carrier should be held responsible to a passenger for injuries received at the hands of an intruder, a stranger, or a fellow passenger only in those cases where its agents or employees knew, or, in the light of surrounding circumstances, ought to have known, that danger threatened or was to be apprehended, and then failed to use their authority and power to protect him from the impending peril, than that the hitherto recognized limits of responsibility for negligent acts should be enlarged, and the carrier be held to answer for a casualty wholly unforeseen, and of which this declaration contains the only recorded instance. In this case, notice to the company or its agents is not charged, and no circumstance is alleged which could have put the company or its agents upon inquiry, or have excited the apprehension of the most careful and cautious. The wrong itself was not only unusual, but it is believed to be wholly without precedent. Certainly, the diligence of counsel and the labors of the court have failed to discover any similar case. Under such circumstances, we think it would be harsh and oppressive to impose a liability upon the defendants." See also *Pittsburgh, Ft. W. & C. Ry. Co. v. Hinds*, 53 Pa. 512, 91 Am. Dec. 224.

saulted and beaten by a fellow passenger,¹⁴ at least, when the conductor knew or had the opportunity of knowing that injury was threatened, and failed to make a fair and honest effort to prevent or mitigate it.¹⁵

The tortious wrongs for which, above all others, the carrier will be held liable in damages are the wrongs committed by those of its servants in charge of the train or car on which the passenger was carried.¹⁶

In *Calder v. Southern R. Co.*, 89 S. C. 287, 71 S. E. 841, an action by a female passenger for an assault committed upon her and a robbery suffered by her while occupying a Pullman berth, the Supreme Court of South Carolina, in sustaining a judgment in favor of the plaintiff against the Pullman Company, declared that "the rule that the duty of the carrier to a passenger, [to protect him] from the wrongful acts of a fellow passenger or stranger, only applies when the carrier has knowledge of the existence of the danger, or of facts and circumstances from which the danger may be reasonably anticipated, is not applicable to passengers asleep in their berths," and commenting upon *Connell's Ex'rs v. Chesapeake & O. Ry. Co.*, supra, stated "that, in so far as it announces the principle that robbery is a danger to the safety of the passenger, which a sleeping car company should guard against, it states the principle correctly. But if it is to be construed as ruling that a sleeping car company cannot be held liable for damages, when a passenger is murdered by a stranger, although both the conductor and porter went to sleep, leaving the passengers unprotected, on the ground that murder was a danger not reasonably to be anticipated, then such a rule is not to be followed. We, however, do not think the court intended to go to that extent, as it did not appear in that case that the sleeping car company had failed to keep a general watch over the passengers. Therefore that case cannot be regarded as authority for

the proposition that it is not the duty of a sleeping car company to take proper care to keep a watch over its passengers, even before it has notice of danger, or of circumstances sufficient to put it on inquiry, which, if pursued with due diligence, would lead to knowledge of the danger."

Where a passenger on a railroad train, who is assaulted and wounded by a fellow passenger, desired and sought the injury which was done him in order that he might recover from the railroad company therefor, such fact will go in mitigation of the damages to which he would otherwise be entitled. *Murphy v. Western & A. R. R.*, 23 Fed. 637, 641.

¹⁴ A colored passenger on a railroad train may recover from the railroad company for an assault and battery committed upon him by a white passenger who, displeased at his presence in the car wherein he is seated, forcibly removes him from his seat therein and ejects him from the car. *Murphy v. Western & A. R. R.*, 23 Fed. 637.

¹⁵ *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689.

That for "opportunity of knowing," the Supreme Court of Alabama would substitute "had possession of facts which would have led a reasonable man to believe," see *Southern R. Co. v. Hanby*, 183 Ala. 255, 62 So. 871.

¹⁶ "There appears to be some divergence of opinion as to a common carrier's liability for an assault, and the like, committed by its agent upon a passenger when the agent is acting

"It is undoubtedly true, that where the employee goes outside of the line of his employment, and for purposes of his own, inflicts an injury upon the person of one who has no claim upon the employer arising out of any special relation existing between them, being a stranger to the master, the principle [that the employer is not liable for the torts of the employee if wilfully or maliciously committed or if not committed within the scope or legitimate course of the latter's employment] * * * is properly applied and has ever been enforced as a rule of the common law, but it does not appear to us that it should be extended so as to embrace a case where the employee of a common carrier engaged in operating the train, commits a tort upon a passenger upon such train. In every contract for carriage the carrier undertakes, not only that the utmost vigilance, care and skill shall be exercised to safely transport the passenger to his destination, but that during the passenger's transit he shall be treated humanely, and protected from all dangers from whatever source arising so far as the efforts of the carrier or his servants can be made available for the protection of such passenger. It is impossible for a railroad company, as such, to perform the contract upon its part, as it can act only through its agents and servants. The performance of its contract is entrusted to agents and servants selected by its author-

beyond the scope of his employment in the usual acceptation of that phrase. Of course, the law is well settled that for torts committed by such agents or employees upon persons who are not passengers, the employer is not liable, unless the act was in a sense in the line of duty imposed by the employment, as, where a conductor of a train, being under duty to the railway company, and having authority to eject persons not entitled to carriage, commits, out of his own malice and personal ill will towards such a person, an unnecessary assault upon him in ejecting him from the train, the wrongful act, though against the express rules and regulations of the carrier, is yet within the scope of the conductor's employment, and the company would be liable in damages for it. But the reverse would be true—the company would not be liable—if such conductor should assault a per-

son standing by the side of the train, for instance, and having no relations with the carrier, nor in any way encroaching upon the rights of the carrier; for in this latter case the wrongful act of the conductor would have no connection with his duties to the company, and would be entirely beyond the scope of his employment. Such is the law as between trespassers and strangers generally, on the one hand, and the carrier on the other. But as between the carrier and its passengers an entirely different rule prevails. As to them the contract of carriage imposes upon the carrier the duty not only to carry safely and expeditiously between the termini of the route embraced in the contract, but also the duty to conserve by every reasonable means their convenience, comfort, and peace throughout the journey. And this same duty is, of course, upon the carrier's agents.

ity for their known or presumed fitness to perform the duties assigned to them. The passenger has no voice in the selection of the employees charged with the fulfilling of the company's contract with him, but relying upon the reasonable presumption that the company has selected competent, faithful and humane servants, he confidently submits himself to their control and direction until the completion of the contract. The employees of the company have exclusive control of the train. In its operation and management, and in the performance of the company's contract with the passenger, they are the representatives of the company, and as to such passenger, they stand in the place of the company, and all their acts, so far as they have a direct connection with the performance or non-performance of the contract, must be held to be acts of the company itself. The company, knowing at the time of entering into the contract for carriage that its servants in charge of the train are the only instrumentalities through and by which it can perform its contract, must be considered as having agreed that such servants should not, either wilfully or negligently, violate such contract to the injury of its patron. If the company has stipulated that the passenger shall during his transit receive kind treatment at the hands of its servants, appointed by itself to fulfil its agree-

They are under the duty of protecting each passenger from avoidable discomfort, and from insult, from indignities, and from personal violence. And it is not material whence the disturbance of the passenger's peace and comfort and personal security or safety comes or is threatened. It may be from another passenger, or from a trespasser or other stranger, or from another servant of the carrier, or, a fortiori, from the particular servant upon whom the duty of protection peculiarly rests. In all such cases the carrier is liable in damages to the injured passenger. And it is of no consequence, when the wrong is committed by the carrier's own servant,—even that servant particularly charged with the duty of conserving the passenger's well-being en route,—that the act bears no connection or relation with or to the duties of such servant to the carrier, and is not committed as an incident to the discharge of any

duty; but is utterly violative of all duty, and apart and away from the scope of employment as that term is understood in the class of cases first above referred to. The carrier is liable in such cases because the act is violative of the duty it owes through the servant to the passenger, and not upon the idea that the act is incident to a duty within the scope of the servant's employment; and it is manifestly immaterial that the act may have been one of private retribution on the part of the servant, actuated by personal malice towards the passenger, and having no attribute of service to the carrier in it. It is wholly inapt and erroneous to apply the doctrine of scope of employment, as ordinarily understood, to such an act. Its only relation to the scope of the servant's employment rests upon the disregard and violation of a duty imposed by the employment. This is, beyond question, we think, the true doctrine

ments in that regard, we fail to perceive why it should not be held liable for a breach of its contract in that respect as well as in any other. Neither can we fully appreciate the argument that a negligent violation of such contract is a breach thereof, while a wilful one is not. The wrongful act of the employee violates his own contract with his employer at the same time that it violates that of the employer with the passenger. And it seems to us to be more in accord with the reason and philosophy of the law, as well as with a sound public policy, that the master should be held to a reasonably strict accountability for such acts of the servant; and if any one is to look to the servant for indemnity, let it be the employer who has selected such servant and entrusted him with the fulfilling of the master's duty to the passenger, rather than apply a principle that would confine the remedy of the passenger to an action against a servant, who in many cases might be insolvent, and for whose appointment the injured one is not in any manner responsible. The fact that the servant is liable in tort for his wrongful act does not lessen the liability of the master, where such act is also a breach of the master's contract. In such case the injured party has his election to sue in assumpsit for a breach of contract duty, or in tort for the wrongful injury." ¹⁷ Thus the

on principle; and while, as indicated above, there are adjudications against it, the great weight of authority supports it." *Birmingham Ry. & Elec. Co. v. Baird*, 130 Ala. 334, 54 L. R. A. 752, 89 Am. St. Rep. 43, 30 So. 456.

"While it * * * may be safely accepted as a correct general rule, that a brakeman, in the absence of express orders, has no authority to eject a passenger from a train, it is nevertheless true that a railway company is liable for an injury wantonly inflicted by a brakeman on a passenger traveling on a train on which he is acting as brakeman. * * * This liability is based upon the doctrine that a passenger while traveling on a train is under the care and control of the railway company, and is hence entitled to be protected against the wilful misconduct of the company's agents and servants in charge of the train, and to whose authority he is required, for the time

being, to yield greater or less obedience." *Wabash Ry. Co. v. Savage*, 110 Ind. 156, 9 N. E. 85.

¹⁷ *Chicago & E. I. R. Co. v. Flexman*, 9 Ill. App. 250, 254, aff'd 103 Ill. 546, 42 Am. Rep. 33.

"As between the carrier and its passengers, the contract of carriage imposes upon the carrier the duty, not only to carry safely and expeditiously between the termini of the road expressed in the contract, but also to conserve by every reasonable means their convenience, comfort, and peace throughout the journey. And the same duty is of course upon the carrier's agents. They are under a duty to protect each passenger from bodily discomfort, from insult, from indignities, and personal violence from whatever source. This is true although the act is one which bears no relation to the duty of carrier, and is not connected as an incident to the discharge of any duty. In such case

carrier will be liable for an unjustifiable assault and battery committed upon a passenger,¹⁸ whether it is the act of its conductor¹⁹ or brake-

the carrier is liable because of violation of duty it owes to passengers, and not that the act is incident to the duty and scope of employment." *Baltimore & O. S. W. R. Co. v. Davis*, 44 Ind. App. 375, 89 N. E. 403.

¹⁸ A railroad company will be liable to an intending passenger who is assaulted by the company's employees while he is seated in a passenger car waiting for the train to start even though he has not procured a ticket, it being the custom of the company not to require passengers to purchase their tickets before boarding the train. *Illinois Cent. R. Co. v. Sheehan*, 29 Ill. App. 90.

"A passenger injured by being unlawfully and forcibly thrown from a moving train by an employee of the railroad company in its service on that train is entitled to maintain an action against the company, although it was not within the line of this employee's business to eject from such train persons not rightfully thereon." *Brunswick & W. R. Co. v. Bostwick*, 100 Ga. 96, 27 S. E. 725 (memorandum decision—syllabus by the court).

A declaration averring that the person who struck the plaintiff was at the time a servant of the defendant railroad company and acting within the scope of his employment, and that the plaintiff was at the time a passenger of such company is not demurrable on the ground that it failed to show any liability on the part of the company. *Whittington v. Philadelphia, B. & W. R. Co.*, 5 Boyce (Del.) 248, '92 Atl. 812.

¹⁹ *St. Louis Southwestern R. Co. v. Mallard*, 104 Ark. 641, 148 S. W. 261.

This is true, although it neither authorized nor ratified the conductor's act. *Southern R. Co. v. Grubbs*, 115

Va. 876, 80 S. E. 749. See also *Chicago & E. R. Co. v. Flexman*, 103 Ill. 546, 52 Am. Rep. 33, aff'g 9 Ill. App. 250; *McKinley v. Chicago & N. W. R. Co.*, 44 Iowa 314, 24 Am. Rep. 748; *Goddard v. Grand Trunk Ry. of Canada*, 57 Me. 202, 2 Am. Rep. 39; *Bryant v. Rich*, 106 Mass. 180, 8 Am. Rep. 311; *Dwinelle v. New York Cent. & H. River R. Co.*, 120 N. Y. 117, 8 L. R. A. 224, 17 Am. St. Rep. 611, 24 N. E. 319. Compare *Goodloe v. Memphis & C. R. Co.*, 107 Ala. 233, 29 L. R. A. 729, 54 Am. St. Rep. 67, 18 So. 166.

In *Alabama City, G. & A. R. Co. v. Sampley*, 4 Ala. App. 464, 58 So. 974, an action against a carrier for an unjustifiable assault and battery committed by its conductor on a passenger on its car, the court held that, under the evidence in the case, "if the defendant's conductor assaulted the plaintiff while he was on the defendant's car or the steps of the car and afterwards jumped from the car and continued to beat the plaintiff, then the plaintiff was entitled to recover. On the other hand, if, as the defendant contended, the assault did not take place on the car, but after the plaintiff had left the car, then the defendant was entitled to a verdict." See also *Sterneman v. Springfield Traction Co.*, 178 Mo. App. 64, 163 S. W. 258.

In an action of trespass against a street railroad company for an assault and battery committed by its conductor upon plaintiff while the latter was a passenger on defendant's car, the facts that the relation of carrier and passenger existed between defendant and plaintiff, and that at the time of the assault the conductor was acting under the authority of the defendant are evidentiary ones which must

man,²⁰ or of a Pullman porter on its train.²¹ Again, a carrier is liable

be proven, in order to show the ultimate fact that the company as such, and in its corporate capacity, committed the assault, although they need not be alleged in the declaration. *Haggerty v. Potter*, 111 Ill. App. 433.

A street railroad company is not liable to a passenger on one of its cars for an assault committed upon him, by the company's motorman, when he interfered to stop a fight, taking place on the ground outside of the car, between the company's conductor and another passenger who had been ejected from the car, nor for the false charge of assault made against him by the conductor, the company's contract not requiring it to protect the passenger from injuries resulting from an act on his part which was foreign to and disconnected from the act of safe carriage required of it, and which was not even committed on its property. *Zeccardi v. Yonkers R. Co.*, 190 N. Y. 389, 17 L. R. A. (N. S.) 770, 83 N. E. 31. Contra, however, when passenger on the car was assaulted by the driver thereof who had become exasperated as a result of the interference by his passengers with his assault upon a trespassing newsboy committed off of the car. *Stewart v. Brooklyn & C. R. Co.*, 90 N. Y. 588, 43 Am. Rep. 185.

²⁰ Where in connection with the exercise of his authority as the collector of tickets the brakeman on a passenger train assaults a passenger, the railroad company will be liable for his wrongful act. *Goddard v. Grand Trunk Ry. of Canada*, 57 Me. 202, 2 Am. Rep. 39.

A passenger on a railroad train has a right of action against the railroad company for an assault and battery committed upon him by the brakeman on the train when the latter heard himself accused by the passenger of

stealing his watch and chain. *Chicago & E. I. R. Co. v. Flexman*, 9 Ill. App. 250, aff'd 103 Ill. 546, 42 Am. Rep. 33.

"A carrier is liable for a wrongful assault upon a passenger by a brakeman, at least while such brakeman is acting within the line of his employment." *Morey v. Chicago, R. I. & P. R. Co.*, 86 Kan. 73, 119 Pac. 544 (headnote by the court). In this case the court expressly pretermits the question of the scope and applicability of the rule under which the carrier would have been liable on the breach-of-duty theory, the evidence tending to show that the brakeman was engaged in the discharge of his duties at the time of the assault.

²¹ In *Rohrback v. Pennsylvania R. Co.*, 244 Pa. 132, 90 Atl. 557, an action against a railroad company for an assault and battery committed upon plaintiff, a Pullman passenger, by the porter on the Pullman car, the Supreme Court of Pennsylvania, in affirming a judgment for the defendant non obstante veredicto, said: "It does not concern us to inquire into the relations between the Pullman Company and the defendant company; nor does the case depend on the question whether the porter was a servant of the latter. The action was against the railroad company as a common carrier, and the one question in the case is the sufficiency of the evidence to charge the defendant with liability for the assault. It was virtually an action of trespass vi et armis, and before our procedure act of 25th May, 1887 (P. L. 271), it must have been so brought. Since negligence was neither alleged nor proved, the one determining question must be, assuming that the porter was the servant of the railroad company: Was the assault committed at the command or with the consent of the employer?"

to a female passenger on its train for an assault with intent to rape

If it was committed in the course of the porter's employment, or in the line of his duty, so much might be inferred; but here we have absolutely nothing to show what the duties of the porter were, while it is made manifest from the plaintiff's own narrative of the circumstance that the assault was a wilful act, without other purpose than to inflict injury and punishment for personal insult, and therefore could not have been in the discharge of any duty owing the employer. Eliminating from the case the question of whether the defendant directed the assault to be made or assented to it, and the further question of negligence—for as we have said there is absolutely no evidence in support of either—we have here a case where the employer was sought to be held liable for trespass committed by a servant on the latter's own responsibility, to accomplish his own purpose, and under conditions which the employer could not reasonably have anticipated. 'To maintain trespass *vi et armis* against the employer, it must appear that the particular injury or act of trespass was done by his command or with his assent.' *Allegheny Valley Railroad Co. v. McLain*, 91 Pa. 442; *Pennsylvania Co. v. Toomey*, 91 Pa. 256; *Pitts., Allegheny & Manchester Passenger Railway Co. v. Donahue*, 70 Pa. 119. The case calls for no further discussion." See also *Win v. Atlantic City R. Co.*, 248 Pa. 134, 93 Atl. 876.

In *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 87, 8 Am. St. Rep. 512, 3 So. 631, it was held that a passenger on a railroad train could not recover from the sleeping-car company, whose car was attached to such train, for a wanton assault and battery committed upon him by the porter of such car when he went thereto,

as he had been directed to do by a porter or brakeman on one of the ordinary cars, and attempted to enter for the purpose of washing his hands, at the same time requesting the porter that he be allowed so to do, there having been no contractual relation between the sleeping-car company and the passenger, the act of the porter not having been committed "in the exercise of the functions in which he was employed," and the company not having ratified such act. (That the railroad company, however, was liable to the assaulted passenger, see *Williams v. Pullman Palace Car Co.*, 40 La. Ann. 417, 8 Am. St. Rep. 538, 4 So. 85.) Said the court in disposing of the question whether the act of the porter was committed "in the exercise of the functions in which he was employed:" "The evidence in this case establishes that the porters employed in defendant's service are mere menials employed to clean up the car and keep it in order, and to wait upon the passengers, having no police authority whatever, and no connection with the enforcement of the rules of the service except to report violations of them to the conductor. Anything more completely outside of 'the functions in which he was employed,' than the assault committed on the plaintiff could hardly be conceived. If it had been his duty forcibly to prevent the plaintiff from entering the car, or to put him out at all, and in performing this duty he had used wanton and needless violence, inflicting injury, defendant might have been responsible. But he had no such duty or authority. We do not lose sight of the fact that plaintiff was not a trespasser, but had a right to enter the car for the purpose of asking permission to wash his hands, or of trying to hire the privi-

committed upon her by the company's baggage master on such train.²² When its conductor commits an indecent assault upon a female passenger, the carrier will be required to respond in damages.²³

Further it has been said that "a carrier is as much bound to pro-

lege, and that in addressing the porter he was dealing with him as a servant of the company. This emphasizes the outrage to which he was subjected, but would be a dangerous ground for holding the employer responsible. A person has a right to enter a bank for the purpose of collecting a check, and to present it to the paying teller for payment; but, if, on such presentation, the teller should leap over the counter and knock him down, surely such an act would not subject the bank to liability. So one may lawfully enter a store and deal with any clerk with reference to the purchase of goods, but, if, on some dispute, the clerk should commit assault and battery upon him, the merchant would not be responsible therefor. Or if one, on lawful business, should knock at the door of any private house, and on asking the servant who answered the call for permission to see the master, the servant should assault and beat him, would the master be responsible? Clearly, in all such cases, the lawfulness of the party's conduct and the fact that the injury was received while he was properly dealing with the servant as a servant, would not suffice to bind the master, unless the latter had expressly or impliedly authorized the act, or had been guilty of some fault in knowingly employing so dangerous a servant. We cannot distinguish this case from the one above indicated. The evidence exonerates the defendant from any fault in the employment of * * * [the guilty] porter. * * * Under these views, while we share plaintiff's indignation at the outrage committed on him, we cannot fix the duty of reparation on the innocent defendant, upon

whom it is not imposed by the letter or spirit of the law."

²² Savannah, F. & W. Ry. Co. v. Quo, 103 Ga. 125, 40 L. R. A. 483, 68 Am. St. Rep. 85, 29 S. E. 607.

²³ Croker v. Chicago & N. W. Ry. Co., 36 Wis. 657, 17 Am. Rep. 504.

The contract of a railroad company with female passengers "embraces an implied stipulation that the corporation will protect them against general obscenity, immodest conduct, or wanton approach." Louisville & N. R. Co. v. Ballard, 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. 530.

A sleeping-car company will be liable for an indecent assault committed upon a female, lawfully occupying a berth on one of its cars, by the porter thereon. Campbell v. Pullman Palace-Car Co., 42 Fed. 484.

In South Covington & C. St. R. Co. v. Cleveland, 30 Ky. L. Rep. 1072, 11 L. R. A. (N. S.) 853, 100 S. W. 283. the court held that the defendant street railroad company was liable for the assault and battery committed by its inspector when, in investigating the extent of the injuries sustained by plaintiff in a collision between defendant's street car and the vehicle in which plaintiff was riding, he opened her waist and placed his hand upon her person.

Where a female passenger, while in the carrier's depot awaiting her train, is assaulted by a negress employed by the carrier as matron of the ladies' waiting room in such depot, the carrier will be liable although the conduct of the negress was wilful and malicious. Gulf, C. & S. F. R. Co. v. Luther, 40 Tex. Civ. App. 517, 90 S. W. 44.

tect, and shield from attack the passenger's feelings as his person, and, if it subjects him to the pain and humiliation of being insulted or abused, it is liable for this negligent omission on the part of its servants to perform towards the passengers the duty of protection imposed by law, and it is immaterial whether the injury be wilful and wanton—whether it be intended or unintentional.”²⁴ Thus a

²⁴ Wolfe v. Georgia R. & Elec. Co., 2 Ga. App. 499, 58 S. E. 899.

A street railroad company is liable for the abuse and defamation of a passenger on one of its cars by the driver thereof as a result of the alleged passing on him of a counterfeit coin by such passenger notwithstanding the fact that had the coin been counterfeit, as it was not, the company would have charged up the amount thereof against the driver, the company being required to protect its passengers from insults by its servants. Laffitte v. New Orleans City & L. R. Co., 43 La. Ann. 34, 12 L. R. A. 337, 8 So. 701.

Where, without any provocation, the conductor on a railroad train addressed a passenger in opprobrious and abusive language, tending to cause a breach of the peace or to humiliate the passenger or subject him to mortification, such passenger has a right of action against the railroad company. Cole v. Atlantic & W. P. R. Co., 102 Ga. 474, 31 S. E. 107. Said the court: “We do not, of course, wish to be understood as dealing with the present action as though it were an attempt to sue the company for a slander committed by its agents. On the contrary, we merely mean to hold that a carrier is liable in damages for failure to perform its public duty to protect a passenger from abusive language which amounts to slander, not as the perpetrator of the outrage itself. Indeed, it matters not whether a servant or a stranger was the real wrongdoer, if the company has failed to furnish the passenger with the

proper protection against such misuse; for, in either event, its liability will result from its breach of a public duty, not because the real wrongdoer's act is in law imputable to it. As has been seen, when the company's servant to whom it intrusts the performance of its duty to protect its passengers is himself the tortfeasor, it is bound to respond in damages simply because it cannot escape liability by delegating its duties to another, who abandons his office at the critical moment, and thus places the company in the attitude of having no one on the scene to perform for it the duty, it having entirely failed to provide for the emergency by choosing to rely solely upon a servant who proves unworthy of the trust. In a word, the company's liability arises from an act of omission, and it is not chargeable with the wanton act of commission on the part of its servant from which the passenger suffers injury to his reputation.”

Petition in an action against a street railroad company for the insult offered plaintiff, a white man, when defendant's conductor on the car on which plaintiff was a passenger requested him to occupy a seat in that part of the car reserved for colored persons on the ground that he was a negro held to set out a cause of action although under the statute the conductor possessed police power and was merely attempting to enforce the statutory requirement of a separation of races. Wolfe v. Georgia R. & Elec. Co., 2 Ga. App. 499, 58 S. E. 899.

female passenger has a right of action against the carrier when its servants either themselves indulge in profane or indecent language in her presence,²⁵ or negligently permit her fellow passengers so to do.²⁶ It has even been held that the fact that the insane condition of the conductor who assaulted, cursed and abused a passenger was not discoverable by the carrier by the exercise of reasonable diligence will not relieve it from liability for the conductor's tort.²⁷ Again it has been held that the causing of the wrongful imprisonment of a

²⁵ *Birmingham Railway, Light & Power Co. v. Glenn*, 179 Ala. 263, 60 So. 111.

A street car company will be liable for insulting treatment of a female passenger on one of its cars by the conductor thereof while he was engaged in the furtherance of the company's business. *San Antonio Traction Co. v. Lambkin* (Tex. Civ. App.), 99 S. W. 574.

²⁶ *Southern R. Co. v. Lee*, 167 Ala. 268, 52 So. 648.

²⁷ "In case of passengers injured by the negligence or tort of one of its employees, a railroad company may not escape liability because it used ordinary care in hiring competent employees. It matters not what degree of care the railroad company may have exercised in this respect; it is still liable for the negligent or tortious act of such employee while acting within the scope of his employment. Ignorance of an employee's incompetency does not excuse it. When acting through a conductor as its agent, it is liable for an injury inflicted by him upon a passenger, whether such injury be the result of negligence, wilfulness, or unsoundness of mind, and without regard to its inability to discover, by the exercise of reasonable diligence, that his conduct and habits, or his mental capacity, were such as to induce a reasonable belief that such acts would follow. We therefore conclude that the railway company is liable in these actions to the extent of compensatory dam-

ages, regardless of whether the conductor was sane or insane at the time of the injuries complained of." *Chesapeake & O. R. Co. v. Francisco*, 149 Ky. 307, 42 L. R. A. (N. S.) 83, 148 S. W. 46 (action for assault, cursing and abuse).

But see *Long v. Chicago, K. & W. R. Co.*, 48 Kan. 28, 15 L. R. A. 319, 30 Am. St. Rep. 271, 28 Pac. 977, in which, in holding that a railroad company is not liable to a passenger who has contracted the smallpox from its ticket agent unless it is shown that the company had knowledge that the agent was afflicted with such disease, the court said *inter alia*: "Insanity is a disease, but a master or railroad company will not be liable for such infirmity in an agent, having no knowledge thereof. * * * But, if one knowingly employs an insane person as his servant or agent, he will be liable for damages to innocent third persons resulting from acts done by the insane person in the scope of his employment. * * * The scienter, however, must be shown. The employment knowingly of an improper person to come in contact with the public as an agent would be gross misconduct, but, if the master or railroad company is faultless in regard to employing an agent and in continuing his employment, the master or railroad company ought to be excused civilly from the consequences of any secret disease or like infirmity of the agent, in the absence of all knowledge thereof."

passenger by the railroad company's conductor,²⁸ auditor²⁹ or brake-

²⁸ *Gillingham v. Ohio River R. Co.*, 35 W. Va. 588, 14 L. R. A. 798, 29 Am. St. Rep. 827, 14 S. E. 243.

A railroad company will be liable for the act of its conductor in wrongfully ordering and procuring the arrest and imprisonment of a passenger when such act, although not authorized by the company, was committed in the course of the conductor's employment. *New York, P. & N. R. Co. v. Waldron*, 116 Md. 441, 39 L. R. A. (N. S.) 502, 82 Atl. 709.

Where the conduct of a passenger is such as to justify the conductor in summoning a policeman and requesting the latter to take the passenger into custody, such passenger cannot recover from the railroad company on the ground of wrongful arrest; and, in any event, the company will not be liable for subsequent wrongful conduct on the part of the policeman for which the conductor was not responsible and which he did not request nor authorize. *Carver v. Carolina, C. & O. R. Co.*, 169 N. C. 204, 85 S. E. 293.

A street car company authorizing its conductor to put off of its car a passenger who refuses to pay his fare does not thereby authorize such conductor to cause the arrest and prosecution of such a passenger on the charge of violating the city ordinance which makes it a misdemeanor for a person to ride on a street car without paying his fare so as to render it liable, on the failure of the prosecution instituted, to damages for malicious prosecution. *Little Rock Traction & Electric Co. v. Walker*, 65 Ark. 144, 40 L. R. A. 473, 45 S. W. 57.

The question, whether the procurement of arrest of and institution of prosecution against a passenger on a railroad train by conductor, on charge of passing counterfeit money in paying fare, was within scope of con-

ductor's authority, as one for jury, see *Galveston, H. & S. A. R. Co. v. Donahoe*, 56 Tex. 162.

The fact that the superintendent of a street car company possesses all of the powers properly pertaining to such a position and has general authority to look after and protect the company's property and to look after and manage the running of the company's cars for the carriage of passengers does not alone, and in the absence of precedent authority expressly conferred or of subsequent ratification or adoption, make his act, in causing the arrest and prosecution of a passenger on one of the company's cars on a charge of passing a counterfeit coin in paying his fare, binding upon the company. *Central Ry. Co. v. Brewer*, 78 Md. 394, 27 L. R. A. 63, 28 Atl. 615.

²⁹ *Moore v. Louisiana & A. R. Co.*, 99 Ark. 233, 34 L. R. A. (N. S.) 299, 137 S. W. 826, holding that the complaint in an action against a railroad company for the false arrest and imprisonment of a passenger on its train, at the instance of the auditor in charge of such train, need not allege that such auditor was acting within the scope of his authority in causing the passenger's arrest and removal from the train.

"A railroad company is liable for the acts done by a train auditor acting within the scope of his general authority, in furtherance of the company's business, and for the accomplishment of the object for which the auditor was employed; and where the act done arises out of a controversy over the payment of fare, and consists in procuring an officer to make an arrest of one aboard the train on which the auditor is employed, and such arrest is wrongful, the company is liable in damages for the injuries

man is a breach of the company's contract and renders the company liable in damages.³⁰

Of course, in order for liability to attach to the carrier, the assault and battery must have been wrongful and without justification.³¹ Thus, if the wounding was a result of the legitimate exercise of the right of self-defense, the wounded passenger has no right of action against the carrier for the injuries received.³²

sustained." Chicago, R. I. & P. R. Co. v. Radford, 36 Okla. 657, 129 Pac. 834 (headnote by the court).

³⁰ St. Louis, I. M. & S. R. Co. v. Tukey, 119 Ark. 28, L. R. A. 1915 E 320, 175 S. W. 403.

³¹ Hanson v. European & N. A. Ry. Co., 62 Me. 84, 16 Am. Rep. 404.

"The carrier, when sued for an assault by the carrier's servant upon a passenger, may prove in justification that the servant could not have been held liable, or has been released, and if the servant was not responsible in damages, the carrier also is exonerated." Horgan v. Boston El. R. Co., 208 Mass. 287, 94 N. E. 386.

³² "Of course, a conductor has the right of self-defense against the assault of a passenger; but the right is the same in this connection as in criminal law. He must be imperiled, and he must be without fault. To be sure, he need not retreat from his car. And he may assault a passenger when necessary to protect other passengers from assault, using no more than necessary force, and this may become a duty,—indeed, it [is] a duty whenever it is a right. But he cannot assault a passenger in retaliation for an assault committed upon himself or upon another passenger, and, a fortiori, he cannot assault a passenger for abusive words, or in revenge or punishment, under any circumstances. And if he does assault a passenger otherwise than under a necessity to defend himself or a passenger from battery, or in rightfully ejecting a passenger, who, by his conduct

towards other passengers, has forfeited his right of carriage, the carrier is liable. The fault of the passenger, short of producing a necessity to strike in self-defense, will neither justify the conductor in striking, nor relieve the carrier from liability for his act. Possibly, such fault could be considered in mitigation of damages." Birmingham Ry. & Elec. Co. v. Baird, 130 Ala. 334, 54 L. R. A. 752, 89 Am. St. Rep. 43, 30 So. 456. See also Gallena v. Hot Springs R. Co., 13 Fed. 116, 122; Birmingham Railway, Light & Power Co. v. Tate, 7 Ala. App. 517, 61 So. 32; Alabama City, G. & A. R. Co. v. Sampley, 4 Ala. App. 464, 58 So. 974.

"A servant of a carrier, assaulted by a passenger, may use such force in resisting the same as is actually or apparently necessary to successfully repel it, but no more. The servant may rightfully do what his principal could do, if he were present and acting, and the measure of the right and duty of the former is, under these circumstances, the same as that of the latter. Self-defense, made within the limitations prescribed by law, is always permissible and never a violation of law. Hence it justifies resistance sufficient to repel the assault wherever and upon whomsoever made. * * * But if the servant of a carrier, assuming to exercise this right, transcends the limits thereof, in respect to an assault made upon him by a passenger, by the use of unnecessary force or violence, his principal is just as clearly liable for the injury done

In a case decided by the Supreme Court of the United States,³³ it is said that "it is not every assault by an employee that gives to the passenger a right of action against the carrier. Suppose a passenger is guilty of grossly indecent language and conduct in the presence of lady passengers, and the conductor forcibly removes him from their presence, there is no misconduct in such removal; and, if only necessary force is used, nothing which gives to the party any cause of action against the carrier. In such a case, the passenger, by his own misconduct, has broken the contract of carriage, and he has no cause of action for injuries which result to him in consequence thereof. He has voluntarily put himself in a position which casts upon the employee both the right and duty of using force. There are many authorities which in terms declare this obligation on the part of the carrier, and justify the use of force by the employee, although such force, reasonably exercised, may have resulted in injury. But if an employee may use force to protect other passengers, so he may to protect himself. He has not forfeited his right of self-defense by assuming service with a common carrier; nor does the common carrier engage aught against the exercise of that right by his employee. There is no

as the servant himself would be for the exercise of such excessive force, when acting in his individual capacity and not as a representative of the carrier. * * * To the extent of the excessive force and violence exerted, the conduct of the servant is necessarily wilful and without justification. Being unlawful, it imposes liability, and that liability falls upon the carrier because of its duty to protect the passenger from injury by its servant." *Layne v. Chesapeake & O. R. Co.*, 66 W. Va. 607, 67 S. E. 1103 (action for death of passenger shot by special police officer).

In *Birmingham Railway, Light & Power Co. v. Coleman*, 181 Ala. 478, 61 So. 890, an action against a street railroad company by a passenger on one of its cars, the court held that it was not error to instruct the jury, at plaintiff's request, "that the assault with a pistol on plaintiff by the conductor, which the undisputed evidence in this case, if you believe it,

shows was committed, cannot be justified so as to relieve defendant from liability to its passenger therefor, unless you find: First, that the conductor was free from fault in bringing on the difficulty, if there was a difficulty; second, that it appeared to the conductor reasonably, and not merely fancifully, that it was reasonably necessary to assault plaintiff in order to protect his own charges, or the person of another passenger, and that the means adopted by the conductor were in kind and degree no more than was reasonable for such protection, and the court charges the jury that the burden of proving its plea of justification is on the defendant."

³³ *New Orleans & N. E. R. Co. v. Jopes*, 142 U. S. 13, 35 L. Ed. 919 (an action to recover for the shooting of a passenger by a conductor when the passenger approached, in a threatening manner, with an open knife in his hand).

misconduct when a conductor uses force and does injury in simple self-defense; and the rules which determine what is self-defense are of universal application, and are not affected by the character of the employment in which the party is engaged. Indeed, while the courts hold that the liability of a common carrier to his passengers for the assaults of his employees is of a most stringent character, far greater than that of ordinary employers for the actions of their employees, yet they all limit the liability to cases in which the assault and injury are wrongful. * * * Here the defense is that the act of the conductor was lawful. If the immediate actor is free from responsibility because his act was lawful, can his employer, one taking no direct part in the transaction, be held responsible? Suppose we eliminate the employee, and assume a case in which the carrier has no servants, and himself does the work of carriage; should he assault and wound a passenger in the manner suggested * * * it is undeniable that if sued as an individual he would be held free from responsibility, and the act adjudged lawful. Can it be that if sued as a carrier for the same act a different rule obtains, and he will be held liable? Has he broken his contract of carriage by an act which is lawful in itself, and which as an individual he was justified in doing? The question carries its own answer; and it may be generally affirmed that if an act of an employee be lawful, and one which he is justified in doing, and which casts no personal responsibility upon him, no responsibility attaches to the employer therefor."

As a general rule, abusive or opprobrious language or epithets directed at the carrier's servant by a passenger will not justify an assault and battery committed upon the passenger by such servant, and the carrier will be held liable notwithstanding the provocation thus offered the tortfeasor.³⁴

³⁴ Abusive, indecent or opprobrious "language or epithets employed by a passenger on a street railway car towards the motorman of the car will not alone warrant an assault by the motorman upon the passenger, nor will the responsibility for any injuries which the passenger may receive in consequence of an assault be limited to the motorman alone, but the company, whose servant the motorman is, is liable also." *Pacelli v. People's R. Co.*, 5 Boyce (Del.) 343, 93 Atl. 560.

The carrier "contracts to carry the passenger safely to his destination.

It does not do so. One of its own servants injures him, and he is denied recovery because he is guilty of misconduct. His assault upon, or abuse of, the servant may obviously excuse the carrier from performance of his contract. It may eject him from its train, but it is difficult to see how this option on its part can excuse the beating of the passenger or the infliction of other injury upon him by way of punishment. This would be setting one wrong against another and would be retaliation, not remedy. *Scott v. Railroad Co.* [53 Hun (N. Y.) 414, 6

§ 3358. — Arrest of passenger by public police officer. Notwithstanding the fact that the carrier may be charged with the duty

N. Y. Supp. 382]; *Railroad Co. v. Wetmore* [19 Ohio St. 110, 2 Am. Rep. 373]; *Favre v. Railroad Co.*, 91 Ky. 541, 16 S. W. 370, and *Peavy v. Railroad Co.*, 81 Ga. 485, 8 S. E. 70, 12 Am. St. Rep. 334, are the only cases, found so far, in which recovery has been denied on account of mere provocation. The proposition, asserted by them, varies from the general principles of American law, governing the relations subsisting between passenger and carrier. Other cases, directly in point, declare the contrary. * * * It seems to us clear that provocation should always be admissible matter in mitigation of the damages, but cannot justify a wrong in a civil action any more than in a criminal prosecution, but this question does not arise and is not decided." *Layne v. Chesapeake & O. R. Co.*, 66 W. Va. 607, 67 S. E. 1103.

"Where a suit was brought against a railroad company for an assault and battery committed by its conductor upon a passenger, if the conduct of the passenger was such as to justify the act of the conductor, the company would not be liable. If the conductor's act was not justified, but mitigated by provocative words or conduct of the passenger at the time, such mitigation would inure to the benefit of the company. But if the conductor committed an assault and battery upon the passenger, and the words and conduct of the passenger were such as to arouse the anger of the conductor and to tend to provoke a difficulty, but not such as to justify the act of the conductor, this would not free the company from liability." *Mason v. Nashville, C. & St. L. R. Co.*, 135 Ga. 741, 33 L. R. A. (N. S.) 280, 70 S. E. 225 (headnote by the court), reviewing, and modifying, so as to

conform them to the rule laid down, *Macon Railway & Light Co. v. Mason*, 123 Ga. 773, 51 S. E. 569; *Dannenberg v. Berkner*, 118 Ga. 885, 45 S. E. 682; *Central of Georgia R. Co. v. Motes*, 117 Ga. 923, 62 L. R. A. 507, 97 Am. St. Rep. 223, 43 S. E. 990; *Georgia Railroad & Banking Co. v. Hopkins*, 108 Ga. 324, 75 Am. St. Rep. 39, 33 S. E. 965; *City Elec. Ry. Co. v. Shropshire*, 101 Ga. 33, 28 S. E. 508; *Georgia Railroad & Banking Co. v. Richmond*, 98 Ga. 495, 25 S. E. 565; *Peavy v. Georgia Railroad & Banking Co.*, 81 Ga. 485, 12 Am. St. Rep. 334, 8 S. E. 70. See also *Georgia Ry. & Elec. Co. v. Wheeler*, 141 Ga. 363, 80 S. E. 993.

If a conductor, in the course of his duties on a car carrying passengers, strikes one passenger and knocks him against another passenger, injuring the latter, it is no defense to a suit brought against the company by the injured passenger that the other passenger had used opprobrious language to the conductor. *Georgia R. & Elec. Co. v. Rich*, 9 Ga. App. 497, 71 S. E. 759.

But see *Scott v. Central Park, N. & E. R. Co.*, 6 N. Y. Supp. 382, an action against a street railroad company for an assault committed by the driver of one of its cars upon the plaintiff while the latter was a passenger on the car, in which the New York Supreme Court at general term said (Daniels, J., concurring only in the judgment of reversal which concurrence he placed on the ground of excessiveness of the verdict): "The evidence upon the part of the defendant in this action showed that the plaintiff got upon the front platform of one of the cars of the defendant. Upon boarding the car he commenced an altercation with the driver, using language which was very

of protecting its passengers from tortious injuries at the hands of

abusive, insulting, and calculated to bring about a personal encounter, which result followed to the detriment of the plaintiff. The plaintiff, upon his part, denied this evidence, but it seems to have been substantiated by an intelligent and credible witness. Upon the conclusion of the trial the learned court was asked to charge the jury, among other things, that if they believed that the plaintiff commenced the altercation, and in the course of it addressed indecent and insulting language to the driver, and language such as was calculated or likely to produce the assault, that the verdict must be for the defendant, which the court refused to charge, and the defendant excepted. This we think was error. It is undoubtedly true that a common carrier of passengers undertakes to protect passengers from the negligence or wilful misconduct of its servants while engaged in performing a duty which the carrier owed to the passengers. But it has not as yet been held that where a passenger by his own misbehavior while being transported has provoked a personal quarrel between himself and one of the employees of the carrier, that the carrier is liable for the results. It may be true that the use of abusive language to the driver did not justify the assault, as far as the driver is concerned, in the eyes of the criminal law; but there is no reason for holding that where a passenger, by his own improper and insulting behavior while a passenger upon the road of the railway company, brings upon himself an assault, the carrier should be responsible. Carriers are to be held to the strictest responsibility. They must treat their passengers respectfully, and protect them, so far as they reasonably can, from injury or insult on the part of their employees. But

there is also a responsibility on the part of the passenger. He is bound to conduct himself in an orderly and decent manner, and, if he forgets his obligations, and by his indecent behavior, and by the use of language which is morally certain to end in a personal encounter, he succeeds in his effort to bring about such a result, certainly the carrier cannot be bound to protect the passenger, under such circumstances, from the natural and probable results of his own act. It is clear that the act of the driver was not in the course of his employment, and the defendant can only be held under the rule that, as the passenger must submit himself to the custody of the employees of the carrier, the carrier must be responsible even for the wilful acts of the employees which result in a trespass against the passenger. But the reason of such a rule can have no application to a case where the trespass is brought about by the improper behavior of the passenger, which caused the assault of which he complains. The duties of the carrier and the passenger are reciprocal. The carrier is bound to protect the passenger, and the passenger, in order to entitle himself to such protection, is bound to behave himself in a decent and orderly manner. Of course this question must be considered in reference to this exception. If the evidence on the part of the defendant was true in regard to the manner in which this assault was provoked, it was a question for the jury; and, if the jury found upon the evidence in this case in favor of the plaintiff, the request in question having been charged, there would have been no reason for disturbing the verdict. But it seems to us that the defendant had a right to have this question submitted to the jury with proper

strangers generally,³⁵ "no obligation rests upon the railroad company or upon its servants in charge of the train to prevent the arrest of one who happens to be upon its train by an officer duly empowered to make such arrest."³⁶ A contract of carriage is not to be made a means of escape and the carrying vehicle, a sanctuary for those guilty of crime. Hence it is that "the law does not impose the duty on the conductor to resist or interfere with the authority of an officer acting

instructions, and, if they found that the assault had been provoked by unseemly behavior on the part of the plaintiff, no recovery could be had." It is, however, with the view of the matter taken by Mr. Justice Daniels that the Supreme Court, Appellate Division, concurs in *Weber v. Brooklyn, Q. C. & S. R. Co.*, 47 N. Y. App. Div. 306, 62 N. Y. Supp. 1. In his dissenting opinion, Daniels, J., said: "The court did charge the jury that the plaintiff was not entitled to recover if he provoked the assault by his acts, or threats of personal violence. This was required by the case, for the reason that the driver testified that he was first personally assaulted by the plaintiff. The requests refused by the court were made upon the theory, that the coarse, insulting, and provoking words of the plaintiff would of themselves justify or excuse the assault of the driver. But the law is settled that words alone will not excuse a resort to personal violence. For that reason these requests could not be charged. But the fact that the plaintiff brought on the altercation, and made use of language naturally calculated to provoke the driver, went very decidedly in mitigation of the damages." After quoting this language of Justice Daniels, the court, in *Weber v. Brooklyn, Q. C. & S. R. Co.*, supra, said: "This states the law as we understand it * * *. To avoid any possible misunderstanding, it may be well to add that, of course the passenger could not recover if he used the provoking language

with the intent of bringing about the assault which followed. Though we are naturally reluctant to differ from the prevailing opinion of the general term in another department, we are constrained to do so when the view of the minority seems to us so much better supported in reason and authority."

That aggravating conduct goes in mitigation of compensatory damages, see further, *Freedman v. Metropolitan St. R. Co.*, 89 N. Y. App. Div. 486, 85 N. Y. Supp. 986.

³⁵ See § 3357, supra.

³⁶ *Mayfield v. St. Louis, I. M. & S. R. Co.*, 97 Ark. 24, 32 L. R. A. (N. S.) 525, 133 S. W. 168.

In *Thompkins v. Missouri, K. & T. Ry. Co.*, 211 Fed. 391, 52 L. R. A. (N. S.) 791, the court said (headnote by the court): "It is the duty of the Pullman Company to exercise reasonable care and diligence to protect the passengers in its cars from unlawful discomforts, attacks, inconveniences, insults, and injuries. That duty, however, does not require it or its employees to substitute their opinions of the law and of the duty of officers of the law for the judgment of the latter and to interfere with and obstruct the discharge by the officers of their duties, and the failure of the Pullman Company and its employees to obstruct, interfere with, or prevent the arrest and removal of a passenger from a car by the officers of the law does not constitute actionable negligence."

under color of his office. * * * The duty to protect the passenger from violence or assault from others does not demand that the conductor should place himself in opposition to the due administration of the law; and he cannot therefore be said to be guilty of misconduct or of negligence where he simply submits to and complies with the request or demands of those officers whose duty it is to enforce the criminal laws. * * * While a railroad company is liable in damages for a wrongful arrest and false imprisonment of a passenger made or caused by its conductor in charge of the train without probable cause, although such arrest was in violation of the authority given him by the company, yet it cannot be held liable for an arrest made by an officer without the procurement or instigation of such conductor."³⁷ Accordingly, liability on the part of the carrier for an arrest by an officer of the law will arise, if at all, only when its servant instigated³⁸ or voluntarily assisted the officer in making the ar-

³⁷ Mayfield v. St. Louis, I. M. & S. R. Co., 97 Ark. 24, 32 L. R. A. (N. S.) 525, 133 S. W. 168.

³⁸ Texas Midland R. R. v. Dean, 98 Tex. 517, 70 L. R. A. 943, 85 S. W. 1135. See also Polonsky v. Pennsylvania R. Co., 184 Fed. 561.

Nonsuit, in an action against a railroad company for not protecting the plaintiff while he was a passenger on its train from an unlawful arrest, for a capital offense committed in a foreign state, at the hands of officers of the law, affirmed. Owens v. Wilmington & W. R. Co., 126 N. C. 139, 78 Am. St. Rep. 642, 35 S. E. 259. Said the court: "In the present case the defendant was wholly ignorant of the occurrence, and its conductor did not originate the cause or instigate or participate in the arrest. It would be vain and unreasonable to require him to resist an officer of the law or the law itself. Whether the officer had authority or probable cause for making the arrest is not material. The conductor was confronted with a known officer of the law, with sufficient force to carry out his purpose."

A street car passenger, arrested by a policeman, as he was stepping from the car, at the request of the car

driver, who had changed a coin for him as he was required to do in order that such passenger might have the proper change to deposit in the fare box, on the wrongful charge of passing counterfeit money, has no right of action against the car company for malicious prosecution, it not being shown "that the charge against plaintiff, and his consequent arrest, instigated by the driver of the car, was done in the exercise of the functions in which he was employed. The driver had no instructions to make arrest for the passing of counterfeit money. No inference of such authority can be drawn from the fact of changing money for passengers. He does this at his own risk and responsibility; the company loses nothing if counterfeit coin is accepted by the driver, as he is charged with it. It has no interest, therefore, in the arrest of the person attempting to pass counterfeit money, other than that which induces every citizen to make known crime when committed. It may be, as alleged by plaintiff, that the act was malicious, wilful, and tortious, but, as it was not done within the scope of the driver's employment, the defendant company cannot be held responsi-

rest.³⁹ Some dicta, however, tend to the view that the company may be liable if the carrier or its servants charged with the protection of its passengers fails to protect against an arrest and search known by

ble in damages. Rev. Civil Code, art. 2320." *Lafitte v. New Orleans City & L. R. Co.*, 43 La. Ann. 34, 12 L. R. A. 337, 8 So. 701.

³⁹ *Texas Midland R. R. v. Dean*, 98 Tex. 517, 70 L. R. A. 943, 85 S. W. 1135, an action against a railroad company for the wrongful arrest of a passenger while the latter was at defendant's station and about to board defendant's train, which arrest was made by a city policeman voluntarily assisted by defendant's baggage-master. The court said: "It appears that the baggage-master was one of the employees selected by the defendant to render service to passengers about the station provided for their use, and that he was present and on duty when the arrest was made. In such places the passenger is as much entitled to proper treatment and protection as when he is aboard a conveyance; and employees put there to be brought in contact with passengers, and to render to them services due to them from the carriers, are as fully within the principle [of liability] stated as are such employees upon trains and vessels."

Even if the rule that exempts from liability one who at the command of an officer of the law assists him in making an illegal arrest applies also to one who thus assists such an officer in the making of an illegal search of the person, it will not operate to protect a railroad company from liability for the participation of its station agent in such a search of the person of a passenger where it does not appear that the officer requested the agent's assistance. *Nashville, C. & St. L. Ry. v. Crosby*, 183 Ala. 237, 62 So. 889.

In *Bowden v. Atlantic Coast Line*

R. Co., 144 N. C. 28, 12 Ann. Cas. 783, 56 S. E. 558, it was held that neither the surrender by the conductor to the officer, on his demand, of the key to the train's water-closet, in which, without the knowledge of the conductor, plaintiff had taken refuge and had bolted himself in, nor the holding of the train at the station for a time longer than usual, was evidence of a purpose on the conductor's part actively to aid and abet the officer in arresting the plaintiff.

"Being authorized to make the arrest, the peace officers would have been justified in using any force necessary to this end, and the agents and servants of the defendant would have been acting contrary to law if they had refused to permit the arrest to be made. The peace officers, acting within their authority, superseded the authority of the conductor and servants of the defendant in charge of the train, the plaintiffs [mother and daughter arrested in berth believed to be occupied by a murderess of a foreign state], by operation of law, were transferred to the custody of the policemen, and the train officials ceased to have any control over them, and the defendant could not, therefore, be held liable for any of the indignities suffered by the plaintiffs. * * * In the case now before us the defendant railroad company took on passengers and undertook to carry them, subject to the laws of this state, to their destination. At Syracuse peace officers, acting under the law, came on board and interrupted the defendant in the performance of its contract, and it cannot, we believe, be held answerable to the plaintiffs in this action. It is not material even that there may have been no felony.

it or its servant to be illegal⁴⁰ or even perhaps where they should have known that the arrest was illegal.⁴¹

In line with those decisions, heretofore discussed, regarding the liability of one for the torts of special police officers employed by

The peace officers had apparent authority to make the arrest. It was a matter of common notoriety that a series of murders had been committed in the state of Indiana, and the perpetrator of these crimes was believed to be Mrs. Gunness. These peace officers told the defendant's conductor that they were after Mrs. Gunness, who was believed to be on car 1 and in berth 1, according to information received from the police department of Rochester, and the conduct of the conductor [who pointed out the designated berth and advised the plaintiffs to leave the train with the officers without trouble] and other members of the train crew was in accordance with law, and involved no liability to the plaintiffs." *Burton v. New York Cent. & H. River R. Co.*, 147 N. Y. App. Div. 557, 132 N. Y. Supp. 628, directing verdict for defendant (Thomas, J., dissenting).

⁴⁰ "When a known officer of the law, in the apparent exercise of official authority, and not exceeding the limits of his customary functions, disturbs the peace and personal security of a passenger, it is not the duty of the carrier or its servants to intervene for the protection of the passenger. * * * If the carrier's servant knows that the arrest or search is illegal, it would doubtless be his duty to make inquiry into the matter and to make reasonable and suitable protest for the protection of the passenger. But it would be contrary to good order and sound policy to require the carrier's servant to forcibly contest with an officer the rightfulness and propriety of his action in making an arrest, or a search, unless, perhaps, it

is accompanied by palpably abusive and improper treatment not germane to his official acts. But where the arrest or search is made by a known officer who is invested with the general authority to do such acts, the carrier's servant is under no duty to inquire whether he is in fact acting officially or with lawful authority in the particular case. He may assume these things and is under no duty to interfere with the officer." *Nashville, C. & St. L. Ry. v. Crosby*, 183 Ala. 237, 62 So. 889.

⁴¹ "It is essential to the maintenance of the law that its processes should be promptly executed, and its officers allowed to proceed without interference, except in cases where such interference is plainly justified. When the arrest is by officers of the law, and is apparently regular, and there is nothing to put the company on notice that the arrest is illegal, the company cannot be held liable for a failure to interfere with the officers and prevent the arrest. It would be going too far to hold that the conductor of a railroad company should interfere with officers of the law and prevent an arrest merely because he did not know whether or not they were acting within their power and authority. We think the correct rule is that a railroad company is not liable for a failure of the conductor to protect a passenger from unlawful arrest, unless the conductor knows, or the facts and circumstances known to him are such as to apprise a person of ordinary prudence, that the arrest is unlawful." *Louisville & N. R. Co. v. Byrley*, 152 Ky. 35, Ann. Cas. 1915 B 240, 153 S. W. 36.

him,⁴² it has been held that a railroad company is not released from its duty to protect the passengers on its train from unlawful violence on the part of its conductor by reason of the fact that such conductor is, under the statute, a peace officer of the state.⁴³ So, while under the Arkansas statute,⁴⁴ making railroad conductors peace officers for the purpose of arresting intoxicated persons on their trains, a railroad company will not be liable for the act of its conductor in arresting any person as long as such conductor was acting in good faith and with ordinary care, it will be liable if the conductor did not exercise ordinary care to ascertain whether a person arrested was drunk, or did not act in good faith, i. e., with the honest purpose to discharge his duty under the circumstances.⁴⁵ The Supreme Court of North

⁴² See § 3352, *supra*.

⁴³ *Southern R. Co. v. Grubbs*, 115 Va. 876, 80 S. E. 749.

A statute conferring on carriers' conductors all of the powers of conservators of the peace does not relieve a carrier from liability for the tortious acts of its conductor committed while he was "engaged in actual discharge of official functions." *Wilhelm v. Parkersburg, M. & I. R. Co.*, 74 W. Va. 678, 82 S. E. 1089 (quoted words from court's syllabus). See also *Gillingham v. Ohio River R. Co.*, 35 W. Va. 603, 14 S. E. 243.

In *Georgia Ry. & Elec. Co. v. Wheeler*, 141 Ga. 363, 80 S. E. 993, it was held that "the presiding judge having charged that the conductor on the electric street car had authority to arrest disorderly persons, substantially as declared by sections 926 and 927 of the Penal Code of 1910, there was no error in further charging that if the defendant's conductor arrested the plaintiff, and while the plaintiff was under arrest the conductor struck him in the face, or on the head, or inflicted upon him a personal injury, the defendant would be liable, and the plaintiff could recover, unless the conductor was justifiable, and that the conductor would be justifiable in using such force as was necessary to prevent any attempt which the plaintiff

made to inflict an injury upon the conductor. In the light of the pleading and evidence, the giving of this charge furnishes no ground for a reversal."

⁴⁴ Acts 1909, p. 100, § 3.

⁴⁵ *St. Louis, I. M. & S. R. Co. v. Hudson*, 95 Ark. 506, 130 S. W. 534.

The Iowa statute (Acts 33rd Gen. Assem. [1909] c. 141), which gives the conductor of a railroad train or street car carrying passengers, the right, *inter alia*, to eject any person found thereon in a state of intoxication, drinking intoxicating liquor as a beverage or using profane or indecent language, and, for the purpose of so doing, to call to his aid any fellow employee, "does not impose any duty upon a conductor, nor does it declare that in exercising any authority which the statute purports to give him he is a public officer. It purports to authorize acts by a conductor which may be somewhat broader in scope than those which he would be justified in exercising as the agent or servant of a common carrier of passengers; but it does not purport to relieve the railroad company of any liability on account of his misconduct in attempting to exercise his authority"; and notwithstanding a passenger is guilty of violating the statute such fact will not serve to justify nor

Dakota, however, has held that a railroad conductor, discharging the duty imposed upon him by the North Dakota statute,⁴⁶ which makes it a crime publicly to drink or offer to another any intoxicating beverage upon a train carrying passengers in the state, except in certain enumerated cases, confers police powers on passenger conductors, and requires them to arrest persons who shall, in their presence or to their knowledge, offend against the statute, and to deliver such persons to a policeman, constable, or other peace officer to be by him informed against and prosecuted, acts not to protect nor to carry out the railroad company's implied contract to protect the arrested passenger's fellow passengers, and not in violation of the company's duty to protect the passenger arrested, but acts at the behest and command and for and in the interest of the state, and the company, therefore, will not be liable to one of its passengers for his wrongful arrest by its conductor acting under such statute.⁴⁷

§ 3359. — Exemplary damages. While some of the courts take the position that where a corporation is guilty of a breach of its duty to protect those to whom it sustains a contract relation from tortious injury at the hands of its servants and third persons,⁴⁸ it will be liable, ipso facto, not only for compensatory damages but, if the act complained of has the necessary characteristics, for exemplary damages as well;⁴⁹ others incline to the opinion that damages of the latter

excuse the company for the act of its conductor in assaulting or mistreating the offending passenger, for while it is proper for the conductor to use all reasonable means at his command to preserve order and protect other passengers from inconvenience or annoyance even to the extent of ejecting an offensive passenger, it is his duty in so doing to use no more force than is reasonably necessary. *Heggen v. Ft. Dodge, D. M. & S. R. Co.*, 150 Iowa 313, 130 N. W. 148.

⁴⁶ Laws 1911, c. 228.

⁴⁷ *Houston v. Minneapolis, St. P. & S. S. M. R. Co.*, 25 N. D. 469, 46 L. R. A. (N. S.) 589, Ann. Cas. 1915 C 529, 141 N. W. 994.

⁴⁸ See § 3356, supra.

⁴⁹ "It may * * * be taken as settled law in this state that punitive damages may be awarded against a

railway corporation for the wanton and malicious torts of its servants, although the corporation, aside from the conduct of its servants, may be entirely blameless." *Pine Bluff & A. R. R. Co. v. Washington*, 116 Ark. 179, 172 S. W. 872 (shooting of passenger by brakeman). See also *St. Louis, I. M. & S. R. Co. v. Jackson*, 118 Ark. 391, L. R. A. 1915 E 668, 177 S. W. 33.

A railroad company "is liable for exemplary damages in case of an injury to a passenger resulting from a violation of duty by one of its employees in the conduct of the train, if it be accompanied by oppression, fraud, malice, insult, or other wilful misconduct, evincing a reckless disregard of consequences." *Louisville & N. R. Co. v. Ballard*, 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. 530. See also

class cannot be imposed upon the corporation where it has not participated in the commission of the tortious act nor authorized, ratified,

Southern R. Co. v. Crone, 51 Ind. App. 300, 99 N. E. 762.

The jury may award exemplary damages against a carrier for the act if its conductor in using profane language in the presence of a female passenger. *Birmingham Railway, Light & Power Co. v. Glenn*, 179 Ala. 263, 60 So. 111. It will be error, however, to authorize the jury to award exemplary damages against a railroad company for merely "indecorous" conduct of its trainmen towards a female passenger. *Louisville & N. R. Co. v. Ballard*, 85 Ky. 307, 7 Am. St. Rep. 600, 3 S. W. 530. Said the court: "The term is too broad. * * * This, as defined by Webster, and as commonly understood, means impolite, or a violation of good manners or proper breeding. It is broad enough to cover the slightest departure from the most polished politeness to conduct which is vulgar and insulting. It does not necessarily, or, indeed, generally, involve an insult. The latter assumes superiority, and offends the self-respect of the person to whom it is offered, while the former excites pity or contempt for the one guilty of it. A word or act may be both indecorous and insulting, but yet it often lacks the essential elements of an insult."

Exemplary damages may be recovered against a railroad company by a passenger who was ejected from its train on his failure to pay the cash fare demanded upon the wrongful refusal of his ticket when the conductor manifested such a reckless indifference to the rights of the passenger in examining the ticket and ejecting him from the train as to establish gross negligence amounting to wantonness. *Southern Kansas R. Co. v. Rice*, 38 Kan. 398, 5 Am. St. Rep. 766, 16 Pac. 817.

Evidence, in an action against a railroad company for an assault and battery by the cook on its train upon a passenger thereon, held to justify the submission to the jury of the question of exemplary damages. *German v. Great Northern R. Co.*, 117 Minn. 310, 135 N. W. 750. (In this case, however, the court declared that if the cook, who was colored, opened the fight "the admitted fact that the plaintiff called him [the cook] a 'coon' mitigates, but does not justify, his act; and, if the fight had not been renewed, the submission to the jury of the question of exemplary damages would have been error.")

When a street car conductor, acting at the time in the line of his employment, commits a wanton and malicious assault and battery upon a passenger, the jury, in an action against the street car company for such tort, may be permitted to impose exemplary damages. *Lexington Ry. Co. v. Cozine*, 23 Ky. L. Rep. 1137, 64 S. W. 848.

Exemplary damages may be assessed against a railroad company for an assault and battery committed by one passenger upon another, provided the passenger assaulted did not desire and seek the injury which was done him, for the purpose of recovering from the company therefor. *Murphy v. Western & A. R. R.*, 23 Fed. 637, 641.

On reversing a judgment for the plaintiff who sued the defendant railroad company for an assault and battery committed upon him and for insult and abusive treatment accorded him by the company's conductor while he was a passenger on its train, the Kentucky Court of Appeals, in *Louisville R. Co. v. Frick*, 158 Ky. 450, 165 S. W. 649, directed that upon a retrial the following instruction, *inter alia*,

adopted or approved of it.⁵⁰ On this subject, Mr. Sutherland has

be given: "If you further believe from the evidence that the conductor used more force than was reasonably necessary, or to him apparently reasonably necessary, to ward off or defend himself from the assault of the plaintiff, Frick, and if you further believe that in doing so he acted in a wilful, wanton and oppressive manner, then you may, or may not, in your discretion, in addition to the compensatory damages before referred to, award the plaintiff such sum by way of exemplary or punitive damages as you believe from the evidence will be just and reasonable for the unnecessary force, if any, used by the conductor, Upton, on the plaintiff, but in no event shall your finding, if any, in both compensatory and exemplary damages exceed the sum of \$25,000, the amount claimed in the petition."

50 "A railroad corporation, without participating in such wanton acts, cannot be charged with punitive or exemplary damages for the illegal, wanton, and oppressive conduct of a conductor or brakeman of one of its trains toward a passenger." *Moore v. Atchison, T. & S. F. R. Co.*, 26 Okla. 682, 110 Pac. 1059 (headnote by the court).

Again, it has been held that a railroad company will not be liable for exemplary damages for an assault and battery committed by its conductor upon one riding on its train as, allegedly, a passenger, where there is no evidence that the conductor's act was either authorized or ratified or approved by the company. *Southern R. Co. v. Grubbs*, 115 Va. 876, 80 S. E. 749.

Nor is a railroad company liable for exemplary damages for an assault committed by its conductor upon a passenger on one of its trains unless it authorized or ratified the con-

ductor's act. *Warner v. Southern Pac. Co.*, 113 Cal. 105, 54 Am. St. Rep. 327, 45 Pac. 187, explaining *Gorman v. Southern Pac. Co.*, 97 Cal. 1, 33 Am. St. Rep. 157, 31 Pac. 1112.

Ordinarily, exemplary damages should not be awarded against a railroad company for an assault and battery committed by passengers on its train upon a fellow passenger unless there was a wilful refusal or absolute failure on the part of its conductor to interfere "when called upon, or when the injury occurs in the presence of the officer who could have prevented it." *New Orleans, St. L. & C. R. Co. v. Burke*, 53 Miss. 200, 24 Am. Rep. 689.

The rule was also construed to prevent the recovery of exemplary damages by a female passenger from a railroad company for an indecent assault committed upon her by the conductor of the train upon which she was riding, as the company, having neither authorized nor ratified the act of the conductor, was, therefore, not in privity with the malice chargeable to him. *Craker v. Chicago & N. W. Ry. Co.*, 36 Wis. 657, 675, 17 Am. Rep. 504.

That ratification cannot be inferred solely from the continued employment of the guilty servant, see *Voves v. Great Northern R. Co.*, 26 N. D. 110, 48 L. R. A. (N. S.) 30, 143 N. W. 760. *Contra*, *Pine Bluff & A. R. Co. v. Washington*, 116 Ark. 179, 172 S. W. 872.

Further on this question see § 3354, *supra*.

In *Voves v. Great Northern R. Co.*, 26 N. D. 110, 48 L. R. A. (N. S.) 30, 143 N. W. 760, the Supreme Court of North Dakota held that punitive damages were not recoverable against a railroad company for an assault and battery committed by its conductor

said: ⁵¹ "If a corporation, like a railroad company, is guilty of an act or default, such as in the case of an individual would subject him to

upon a passenger where it did not participate in the wrongful act nor approve of such act either before or after its commission. In so holding, the court said (headnote by the court): "Section 6562, R. C. 1905, authorizing the recovery of punitive damages by way of punishment and their inclusion in the verdict 'when the defendant has been guilty of oppression, fraud, or malice,' has no application under the facts in this case, that being a general statute applying to all defendants who have acted with malice, while here the act of the servant is not imputed to the corporate master under the doctrine of respondeat superior except because of grounds of public policy and necessity to the extent only of holding such master for full compensatory damages for which the defendant company is concededly liable. Such doctrine is not extended to authorize punitive damages imposed solely as a punishment to the defendant, in the absence of proof that such principal has authorized, sanctioned, or ratified the malicious act of the employee."

In *Wardrobe v. California Stage Co.*, 7 Cal. 118, 68 Am. Dec. 231, an action for injuries sustained by plaintiff while a passenger on one of defendant's stagecoaches, the court instructed the jury that "if they believed the stage was top-heavy and overloaded with passengers, and that with such load it was driven with great recklessness at the time of the disaster, then they should find not only the actual damages sustained by the plaintiff, but they should give additional damages, such as would be an example thereafter, which would tend to prevent such recklessness in the conduct of stages to the great peril of passengers." On appeal by de-

fendant from the judgment rendered on the verdict, by which verdict plaintiff was awarded exemplary as well as actual damages, the Supreme Court held that this instruction was objectionable on two grounds, namely, that it devolved "upon the jury the duty of punishing the defendants for what the court seems to consider an offense to society, and by inflicting a penalty upon them, securing, by force of the example, future safety for the public," and that it was shown "that the stage, at the time of the accident, was driven by the servant or agent of the defendants, and the rule in such cases is that the principal is liable only for simple negligence, and that exemplary damages cannot be imposed upon him." Arguing on the first objectionable feature the court said: "The plaintiff commenced his action to recover damages for the injury he had sustained by reason of the negligence or unskilfulness of the defendant's agents, and not as a public prosecutor, to vindicate the wrongs of the community; he was not the medium through which these rights were to be asserted or maintained. It is true that in actions of this character all the circumstances of the case may be taken into consideration in making up the estimate of damages, and the jury are not confined to the actual damages sustained; but damages which go beyond this, and are professedly laid for the benefit of the public, cannot be recovered."

⁵¹ 3 Sutherland on Damages (4th Ed.), § 950, citing many cases. Approved in *Quinn v. South Carolina Ry. Co.*, 29 S. C. 381, 1 L. R. A. 682, 7 S. E. 614. See also *Hart v. Charlotte, C. & A. R. Co.*, 33 S. C. 427, 10 L. R. A. 794, 12 S. E. 9.

exemplary damages, it is equally liable thereto. Where the servants of a corporation engaged in the carriage of passengers are guilty of such acts or conduct in the performance of their duties in the transportation of the injured party as a passenger as would subject them to damages of this nature, the great weight of authority holds the corporation liable to punitive damages without proof that it directed or ratified such acts or conduct. As the corporation can only act through natural persons, its officers and servants, and as it of necessity commits its trains or vehicles absolutely to the charge of persons of its own appointment, passengers of necessity commit to them their safety and comfort in transitu, the whole power and authority of the corporation, *pro hac vice*, is vested in such employees, and as to such passengers they are the corporation." In a case which was decided by the Supreme Court of Maine a number of years ago but which is even to-day a leading case on the subject of the liability, generally, of a railroad company for tortious injuries inflicted upon one of its passengers,⁵² it was said: "It seems to us that there is no class of cases where the doctrine of exemplary damages can be more beneficially applied than to railroad corporations in their capacity of common carriers of passengers; and it might as well not be applied to them at all as to limit its application to cases where the servant is directly or impliedly commanded by the corporation to maltreat and insult a passenger, or to cases where such an act is directly or impliedly ratified; for no such cases will ever occur. A corporation is an imaginary being. It has no mind but the mind of its servants; it has no voice but the voice of its servants; and it has no hands with which to act but the hands of its servants. All its schemes of mischief, as well as its schemes of public enterprise, are conceived by human minds and executed by human hands; and these minds and hands are its servants' minds and hands. All attempts, therefore, to distinguish between the guilt of the servant and the guilt of the corporation; or the malice of the servant and the malice of the corporation; or the punishment of the servant and the punishment of the corporation, is sheer nonsense; and only tends to confuse the mind and confound the judgment. Neither guilt, malice, nor suffering is predicable of this ideal existence called a corporation. And yet under cover of its name and authority, there is in fact as much wickedness, and as much that is deserving of punishment, as can be found anywhere else. And since these ideal existences can neither be hung,

⁵² *Goddard v. Grand Trunk Ry. of Canada*, 57 Me. 202, 2 Am. Rep. 39 (assault on passenger on railroad train by brakeman authorized to collect tickets).

imprisoned, whipped, nor put in the stocks,—since, in fact, no corrective influence can be brought to bear upon them except that of pecuniary loss,—it does seem to us that the doctrine of exemplary damages is more beneficial in its application to them, than in its application to natural persons. If those who are in the habit of thinking that it is a terrible hardship to punish an innocent corporation for the wickedness of its agents and servants will for a moment reflect upon the absurdity of their own thoughts, their anxiety will be cured. Careful engineers can be selected who will not run their trains into open draws; and careful baggagemen can be secured, who will not handle and smash trunks and handboxes as is now the universal custom; and conductors and brakemen can be had who will not assault and insult passengers; and if the courts will only let the verdicts of upright and intelligent juries alone, and let the doctrine of exemplary damages have its legitimate influence, we predict these great and growing evils will be very much lessened, if not entirely cured. There is but one vulnerable point about these ideal existences called corporations; and that is, the pocket of the moneyed power that is concealed behind them; and if that is reached they will wince. When it is thoroughly understood that it is not profitable to employ careless and indifferent agents, or reckless and insolent servants, better men will take their places, and not before. It is our judgment, therefore, that actions against corporations, for the wilful and malicious acts of their agents and servants in executing the business of the corporation, should not form exceptions to the rule allowing exemplary damages. On the contrary, we think this is the very class of cases, of all others, where it will do the most good, and where it is most needed. And in this conclusion we are sustained by several of the ablest courts in the country.”⁵³ Diametrically opposed to the doctrine of this case, however, is that of a case subsequently decided by the Supreme Court of Texas.⁵⁴ In the Texas case, wherein a passenger on a railroad train sued the receivers of the railroad company for an assault and battery committed upon him, solely out of vindictiveness, by the conductor on the train, the court had under review an instruction whereby the jury were told that “to authorize a recovery of exemplary damages against the employer or master on account of an injury inflicted by an employee or servant, the wrongful act from which the injury resulted must be done by the servant

⁵³ See also *Hanson v. European & N. A. Ry. Co.*, 62 Me. 84, 16 Am. Rep. 404; *Quigley v. Central Pac. R. Co.*, 11 Nev. 350, 21 Am. Rep. 757.

⁵⁴ *Dillingham v. Anthony*, 73 Tex. 47, 3 L. R. A. 634, 15 Am. St. Rep. 753, 11 S. W. 139.

or employee maliciously, and under such circumstances as would also authorize the recovery of actual damages from the employer or master; and, further, the act must be ratified by him. If the employer or master have a knowledge of the act and its character, and still continues the employee or servant in his former position, such retention is a ratification of the act of the servant or employee." Accepting, as the rule prevailing in Texas, the one which had been theretofore laid down that a corporation is liable for exemplary damages only "if the malicious act of the agent is ratified or adopted; if there is carelessness in the selection of employees or in the establishment of regulations; if, in short, the corporation or its officers by whom it is controlled are guilty of some fraud, malice, gross negligence, or oppression," the court declared the remaining inquiry to be, "was the charge as to liability of appellants [the receivers] resulting from their ratification of the acts of the conductor called for by the facts of the case, or correct as a legal proposition in any case"; and, having described the assault and battery and characterized it as "the wilful and malicious act of the conductor, in violation of his duty to his employers, and to the service, as well as to the passenger," said: "Appellants [the receivers], as carriers, are liable to appellee [the passenger] for actual damages, because there was a failure on their part, through the conductor or some other representative, to give that protection to the passenger which they, as carriers of passengers, were bound to give; and this liability does not depend on whether the servant's failure of duty was unintentional, wilful or malicious; but to make them liable for exemplary damages, if they stand on the same ground as other carriers, the wilful or malicious act of their servant must have become, in law, their wilful or malicious act. The rule in reference to affecting the master with the wilfulness or malice of a servant must be the same whether the master be a corporation, a receiver in charge of the business and property of a corporation, or an individual. * * * The court below charged that the act of the servant, with all of the servant's wilfulness and malice, would be imputed to appellants, if, with knowledge of his misconduct, they kept him in their employment; and so, without reference to whether the act was within the line of the conductor's duties, or one illegal in itself,—without reference to the manner of its execution. If there were no other ground on which the appellants could be held liable for actual damages resulting from the injuries received by appellee from the battery made upon him by the conductor than that they had ratified his act, could their liability be fixed on that ground, however clear their subsequent approval of his act might be made to appear?

'In order to constitute one a wrong-doer by ratification the original act must have been done in his interest, or been intended to further some purpose of his own.'⁵⁵ * * * In the case before us there can be no pretense that the act of the servant was done in the interest of appellants, under any pretense of authority from them, or to further any interest of themselves or the corporation whose business and property they were controlling; and that there was no ground on which to base ratification, which is but an agreement, express or implied, by one to be bound by the act of another performed for him. If appellants could not be held to have ratified their servant's unauthorized, wilful, and malicious act, not done in their interest or for their benefit in fact or pretense, it is not perceived on what ground they can be held to be affected by the animus with which the servant committed the act; and, unless they could be so affected, there is no legal ground for awarding against them exemplary damages. If the servant's act be one not authorized by the master, or one not done in the exercise of a power fairly arising from the character of his employment, but be an act done for the use or benefit of the master, then the master may doubtless ratify the act of the servant through which a tort was committed; and it may be that, in such case, the ratification of the master would fix upon him the bad motive which prompted the servant's act, and thus impose on the master a liability even for exemplary damages. It has been so held by courts that hold the master not liable for exemplary damages in all cases in which the servant is.⁵⁶ * * * Such may be the effect of the decisions in this state to which we have referred, though there are contrary holdings.⁵⁷ * * * Such a question, however, is not before us. Relying, as appellee does, on the injury inflicted upon him by the conductor after he took a seat in the car, we are of the opinion, under the evidence, that he shows no case entitling him to exemplary damages, under the decisions heretofore made in this state, to which we have referred; and that a case is not shown in which the jury should have been charged that they might find appellants had ratified the act of the conductor. If, however, the case were different, and it appeared that the conductor's act was done in the course of his employment, giving to this every intendment arising from his position and the nature of his duties, even then, it seems to us, that it cannot be held as matter of law that the mere retention of the conductor in

⁵⁵ Citing, *inter alia*, Cooley on Torts, 127 (3rd Ed. 214), in which there appears the last statement quoted.

⁵⁶ Citing *Bass v. Chicago & N. W. Ry. Co.*, 42 Wis. 654, 24 Am. Rep. 437.

⁵⁷ Citing *Sutherland v. Sutherland*, 69 Ill. 481.

the same position, after knowledge of his misconduct, operates a ratification of his wilful and malicious act, and thus fixes his evil motive on his employer. The whole doctrine of *ex post facto* animus as a basis for exemplary damages seems to us an anomaly. It goes further than to punish for evil motive, and condemns and punishes for evil afterthought imputed, which the court below informed the jury existed, as matter of law, if the conductor was retained in the service after knowledge of his misconduct. There are cases which hold that retention in service, under such circumstances, amounts to ratification of acts that may be ratified; but it seems to us that this is not necessarily true, and that, where ratification is an issue, this should be left to the jury or court trying the cause, under all the evidence, to be passed upon as any other fact in issue. The charge given assumed that the act of the conductor was such as might be ratified, and that the facts recited in the charge, as matter of law, amounted to ratification. We think this was error. The case does not call for it, and we are not now disposed to consider what bearing the retention of a servant in a position he has abused ought to have in determining the liability of the master for his past or subsequent acts.”⁵⁸

⁵⁸ In considering whether the verdict in plaintiff's favor should be set aside for excessiveness, the court, in *Goddard v. Grand Trunk R. Co.*, supra, said: “A careful examination of the case fails to satisfy us that the jury acted dishonestly, or that they made any mistake in their application of the doctrine of exemplary damages. We have no doubt that the higher punitive character of their verdict is owing to the fact, that, after [the brakeman's] * * * misconduct was known to the defendants, they still retained him in their service. The jury undoubtedly felt that it was due to the plaintiff, and due to every other traveler upon that road, to have him instantly discharged; and that to retain him in his place, and thus shield and protect him against the protestation of the plaintiff, made to the servant himself at the time of the assault, that he would lose his place, was a practical ratification and approval of the servant's conduct, and would be so understood by him and

by every other servant on the road. And when we consider the violent, long-continued, and grossly insulting character of the assault; that it was made upon a person in feeble health, and was accompanied by language so coarse, profane and brutal; that so far as appears it was wholly unprovoked; we confess we are amazed at the conduct of the defendants in not instantly discharging [the brakeman]. * * * Thus to shield and protect him in his insolence, deeply implicated them in his guilt. It was such indifference to the treatment the plaintiff had received, such indifference to the treatment that other travelers might receive, such indifference to the evil influence which such an example would have upon the servants of this and other lines of public travel, that we are not prepared to say the jury acted unwisely in making their verdict highly punitive. We cannot help feeling that if we should interfere and set it aside, our action would be most unfortunate and detrimental to the pub-

III. CHARITABLE CORPORATIONS

§ 3360. **Duncan v. Findlater; Feoffees of Heriot's Hospital v. Ross; Mersey Docks v. Gibbs.** There are, perhaps, no three cases which have played as prominent a part in the shaping of the law—or, more strictly, laws⁵⁹—on the subject of charitable corporations' liability in tort as three English decisions, viz., *Duncan v. Findlater*,⁶¹ *Feoffees of Heriot's Hospital v. Ross*⁶² and *Mersey Docks v. Gibbs* (and *Mersey Docks v. Pierce, Penhallow and others*),⁶³ each decided by the House of Lords, the first in 1839, the second in 1846, and the third in 1866. Over these cases, the courts have argued; about them, they have debated; concerning their interrelation and effect, they have differed, and as to the character of the law laid at their doorstep, they have disagreed.⁶⁴ In *Duncan v. Findlater*, an action

lic interests. On the contrary, if we allow it to stand, we cannot doubt that its influence will be salutary. It will be an impressive lesson to these defendants, and to the managers of other lines of public travel, of the risk they incur when they retain in their service servants known to be reckless, ill-mannered, and unfit for their places. And it will encourage those who may suffer insult and violence at the hands of such servants, not to retaliate or attempt to become their own avengers, as is too often done, but trust to the law and to the courts of justice for the redress of their grievances. It will say to them, be patient and law-abiding, and your redress shall surely come, and in such measure as will not add insult to your previous injury."

⁵⁹ One need only refer to §§ 3361-3363, *infra*, to be convinced that the courts are in wide disagreement as to whether a charitable corporation can ever be held liable in tort, on what grounds liability is to be denied or recognized, and, there being recognition of a limited or qualified liability, as to the particular cases in which liability attaches; and, further, that each viewpoint is supported by

reasoning which to the court holding it seems impeccable.

⁶⁰ As to what are charitable corporations, see §§ 100, 124, *supra*.

⁶¹ 6 Cl. & F. 894.

⁶² 12 Cl. & F. 507.

⁶³ 11 H. L. Cas. 686, L. R. 1 H. L. 93.

⁶⁴ On the subject of the interrelation of these cases, the Missouri Court of Appeals has said (*Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453): "In the course of their opinions [in *Feoffees of Heriot's Hospital v. Ross*], the judges refer as authority to the case of *Duncan v. Findlater*, 6 Cl. & F. 894. That case has been overruled in *Mersey Docks v. Gibbs*, L. R. 1 H. L. 117 (same case in 11 H. L. Cas. 720; 1 Eng. & Irish Appeal Cas. 93), and was, therefore, not followed in as late a case as that of *Gilbert v. Corporation of Trinity House*, L. R. 17 Q. B. 795. From the fact that *Duncan v. Findlater* was stated to be authority supporting the holding in *Heriot's Hospital v. Ross*, and that the former was afterwards overruled, the notion came to prevail, in some quarters, that the latter case was also discredited. But an examination of the cases, and others of sim-

brought in Scotland, the pursuer, an innkeeper, sued the treasurer of the trustees for a turnpike road, the action being laid upon an act of Parliament whereby the trustees of such a road were authorized to sue and were permitted to be sued in all actions and processes in the name of their clerk or treasurer for the time being. The summons alleged that the trustees "or their surveyors or contractors, or other person or persons for whom these trustees were and are responsible, were engaged in constructing or repairing a large drain or ditch, running along the side of the turnpike: that a quantity of stones intended

ilar character, will disclose that they belong to different classes and that the principle or foundation upon which they rest is radically unlike. One class involves the right to divert charity funds from the object of the donor by appropriating them in payment of damages caused by the neglect of the trustees; the other involves the liability of public corporations (not charitable) for the negligence of trustees or other officers in charge thereof. It is not necessary to refer to the rule as to liability of corporations in this country, or to differences which may exist between the rule adopted in this state and that applied in England, whether such corporations be private trading corporations, or governmental, or partly both. It is sufficient for present purposes to know that *Heriot's Hospital v. Ross*, involving a case of a distinct and wholly different class, has not had its value at all abated by the other cases. *Duncan v. Findlater* was an action against the trustees of a public road (appointed under a statute) and was for injury to one traveling at night, by reason of defects in the highway. The decision was that the road fund was not to be subject to such damages. It was overruled, as above stated, in *Mersey Docks v. Gibbs*, a case where trustees, who were by statute in charge of a harbor and docks, suffered them to become obstructed with mud so that a ship and cargo were dam-

aged. It was decided that the corporation was liable for the negligence of the trustees, and *Duncan v. Findlater* was overruled. But the ground of objection to *Duncan v. Findlater* was not a ground which can apply to the reason for the rule which supports the exemption of charities. The *Mersey Docks* were authorized by act of parliament, and were entitled to receive port dues and apply the same to the improvement of the harbor and maintaining the docks, to the payment of debts, and, after such debts were paid, the trustees were required to lower and reduce the rates 'as far as can be done, leaving sufficient for defraying all charges of management and other concerns of the docks, etc., and improving, repairing, and maintaining the same, and for carrying into execution the provisions of this act and former acts.' While, in the course of the opinion, strong objection is taken to *Duncan v. Findlater* in deciding no liability existed for negligently permitting a defective highway, yet the ground upon which the case is put turned upon a construction of the acts of parliament authorizing the trustees to take charge of the harbor and docks (see pages 104, 107, 118). * * * The case decided in *Queen's Bench (Gilbert v. Corporation of Trinity House, supra)* is decided on the same principle as that which governed the *Mersey Docks Case*. It was a case where the care and man-

to be used in that operation had been thrown down, and allowed to remain on the road, so as to form a dangerous obstruction to travellers at night: that the trustees or workmen, or others employed, permitted the stones to remain on the road without adopting the precautions necessary to be taken to prevent danger; that the pursuer, having occasion to travel along the road by night, in a gig, accompanied by his son, the gig came in contact with the stones and was overturned, by which the pursuer himself was injured, and his son so seriously hurt that he died in consequence of the injuries received." Recovery

agement of all lighthouses and beacons in England and adjacent seas were vested in Trinity House, and the corporation was held to be liable for the negligence of one it licensed to remove a partially destroyed beacon. It seems clear to us that those cases, and others of like character, should not be thought to be in conflict with those which have steadily maintained the rule exempting the diversion of funds set apart for the support of charitable institutions. We have not been advised of any case in England which has doubted the authority of *Heriot's Hospital v. Ross*. And, though it was cited in *Mersey Docks v. Gibbs*, it is not questioned or mentioned by the court, undoubtedly upon the ground that it did not depend upon like considerations. Indeed, afterwards, in a case in the House of Lords, involving the liability of the *Mersey Docks* to be rated for taxation, Justice Blackburn, who delivered the opinion in the case of *Mersey Docks v. Gibbs*, disclaimed that that case involved considerations applicable to charities. In the course of his opinion, at page 465 of the report, he said that there were 'several cases relating to charities which were mentioned at your Lordships' bar, but were not much pressed, nor, as it seems to us, need they be considered now, for, whatever may be the law as to exemption of property occupied for charitable purposes, it is clear that the docks in question can come with-

in no such exemption.' *Mersey Docks v. Cameron*, 11 H. L. Cas. 443. * * * The weight of authority in this country supports *Heriot's Hospital v. Ross* as being the rule which commends itself, not only because it carried out the donor's intention, but because it is more reasonable and just, and better subserves an enlightened public policy."

In *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675, it was observed that *Feoffees of Heriot's Hospital v. Ross*, was based on *Duncan v. Findlater*, wherein, the Rhode Island court stated, the House of Lords held that an action "against trustees appointed under a public road act, to charge them in their quasi corporate capacity for an injury occasioned by the negligence of the men in making the road" could not be maintained; that this latter "case resembles *Holliday v. St. Leonard* [11 C. B. (N. S.) 192], and like it, in the light of the later decisions, it has no value as a precedent for any case where there are funds which can be applied to the payment of damages"; that "the case of *Duncan v. Findlater* was cited by Mr. Justice Blackburn in his opinion [in *Mersey Docks v. Gibbs*], and the language there used by Lord Cottenham, which was chiefly relied on as authority for the decision in *Feoffees of Heriot's Hospital v. Ross*, was expressly disapproved," and that "it is remarkable * * * that the case of *Feof-*

was sought, and verdict was given and judgment rendered in the trial court, for damages by way of compensation for the pursuer's injuries and solatium (recognized by Scotch law) for the son's death. On appeal by the defender to the House of Lords, the interlocutors of the trial court were reversed. Lord Chancellor Cottenham delivered the principal opinion on the appeal and, after disposing of an alleged conflict between the Scotch and the English law bearing on the subject in the doing of which he stated that "in England, we have long held that trustees of a turnpike-road are not liable in cases of this

fees of *Heriot's Hospital v. Ross*, though cited by counsel, does not seem to have attracted the attention of either Mr. Justice Blackburn or of the three learned lords who delivered concurring opinions." Further, the Rhode Island court stated that "in all the English cases decided since the decision of *Mersey Docks v. Gibbs*, which we have seen, the cases of *Duncan v. Findlater*, and *Holliday v. St. Leonard*, as authority for the broader doctrines declared in them, are uniformly regarded as overruled." In *Abston v. Waldon Academy*, 118 Tenn. 24, 11 L. R. A. (N. S.) 1179, 102 S. W. 351, the Supreme Court of Tennessee refers to the fact that "nowhere in the opinion of Mr. Justice Blackburn [in *Mersey Docks v. Gibbs*], or those of the Lord Chancellor and Lord Westbury, all of which recommended an affirmance of the judgment in the court below against the trustees, is the earlier case [*Feoffees of Heriot's Hospital v. Ross*] referred to," and states that "this omission, we think, can be accounted for only on the ground that the two cases were regarded as essentially dissimilar, and that the principle controlling in the one was not to be applied in the other." Further, the Tennessee court said, in this case which was decided some 28 years after *Glavin v. Rhode Island Hospital*, supra: "It is true in *Feoffees of Heriot's Hospital* the learned judges delivering the several opinions did

regard the case of *Duncan v. Findlater* * * * as sustaining the conclusion announced in the one then at bar, and that the authority of that case [*Duncan v. Findlater*] was shaken by the opinion in the case of the *Mersey Docks Trustees*; but the rule that trust funds cannot be appropriated to satisfy claims growing out of the wrongs of the trustees thereof, or their agents, remains, so far as we have been able to ascertain, unshaken, and is the law of England today."

Feoffees of Heriot's Hospital v. Ross, was said, in *Fire Ins. Patrol v. Boyd*, 120 Pa. St. 624, 1 L. R. A. 417, 6 Am. St. Rep. 745, 15 Atl. 553, not to be in conflict with *Mersey Docks v. Gibbs*, nor with *Parnaby v. Canal Co.*, 11 A. & E. 223, and, in *Abston v. Waldon Academy*, 118 Tenn. 24, 11 L. R. A. (N. S.) 1179, 102 S. W. 351, not to have been overruled or qualified to any degree by *Mersey Docks v. Gibbs*.

For other discussions bearing on the subject, see:

United States. *Powers v. Massachusetts Homœopathic Hospital*, 109 Fed. 294, 297, 65 L. R. A. 372.

Alabama. *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 10 N. C. C. A. 361, 68 So. 4.

Connecticut. *Hearns v. Waterbury Hospital*, 66 Conn. 98, 31 L. R. A. 224, 33 Atl. 595.

Michigan. *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150, 110 N. W. 951.

sort. *Baker v. Harris*,⁶⁵ *Humphries v. Mears*,⁶⁶ and *Hall v. Smith*.⁶⁷ In all these cases it was distinctly held that such trustees are not answerable but for their own personal default. There is another class of cases in which it has been decided that trustees exceeding the authority given them may be personally liable, but keeping within it they are not answerable. In this instance there is no pretence for setting up personal liability. In some cases, it is true, a person injured may be without a remedy; but the fact that he may be so will not alter the principle of law which has left him in that situation," said: "Independently of the authorities, let us first inquire what are the merits of the case on the statute under which these trustees act. * * * The learned judge [directed the jury that] * * * 'the road trustees, in forming a road, are liable for any injury which may happen to passengers in consequence of the negligence or improper conduct of labourers or surveyors, or other persons employed by the trustees, or by the officers of the trustees, when engaged in any operation performed under the authority of the trustees.' If the law thus laid down to the jury is wrong, the verdict which has been given in consequence of it cannot be permitted to stand. The law is stated to be that the road fund is liable for the misconduct of any person employed by the road trustees. This direction assumes that the act done was an act not within the provisions of the statute, that it was not done in consequence of these provisions; for otherwise the direction would be in that respect improper, since whatever is done under the authority of the statute gives no right of action. If that was not so, the result would be that all the damages, though not arising from any act done by the immediate authority of the road trustees, would be liable to be compensated out of the trust fund; a proposition which certainly cannot be supported by the law which regulates the liability of master and servant. Reference has then been made to * * * the General Turnpike Act, which authorizes the trustees to appoint surveyors and other officers, with reasonable salaries, as showing that the persons employed on the works must be considered as their servants; and therefore as persons for whose conduct they are answerable. But I think that argument cannot be supported; and at the utmost it is but an inferential argument adduced to support a proposition directly contrary to the plainest words of the statute, by which it is ordained that the funds thereby raised shall be applied to the purposes therein set forth, 'and to no other purposes whatsoever.'

Ohio. <i>Taylor v. Protestant Hospital</i>	65 4 M. & S. 26.
Ass'n, 85 Ohio St. 90, 39 L. R. A.	66 1 M. & R. 187.
(N. S.) 427, 96 N. E. 1089.	67 2 Bing. 156.

It is impossible to suppose that the framers of this statute contemplated that any part of this fund would be appropriated for the purpose of affording compensation for any act of the persons who might be employed under the authority of the trustees. If the thing done is within the statute, it is clear that no compensation can be afforded for any damage sustained thereby, except so far as the statute itself has provided it; and this is clear on the legal presumption that the act creating the damage being within the statute must be a lawful act. On the other hand, if the thing done is not within the statute, either from the party doing it having exceeded the powers conferred on him by the statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct? Cases may possibly be supposed in which the funds raised by a statute would be liable for acts done strictly in pursuance of the directions of that statute, but none in which such funds would be liable for acts done without the authority of the statute."

In *Feoffees of Heriot's Hospital v. Ross*, it was alleged that one Heriot by his last will and testament, executed in the year 1623, directed his debts and certain legacies to be paid and then bequeathed all the rest and residue of his estate to "the provost, bailiffs, ministers, and ordinary council for the time being of the town of Edinburgh, in perpetuity, and for and towards the erecting and founding a hospital within the said town of Edinburgh, and for and towards the purchasing of certain lands in perpetuity to belong unto the said hospital, to be employed for the maintenance, relief, bringing-up, and education of so many poor fatherless boys, freemen's sons of that town, as the means which I give, and the yearly value of the lands so purchased by the said provost, &c., shall amount and come unto," which hospital was to be governed by such rules as the testator or a friend, named, might frame; that certain rules were framed; that among them was one to the effect that no boys should be admitted before seven nor after ten years of age and that "the electors shall choose no burgess' children into these places, if their parents be well and sufficiently able to maintain; and they shall not stay in the hospital after they are of the age of sixteen years complete"; that the pursuer was a candidate for admission into the hospital; that he was the son of a poor freeman of Edinburgh; that his father was dead; that he was, therefore, poor and fatherless; that he was in other respects, namely, as to age, qualified within the meaning of the founder's will and the regulations, and that he should have been admitted, but that the trustees had elected and admitted to the benefits of the said

charity other applicants who were not fatherless, and, therefore, were not entitled to admission. On these allegations it was prayed that the pursuer be declared entitled to admission and be ordered to be admitted, and, since he had "suffered great hardships, &c.," by reason of admission having been denied him and since the age within which he was eligible might pass by before justice was done him and he thereby lose all right to election and to the benefit of the charity, it was also prayed that he be awarded damages, both accrued and to accrue, against the administrators of the charity. The case reached the House of Lords on an appeal by the defenders from an interlocutor, the effect of which was, in part, to recognize the pursuer's right to damages, and this interlocutor the Lords reversed. Said Lord Cottenham: "The pursuer here says that he has been improperly rejected from the benefits of this charity, that he was duly qualified, and being so qualified he claimed to be admitted, but was rejected. But it appears that though he was capable of establishing his right, so far as qualification was concerned, at the time he put in his claim, he cannot at the present moment have any remedy, as he has passed the age at which he could have been admitted. He therefore prays for damages in respect of this injury. He sues in this proceeding not the individual trustee, nor is this a personal action against any of them; it is a proceeding against them in their corporate capacity as feoffees of the charity funds. He does not in terms pray for the payment of damages from the trust funds, but still as the summons is constituted, he cannot receive damages, should he receive them at all, except from those funds; and it has been throughout the proceedings understood that, if there are to be any damages at all, they must be paid out of the trust fund. The question then comes to this,—whether by the law of Scotland a person who claims damages from those who are managers of a trust fund, in respect of their management of that fund, can make it liable in payment. It is obvious that it would be a direct violation, in all cases, of the purposes of a trust, if this could be done; for there is not any person who ever created a trust fund that provided for payment out of it of damages to be recovered from those who had the management of the fund. No such provision has been made here. There is a trust, and there are persons intended to manage it for the benefit of those who are to be the objects of the charity. To give damages out of a trust fund would not be to apply it to those objects whom the author of the fund had in view, but would be to divert it to a completely different purpose. When the question came before this House, in the case of *Duncan v. Findlater*, your Lordships were surprised to find

that such a mode of proceeding had been adopted in Scotland. There had been no direct decision as to the right; yet it was distinctly stated that in more than one case such had been the practice there. The House expressed a strong opinion in disapprobation of such a practice; and observations were made which it might have been supposed would have led to a deliberate consideration in the Court of Session, whether such a practice was in accordance with the law of Scotland, or indeed of any civilized country. It is true that the summons in this case appears to have been issued before the case of *Duncan v. Findlater* was decided in this House, which will account for these proceedings not having been stopped at once; but that does not explain to me how this point came to be overlooked in the course of the subsequent proceedings in the cause. Only one of the Judges, Lord Mackenzie, directed his attention to the matter," Lord Brougham, taking the same view of the subject as Lord Cottenham, said: "It is much to be regretted, though the suit was instituted before the case of *Duncan v. Findlater* was decided, that that Court [the Court of Session] did not, when that case had been decided, pay attention to that decision, which authoritatively lays down the law." Lord Campbell, concurring in the judgment pronounced, said: "Damages are to be paid from the pocket of the wrong-doer, not from a trust fund. A doctrine so strange as the Court below has laid down in the present case, ought to have been supported by the highest authority. There is not any authority, not a single shred, here to support it. No foreign or constitutional writer can be referred to for such a purpose. The only reference made is to an understanding said to prevail in the Scotch Courts, and this understanding is itself referred to a case said to be analogous, but that was a case in which a feeling of compassion prevented the Court from strictly enforcing the rules of law. The case of *Duncan v. Findlater* is directly in point: that decision gave universal satisfaction, and the mistaken practice which it overthrew has since been universally scouted. It is to be hoped that we shall never again hear of a decision like the present, contrary to reason, sense and justice,⁶⁸ and which is wholly unsupported by authority, and is contrary to the law of Scotland. That being so, the damages claimed here the pursuer cannot obtain, and if so, he cannot derive any advantage in this form of action, and consequently it ought not to have been instituted or not allowed to proceed."

Stating the facts, the issue and the judgment in *Mersey Docks v.*

⁶⁸ Had Lord Campbell lived long enough, he would have seen his hope shattered and thus have realized its vanity.

Gibbs (and Mersey Docks v. Pierce, Penhallow and others) in the words of Lord Chancellor Cranworth: "Both cases arise out of one transaction. A ship called the 'Sierra Nevada,' in entering or endeavoring to enter, one of the docks, sustained injury by reason of a bank of mud left negligently at its entrance. The ship and the cargo were damaged. Two actions were brought against the appellants, one by Gibbs, as owner of the cargo, the other by Penhallow, as owner of the ship. I do not think it necessary to go through the pleadings. In both cases the Exchequer Chamber held that the appellants were liable. In both cases they have appealed. And the ground of appeal is, that they are not a mere company deriving benefit, like a railway company, from the traffic, but a public body of trustees, constituted by the legislature for the purpose of maintaining the docks, and for that purpose having authority to collect tolls, to be applied in the maintenance and repair of the docks, then in paying off a large debt, and ultimately in reducing the tolls for the benefit of the public. In the case of Gibbs it must be taken as admitted by the appellants, that knowing that the dock was, by reason of an accumulation of mud therein, in an unfit state to be navigated, they did not take reasonable care to put the same 'into a fit state for that purpose'; whereupon the 'Sierra Nevada,' in endeavoring to enter into the dock, struck against the mud, and the cargo thereby became damaged. In the other case (which did not arise upon a demurrer) it must be taken as an established fact that the appellants had by their servants the means of knowing the dangerous state of the dock, but were negligently ignorant of it. It is plain that if the appellants are liable in the former case, they must be liable also in the latter. If the knowledge of the existence of the mud-bank made them responsible for the consequences of not causing it to be removed, they must be equally responsible if it was only through their culpable negligence that its existence was not known to them. The principles, therefore, which are to regulate the judgment of the House in the one case must also decide it in the other: and the question therefore is, what are the principles which regulate the liabilities of such a body as that of the Mersey Docks and Harbour Board?" The principles sought after were found by the House of Lords to be adverse to the contentions of the Board and judgment was rendered for defendants in error. Although Lord Cranworth did not refer to *Duncan v. Findlater*, *eo nomine*, he admitted that there were dicta "and perhaps decisions" which were not capable of being reconciled with the result at which he arrived but stated that "all these authorities have been so fully brought under review, in the very able and elaborate opinion

of the learned Judges delivered by Mr. Justice Blackburn in answer to the questions put to them by your Lordships, that I do not feel myself called on to do more than to express my concurrence in that opinion." In the opinion referred to, Justice Blackburn said: "Duncan v. Findlater was a Scotch appeal brought before the House of Lords on a bill of exceptions. The action was against the trustees of a turnpike road, to recover damages for an injury sustained by the plaintiff from falling over a heap of stones negligently left on the road. It was stated on the bill of exceptions that the trustees had given directions, through their surveyor, that a drain should be filled up, and that the workmen engaged in filling up the drain left negligently the stones in the road. Assuming that the law of Scotland and of England are the same, it is clear that no one could be answerable for this sort of negligence unless he stood to those who actually were guilty of the negligence in the relation of master and servant. The judge who presided at the trial took a different view of the law of Scotland, and directed the jury 'that road trustees on a public road are liable for any injury which may happen to passengers, in consequence of the negligence or improper conduct of labourers or surveyors, or other persons employed by the trustees, or by the officers of the trustees, when engaged in any operation performed under the authority of the trustees.' And to this direction there was an exception. If the body authorizing the operation had been a railway company or a private individual, instead of being trustees of a turnpike-road, this direction would, according to English law, have been wrong; and this is pointed out by Lord Brougham, who says: 'The rule of liability and its reason I take to be this—I am liable for what is done by me and under my orders by the man I employ, for I may turn him off from that employ when I please. And the reason I am liable is this, that by employing him I see the whole thing in motion, and what he does, being done for my benefit, and under my direction, I am responsible for the consequences of doing it.' * * * But though all that really was decided in that case was that the trustees were not liable for the negligence of persons in their employment who were not shown to be their servants, it is not to be disputed that Lord Cottenham's language goes a great deal further, and shows that, in his opinion, persons incorporated for the purpose of executing works could never in their official or corporate capacity be liable to damages at all, the remedy for any wrong or neglect being only against the individual corporators for their individual wrong or neglect. His reasoning on this point is: 'If the thing done is within the statute, it is clear that no compensation can be afforded for any

damage sustained thereby, except so far as the statute itself has provided it. And this is clear on the legal presumption that the act creating the damage, being within the statute, must be a lawful act. On the other hand, if the thing done is not within the statute, either from the party doing it having exceeded the powers conferred on him by statute, or from the manner in which he has thought fit to perform the work, why should the public fund be liable to make good his private error or misconduct?" Lord Cottenham is there speaking of a body of trustees acting under the Scotch Turnpike Act, but his reasoning is general; and the dilemma, if a good one, is applicable to all cases. This is, no doubt, a very high authority, being said by the Lord Chancellor in the House of Lords, though in a Scotch case; but not being the point decided by the House, it is not conclusively binding, and we think that, with great deference to his high authority, we must dissent from the position there laid down, both on principle and on the preponderance of authority." Lord Westbury concurred "in the conclusion derived from the authorities and from the principles of law laid down in the very able opinion delivered to your Lordships by Mr. Justice Blackburn," and stated that he thought "it desirable to say a few words with reference to the difficulty felt by the learned judges in consequence of certain observations that fell from Lord Chancellor Cottenham, and which are reported in the case of *Duncan v. Findlater*." Continuing, he said: "I can well divine what was, at that time, passing in the mind of my Lord Cottenham. My Lord Cottenham seems to have thought, that if a corporation be trustees of property for the direct benefit of certain individuals, and there is no other corporate property, and if in their capacity as trustees an act is done by order of the corporation, which amounts to a tort or trespass, and gives a right of action, and a right to damages to any private individual, a court of equity would not permit an execution to issue on any judgment that might be recovered against the property of the corporation, seeing that it is property held upon trust for certain beneficiaries, and that the corporation, as trustees, have no interest therein. But I apprehend that that was a misapprehension on the part of the noble and learned Lord, and that it would lead to very mischievous consequences. It is by no means true that a court of equity is able to protect the property of beneficiaries against the act of trustees. If trustees alienate property for a valuable consideration, to a person who pays that consideration without notice of the trust, the interest of the beneficiaries suffers from that act; and it would be a very unreasonable and a very mischievous thing if, in the case of a corporation dealing with the public or with individ-

uals, such corporation should, by any conduct of theirs in respect to property committed to their care, give a right of action to individuals, that such individuals should be deprived of the ordinary right of resorting to a remedy against the body doing or authorizing these acts, and should be driven to seek a remedy against the individual corporators, whose decision or order, in the name of the corporation, may have led to the mischief complained of. It is much more reasonable in such a case, that the trust or corporate property should be amenable to the individual injured, because there is then no failure of justice, seeing that the beneficiary will always have his right of complaint, and his title to relief against the individual corporators, who have wrongfully used the name of the corporation. The learned judges observed, and with very great correctness, that it is not everything that falls from a noble and learned Lord in advising the House which is to be considered as the opinion of the House. Those observations of Lord Cottenham, which directly tend to this conclusion, that the corporation in the case supposed would not be amenable, nor would the corporate property be liable, but that the party injured would be obliged to have resort to the individual members who directed the act to be done, would, if they were recognized as the law, undoubtedly lead to very great evil and injury. * * * With regard to the observations attributed to the noble and learned Chancellor (Lord Cottenham), I conceive that they ought not to be taken or regarded as establishing any rule that at all interferes with the decision at which your Lordships have arrived in the case now before you."

§ 3361. Glavin v. Rhode Island Hospital. The American case which more frequently than any other, perhaps, the courts have either been willing to follow or been compelled to distinguish or disapprove is that of *Glavin v. Rhode Island Hospital*,⁶⁹ decided by the Supreme Court of Rhode Island in 1879. In this case plaintiff sued for personal injuries sustained when a pay patient in defendant's hospital as a result of the failure of defendant's interne immediately to call in one of defendant's staff surgeons to attend plaintiff, as defendant's rules required the interne to do under the circumstances, and as a result of the personal ministrations of the interne by which he sought to meet plaintiff's need. A judgment for defendant was rendered by the trial court, but on appeal the Supreme Court reversed such judgment and granted plaintiff a new trial. According

⁶⁹ 12 R. I. 411, 34 Am. Rep. 675.

to a later case decided by the same court,⁷⁰ in which case the court expressed itself as being satisfied with the correctness of the conclusions reached in *Glavin v. Rhode Island Hospital*,⁷¹ such case "stands for four things: First, it sets forth the true relation of a charitable corporation to the skilled attendants, such as physicians, surgeons, and nurses, whose services are furnished to its patients, showing that such skilled attendants are not in general the servants of the corporation in that they are not under the control of the corporation as to their treatment of patients, and that, if they are selected with due care, their negligence is not the negligence of the corporation, * * * second, that there are certain duties to patients which are corporate duties, such as the exercise of due care in the selection of skilled and competent attendants and the exercise of due care in the summoning of such attendants in a case where the condition of the patient requires such service, and that the agent of

⁷⁰ *Basabo v. Salvation Army*, 35 R. I. 22, 42 L. R. A. (N. S.) 1144, 85 Atl. 120 (action for death of third person fatally injured through negligence of servant of defendant, a charitable corporation).

In *Thomas v. German General Benevolent Society*, 168 Cal. 183, 141 Pac. 1186, an action for personal injuries sustained by the plaintiff while in the employ of the defendant, the court, by way of disposing of the defendant's contention that it was not liable by reason of the fact that it was a charitable institution and that an action such as the one brought by the plaintiff would not lie against it, said: "Such was the doctrine of some of the earlier cases. We need not enter into an elaborate discussion of the question. All of the authorities pro and con have been elaborately collated and learnedly reviewed in *Basabo v. Salvation Army*, 35 R. I. 22, 85 Atl. 120, 42 L. R. A. (N. S.) 1144. With the conclusion there reached we are in accord. That conclusion is that the true doctrine amounts to this: That where one accepts the benefit of a public or of a private charity he ex-empted by implied contract the bene-

factor from liability for the negligence of the servants in administering the charity, if the benefactor has used due care in the selection of those servants."

⁷¹ "It has been suggested * * * that in view of the numerous decisions of other courts, rendered since [*Glavin v. Rhode Island Hospital*] * * * was decided, this court should not adhere to that decision. That case has been carefully re-examined in the light of all the cases cited by the parties hereto, and of some other cases which are cited by neither party, and this court sees no reason to modify the conclusions reached in said decision, or in any respect to recede from them or to doubt their correctness, upon the facts of that case as reported. It is true that, in many of the cases decided by other courts since 1879, the *Glavin Case* has been referred to, in some it has been criticized, but in none of them has it been fully and correctly stated, nor do we find any case which is quite on all fours with it." *Basabo v. Salvation Army*, 35 R. I. 22, 42 L. R. A. (N. S.) 1144, 85 Atl. 120.

the corporation, whose duty it is to summon such attendants, is in such case the agent and representative of the corporation, whose negligence is deemed to be that of the corporation itself; third, that the doctrine of the general immunity of a charitable corporation from liability for damages, on the ground of public policy as involving the diversion of trust funds from the purposes of the trust, has no logical foundation; fourth, that, where such a corporation has funds available for the general purposes of the corporation, it may apply such funds to pay damages for which it is held liable 'notwithstanding the trusts for which they are held, because the liability is incurred in carrying out the trusts and is incident to them' (12 R. I. page 428, 34 Am. Rep. 675), even though certain property, such as its real estate, may be 'subject to so strict a dedication that it cannot be diverted to the payment of damages.' 12 R. I. page 429, 34 Am. Rep. 675." ⁷²

⁷² See, however, in connection herewith Gen. Laws of R. I. 1896, c. 177, § 38, which provides that "no hospital incorporated by the general assembly of this state, sustained in whole or in part by charitable contributions or endowments, shall be liable for the neglect, carelessness, want of skill or for the malicious acts, of any of its officers, agents or employees in the management of, or for the care or treatment of, any of the patients or inmates of such hospital; but nothing herein contained shall be so construed as to impair any remedy under existing laws which any person may have against any officer, agent or employee of any such hospital for any wrongful act or omission in the course of his official conduct or employment."

Probably one of the most emphatic disapprovals of *Glavin v. Rhode Island Hospital* that has ever been entered is that of Mr. Justice Mayfield of the Alabama Supreme Court. In dissenting from the opinion of the majority of that court in *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 10 N. C. C. A. 361, 68 So. 4, which majority finds the conclusion it reached supported in principle by *Glavin v. Rhode*

Island Hospital, Justice Mayfield said: "If the law is as it is here decided to be, is it not strange that no text-book writer in England or America has ever been able to learn it? It does seem that such judges and text-book writers as Cooley, Kent, Story, Parsons, Shaw, Gibson, Beasley, Bush, Morawetz, Jaggard, and others of equal note, would have found it out, and not have misled the world-litigants and world-courts for a century or more. Is it possible that one decision of one court of the smallest state in the Union contains more wisdom than all other courts, and all text-writers on the subject? There is no decision of any American court, nor opinion of any judge, nor mention by any text-book writer, in accord with the decision of this case, that does not base the opinion on the Rhode Island case cited in this opinion. It has been criticized scores if not hundreds of times, where it has been approved or followed once. * * * If the decision of this case is to stand as the law of this state, it cries loudly for the legislature of Alabama to do what the legislature of Rhode Island did—put the law of that state in line with that of all the other

§ 3362. Controlling theories. There are several different outstanding theories on the subject of the liability in tort of charitable corporations. One of the theories of nonliability may be denominated the "public policy" theory. The Supreme Court of South Carolina, adopting and applying this theory in a recent case, said: "The exemption of public charities from liability in actions for damages for tort rests not upon the relation of the injured person to the charity, but upon grounds of public policy, which forbids the crippling or destruction of charities which are established for the benefit of the whole public to compensate one or more individual members of the public for injuries inflicted by the negligence of the corporation itself, or of its superior officers or agents, or of its servants or employees. The principle is that, in organized society, the rights of the individual must, in some instances, be subordinated to the public good. It is better for the individual to suffer injury without compensation than for the public to be deprived of the benefit of the charity. The law has always favored and fostered public charities in ways too numerous to mention, because they are most valuable adjuncts of the state in the promotion of many of the purposes for which the state itself exists. That being so, what difference can it make whether the tort is that of the corporation itself or its superior officers and agents, or that of its servants? Liability for the one would as effectually embarrass or sweep away the charity as the other. It would therefore be illogical to admit liability for the one and deny it for the other. This rule does not put such charities above the law, for their conduct is subject to the supervision of the court of equity; nor does it deny an injured person a remedy for his wrong. It is merely an exception to the rule of *respondeat superior*, which is itself based on reasons of public policy. The injured person has his remedy against the actual wrongdoer. It is said, however, that he may be and often is financially irresponsible. But the answer is that the law does not undertake to provide a solvent defendant for every wrong done. There are many cases of wrongful injury not compensated, because the wrongdoer is insolvent. The head of a family is liable for the torts of his servants; but you cannot take his homestead and break up his family to satisfy a judgment against him, either for his own or for his servant's torts. Public policy says it is better for the individual to suffer the injury uncompensated than for the state to suffer the evil consequences of having the homes and families

states by a statute. I ask the question: Should we follow the court of Rhode Island, when the decision of that court was deemed so bad by the people that they rid themselves of it by an express statute?"

of its citizens destroyed. The state is likewise most deeply interested in the preservation of public charities. Questions of public policy must be determined upon consideration of what on the whole will best promote the general welfare.”⁷³

⁷³ *Vermillion v. Woman's College of Due West*, 104 S. C. 197, 88 S. E. 649, decided on the authority of *Lindler v. Columbia Hospital of Richland County*, 98 S. C. 25, 81 S. E. 512, in which the court said: “The true ground upon which to rest the exemption from liability is that it would be against public policy to hold a charitable institution responsible for the negligence of its servants, selected with due care. But the question whether it would be liable for negligence in the selection of its servants without due care is not before the court for consideration.” In his dissenting opinion in this case, however, Justice Fraser said: “Another reason given [for the rule of nonliability] is that it is not in accord with public policy to allow these good people to be annoyed by damage suits. They are good people, but the legislature fixes the public policy of a state. The reason for this supposed public policy is not altogether clear. Is the damage suit an evil spirit invented by man to harass soulless corporations and from its evil influence the good are immune? If so, they ought to be abolished all together. That is not the theory. The theory is that, in a damage suit for simple negligence, the evil of the past is compensated for, and for wilfulness, evil for the future is prevented. * * * There is nothing in the Constitution, statutes, or judicial records [which contain the law of the state and therefore define its public policy] to warrant immunity. Public policy is not the opinion of a judge as to what ought or ought not to be. * * * The legislature of this state has in recent years passed several acts that remove the

immunity from governmental agencies, such as cities and counties, and require them to respond in damages for injuries caused by the negligence of their employees. We cannot therefore say that it is against the public policy of this state to require the wrongdoer to pay damages caused by the negligence of employees. The foundation of the original doctrine has been destroyed in the state, and this offspring ought to die with it. The rule is clear and certain that, if a physician undertakes to attend a patient through charity, he is bound to exercise due care and skill and is responsible for negligence. If, however, several combine and subscribe a fund and call it charity (more convenient still, if, as here, some one else will furnish the money), it shall cover a multitude of sins, and it makes no difference what happens, there are only two remedies. One is to close up the place as a public nuisance, and the other is to sue the woman [who, as in this case, was, in her capacity as nurse, guilty of the negligence].”

“No principle of law seems to be better established both upon reason and authority than that which declares that a purely charitable institution, supported by funds furnished by private and public charity, cannot be made liable in damages for the negligent acts of its servants. Were it not so, it is not difficult to discern that private gift and public aid would not long be contributed to feed the hungry maw of litigation, and charitable institutions of all kinds would ultimately cease or become greatly impaired in their usefulness.” *Jensen v. Maine Eye & Ear Infirmary*, 107 Me. 408, 33 L. R. A. (N. S.) 141, 78

Opposed to this view of the matter, there is the holding of the Supreme Court of Rhode Island to the effect that public policy does not require that a charitable corporation be held exempt from liability for injury to a third person resulting from the negligence of one between whom and the corporation there existed the legal relation of servant and master, but, on the other hand, that to relieve it from liability in such case would be contrary to true public policy. In thus holding the court said: "We are clearly of the opinion that the true legal relation of master and servant existed between the defendant [corporation] and [the person guilty of the negligence] * * * and that, just as such a servant has a lawful right to recover his stipulated wages for his services and to recover damages for breach of his contract of service on the part of his master, so, also, would he be entitled to recover for injuries due to the negligence of his master as in other cases of master and servant, and so, also, would his master be liable for his torts and negligence while in the service of the master as in any other case. It would, in our opinion, be manifestly unjust and contrary to public policy to hold that a person run over and injured on a public highway by a horse and wagon belonging to the defendant and driven by the defendant's servant, through the negligent acts of such servant, [as in this case,] would not be entitled to recover against the master, but could only recover against the negligent servant, while a person injured under similar circumstances by the servant of an expressman, or the driver of a cab belonging to a liveryman, would be allowed to recover against the master. There is no reason or logic in the attempted distinction between the servant of the defendant and the servant of any other person or corporation." ⁷⁴

Another theory of nonliability is the "trust-fund" theory. This theory is the one that a charitable corporation holds all of its funds in trust for the charity administered; that it would be a breach of trust to apply them to any other purpose; that the payment of damages for injuries resulting from the negligence of the corporation's servants is not a purpose contemplated by the trust, and that the corporation's funds, therefore, cannot be applied thereto.⁷⁵ Not only was this

Atl. 898, which was an action for the death of a person, renting room in infirmary, which resulted from her being permitted to evade the supervision of the attendants and fall through a window.

⁷⁴ *Basabo v. Salvation Army*, 35 R. I. 22, 42 L. R. A. (N. S.) 1144, 85 Atl.

120. See § 3361, *supra*. See also that portion of Justice Fraser's dissenting opinion in *Lindler v. Columbia Hospital of Richland County*, 98 S. C. 25, 81 S. E. 512, quoted in note 73, *supra*.

⁷⁵ *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 10 N. C. C. A. 361, 68 So. 4 (this theory, the Alabama Su-

theory adopted by the House of Lords in *Feoffees of Heriot's Hospital v. Ross*,⁷⁶ but it has also found favor with more than one American court since the decision in the English case was rendered,⁷⁷ at least,

preme Court rejects as unsound).

⁷⁶ See § 3360, supra.

⁷⁷ In *Fire Ins. Patrol v. Boyd*, 120 Pa. St. 624, 1 L. R. A. 417, 6 Am. St. Rep. 745, 15 Atl. 553, an action for the wrongful death of a person who while passing along a sidewalk was fatally injured by being struck by a bundle of tarpaulins which defendant's employee threw from a window in an abutting building, it appeared that the defendant was a corporation without capital stock or moneyed capital; that it was supported by voluntary contributions made by various fire insurance companies; that its object and business were to save life and property in or contiguous to burning buildings; that in saving and protecting property thus situated no difference was made between that which was insured and that which was uninsured, and that no dividends were made, and hence none was divided among the corporators. Upon these facts the court, declaring the true test of a legal public charity to be "the object sought to be attained; the purpose to which the money is to be applied; not the motive of the donor," held that the defendant was "a public charitable institution; that in the performance of its duties it [was] * * * acting in aid and in ease of the municipal government in the preservation of life and property at fires"; that in consequence thereof the rule of respondeat superior did not apply to it, and that therefore it was not liable at plaintiff's suit. In the course of its opinion, wherein it declined to follow *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675, even though such case was applicable, the court said: "The Insurance Patrol is a public charity. It

has no property or funds which have not been contributed for the purposes of charity; and it would be against all law and all equity to take those trust funds, so contributed for a special, charitable purpose, to compensate injuries inflicted or occasioned by the negligence of the agents or servants of the patrol. It would be carrying the doctrine of respondeat superior to an unreasonable and dangerous length. That doctrine is, at best, as I once before observed, a hard rule. I trust and believe it will never be extended to the sweeping away of public charities; to the misapplication of funds specially contributed for a public charitable purpose to objects not contemplated by the donors. I think it may be safely assumed that private trustees, having the control of money, contributed for a special charity, could not, in case of a tort committed by one of their number, apply the funds in their hands to the payment of a judgment recovered therefor. A public charity whether incorporated or not, is but a trustee, and is bound to apply its funds in furtherance of the charity, and not otherwise. This doctrine is hoary with antiquity, and prevails alike in this country and in England, where it originated as early as the reign of Edward V., when it was announced in the Year Book of that period. * * * I am glad to be able to say that no state in this country, or in the world, has upheld the sacredness of trusts with a firmer hand than the state of Pennsylvania. Not only is a trustee for a public or private use not permitted to misapply the trust funds committed to his care, but, if he converts them to his own use, the law punishes him as a thief. How much better than a thief would be the law

when the one seeking to recover damages was accepting the benefit of the trust fund at the time the injuries complained of were sustained.⁷⁸

itself were it to apply the trust's funds, contributed for a charitable object, to pay for injuries resulting from the torts or negligence of the trustee? The latter is legally responsible for his own wrongful acts. I understand a judgment has been recovered against the individual whose negligence occasioned the injury in this case. If we apply the money of the Insurance Patrol to the payment of this judgment, or of the same cause of action, what is it but a misapplication of the trust fund, as much so as if the trustees had used it in payment of their personal liabilities? It would be an anomaly to send a trustee to the penitentiary for squandering trust funds in private speculations, and yet permit him to do practically the same thing by making it liable for his torts. If the principle contended for here were to receive any countenance at the hands of this court, it would be the most damaging blow at the integrity of trusts which has ever been delivered in Pennsylvania. We are not prepared to take this step."

⁷⁸ *Gable v. Sisters of St. Francis*, 227 Pa. St. 254, 136 Am. St. Rep. 879, 75 Atl. 1087, quoting with approval from *Downes v. Harper Hospital*, 101 Mich. 555, 25 L. R. A. 602, 45 Am. St. Rep. 427, 60 N. W. 42. In *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150, 110 N. W. 951, an action by a third person, the court distinguished *Downes v. Harper Hospital*, supra, and, relative to the proposition that "it would thwart the purpose of the trust; that is, it would oppose the will of the founder of the trust to pay from the trust funds damages caused by an agent's torts," said: "It is entirely logical to say that this will

must be recognized by beneficiaries of the trust. It may justly be said that the benefit of the trust is extended to them and accepted by them upon the implied condition that they shall recognize that will. By becoming beneficiaries they agree to recognize it. But I can see no ground upon which it may be held that the rights of those who are not beneficiaries of a trust can in any way be affected by the will of its founder. The rights of such persons are those created by general laws, and the duties of those administering the trust to respect those rights are also created by general laws. The doctrine that the will of an individual shall exempt either persons or property from the operation of general laws is inconsistent with the fundamental idea of government. It permits the will of the subject to nullify the will of the people. Nor can I conceive any ground upon which a court can hold that effect can be given to that will when it relates to property devised or conveyed for the purpose of a charitable trust. Such a holding must rest upon the argument that the advantages reaped by the public from such trusts justify the exemption; that is, as applied to this case, the advantages to the public justify defendant's exemption from liability for wrongs done to individuals. If this argument is sound—and its soundness may be questioned, for there are those who will deny that the advantages to the public justify the wrong to the individual—it should be addressed to the legislative, and not to the judicial, department of the government. It is our duty as judges to apply the law. We have no authority to create exemptions or to declare immunity." See also *Gallon*

On the other hand, some courts have expressly rejected this theory,

v. House of Good Shepherd, 158 Mich. 361, 24 L. R. A. (N. S.) 286, 133 Am. St. Rep. 387, 122 N. W. 631; Hordern v. Salvation Army, 199 N. Y. 233, 32 L. R. A. (N. S.) 62, 139 Am. St. Rep. 889, 92 N. E. 626.

In *Parks v. Northwestern University*, 218 Ill. 381, 2 L. R. A. (N. S.) 556, 4 Ann. Cas. 103, 75 N. E. 991, aff'g 121 Ill. App. 512, the Supreme Court of Illinois held that the fact that the defendant university corporation required its students to pay tuition did not change its charitable character, and that, being a charitable corporation, it was not liable for personal injuries sustained by a student, while in a classroom or laboratory maintained by it, as a result of the negligence of its instructor in whose charge the student was at the time. In the course of its opinion the court said: "The * * * university is a private corporation but is organized for purely charitable purposes. It declares no dividends, and has no power to do so. It depends upon the income from its property and the endowments and gifts of benevolent persons for funds to carry out the sole object for which it was created—the dissemination of learning. Its charter secures to all persons of good moral character who have made sufficient preliminary advancement the benefits of the university, and all of its funds and property, from whatever source derived, are held in trust by it, to be applied in furtherance of the purpose of its organization and increasing its benefits to the public. The funds and property thus acquired are held in trust, and cannot be diverted to the purpose of paying damages for injuries caused by the negligent or wrongful acts of its servants and employees to persons who are enjoying the benefit of the charity. An

institution of this character doing charitable work of great benefit to the public without profit, and depending upon gifts, donations, legacies, and bequests made by charitable persons for the successful accomplishment of its beneficial purposes, is not to be hampered in the acquisition of property and funds from those wishing to contribute and assist in the charitable work, by any doubt that might arise in the minds of such intending donors as to whether the funds supplied by them will be applied to the purposes for which they intended to devote them, or diverted to the entirely different purpose of satisfying judgments recovered against the donee because of the negligent acts of those employed to carry the beneficent purpose into execution."

The argument that permitting the recovery from charitable corporations of damages resulting from their torts would discourage the making of contributions to them was advanced in the case of *Glavin v. Rhode Island Hospital*, supra, § 3361, which was decided more than a quarter of a century before *Parks v. Northwestern University*, supra, and was held by the Supreme Court of Rhode Island not to bear examination. Said the court: "The argument is that hospitals, like the Rhode Island Hospital, are a public benefit; but if they are liable for the torts of the physicians or surgeons attendant on them, or of the medical or surgical internes, or of their nurses and other servants, people will be discouraged from voluntarily contributing to their foundation and support, and therefore public policy demands that they shall be exempted from liability. In our opinion the argument will not bear examination. The public is doubtless interested in the maintenance of a great

not only in cases where the injured person was a stranger to the corpo-

public charity, such as the Rhode Island Hospital is; but it also has an interest in obliging every person and every corporation which undertakes the performance of a duty to perform it carefully, and to that extent therefore it has an interest against exempting any such person and any such corporation from liability for its negligences. The court cannot undertake to say that the former interest is so supreme that the latter must be sacrificed to it. Whether it shall be or not is not a question for the court, but for the legislature." As in line, however, with *Parks v. Northwestern University*, supra, both in its recognition of this argument as a valid one and in its approval of the trust fund theory, see *Adams v. University Hospital*, 122 Mo. App. 675, 99 S. W. 453, in which the court said: "In this country whatever conflict in the authorities may appear has arisen from applying rules to charities which * * * were laid down as governing an entirely different class of cases—cases clearly involving governmental function, or substitutes for private enterprise. A fund arising from charges against shipowners for use of docks for landing, unloading, and storing freight, a fund arising from toll taken of those using a public highway, and the like, are matters of business or are of quasi governmental concern, which bear no likeness to the funds which are provided by the generosity of donors for the perpetual alleviation of suffering and for the betterment of the health and moral being of mankind. In the former class, it may be well enough to say that the law intended the fund to make good an injury which its managers may inflict. But in the latter, it would be against every principle of right and an outrage on justice to deplete a fund set

aside for perpetual charity, by using it in paying damages caused by the acts of those engaged in administering the trust. Charity funds are things apart from ordinary matters of business or trade. In the thoughts and consciences of men, charities are not loaded with the burdens put upon other matters. Charity suggests different considerations and treatment from matters of ordinary business, and hence there has arisen out of the conscience, a principle which protects it in its beneficent and perpetual purpose. The greatest authority has said that, though prophecies shall come to naught, and tongues shall cease, and knowledge shall vanish away, yet 'charity never faileth.' That and other statements of like tenor, though perhaps referring to mental conditions, have doubtless done much to foster the privileges which have ever been accorded to material benevolence. To repeat a thought already suggested, every one, in the present or the future, coming within the object of a charity, has a right to the enjoyment of its benefits, and no one has a right to appropriate to himself in settlement of claims, the fund whereby those benefits are secured. To permit it to be done would be not only setting aside the purpose of the donor, but would, in its results, allow the claim of one person to exclude the rights of all others who may come after him. It would be a matter of grave concern and regret if funds set apart for support of our charitable institutions should be made subject to the assaults of the damage claimant, and be called upon, not only for compensatory recompense, but to stand for punishment in the way of exemplary damages. Especially would it strike one as unfortunate, when it is realized that such claimant has his

ration,⁷⁹ but also in cases where he was a beneficiary of the trust.⁸⁰

primary right to hold to the strictest accountability the individual who does him the injury for which he makes complaint, and that in denying him the right to impoverish benevolence we do not deny him a remedy against the actual wrongdoer. So the weight of authority in this country supports *Heriot's Hospital v. Ross* as being the rule which commends itself, not only because it carried out the donor's intention, but because it is more reasonable and just, and better subserves an enlightened public policy. * * * It is manifest that, if we uphold a rule which would make an institution of charity liable to a patient who has been injured by an incompetent servant, negligently selected, we destroy the principle we have endeavored to make plain, that charitable trust funds cannot be diverted from the purposes of the donor. For it can make no difference, so far as the integrity of the fund is concerned, whether it be sought after by one who is injured by the negligence of a servant, or the negligent selection of such servant."

In connection with the suggestion in the last sentence above quoted, see *Hordern v. Salvation Army*, 199 N. Y. 233, 32 L. R. A. (N. S.) 62, 139 Am. St. Rep. 899, 92 N. E. 626, in which the court said: "Certainly liability for negligence in the selection of servants may impair the integrity of the trust estate just the same as liability for the negligence of servants, though of course not so frequently."

A charitable corporation holds merely the naked legal title to realty standing in its name but dedicated to the public charity administered, the beneficial interest in such property being owned by the public, and such realty is not subject to sale under an

execution on a judgment rendered against the corporation in an action of tort against it where the statute makes only such real estate as the defendant, or a third person for his use, was seized of in law or equity at the time of the rendition of the judgment against him, subject to execution. *Woman's Christian Nat. Library Ass'n v. Fordyce*, 73 Ark. 625, 86 S. W. 417.

An educational corporation of an eleemosynary character is not liable for personal injuries, sustained by a student in its institution, as a result of the negligence of the institution's managers in failing to provide, as required both by city ordinance and state statute, fire escapes for the dormitory in which the student was lodged, at least, not when the only means of satisfying a judgment therefor would be by an appropriation of property touched directly by the charitable use; and, in this connection, it is immaterial that the students in the institution were required to pay tuition and board and that the charter of the corporation provided that it might "sue and be sued." *Abston v. Waldon Academy*, 118 Tenn. 24, 11 L. R. A. (N. S.) 1179, 102 S. W. 351.

⁷⁹ *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150, 110 N. W. 951, distinguishing *Downes v. Harper Hospital*, 101 Mich. 555, 25 L. R. A. 602, 45 Am. St. Rep. 427, 60 N. W. 42. See *Kellogg v. Church Charity Foundation of Long Island*, 203 N. Y. 191, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913 A 883, 96 N. E. 406; *Hospital of St. Vincent of Paul v. Thompson*, 116 Va. 101, 51 L. R. A. (N. S.) 1025, 81 S. E. 13.

⁸⁰ *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 68 So. 4.

In *Powers v. Massachusetts Homœ-*

A further distinction has been made to depend upon whether the tort grew out of a want of due performance of ministerial or administrative duties, or whether it arose from the malpractice of the physicians, nurses and others in ministering professionally to the patient. In the latter cases, provided the corporation has exercised due care in its non-delegable duty of selecting proper physicians and nurses and providing suitable appliances for them, to which reference is made

opathic Hospital, 109 Fed. 294, 300, 65 L. R. A. 372, an action for injury to a pay patient in a charity hospital, Judge Lowell, in the course of his opinion, said: "There is no less impropriety in diverting funds impressed with a trust for the benefit of individuals than in diverting those impressed with a trust for a public charity. Yet the effectual though indirect liability of a private trust fund for the torts of those concerned in its management is undoubtedly recognized. It is true that a suit cannot be maintained against a trustee, as such, for torts committed in the management of the trust property. The suit is brought against the trustee as an individual. The judgment and execution run against him individually. When these are satisfied, however, the trustee is reimbursed from the trust estate, unless individually at fault.

* * * The trust fund is protected from immediate levy to satisfy the execution, not because of its complete immunity, but rather from technical reasons connected with the legal estate of the trustee in the property. Its technical immunity affords it no ultimate protection. Indeed, the law on this point is so plain that no case can be found in the Massachusetts Reports expressly sanctioning the payment from a private trust fund of damages for a tort committed in the administration of the trust property, though the practice must be of weekly occurrence in this city of Boston. Practically the trustee generally satisfied the judgment by a payment

directly from the trust fund, or compromises the claim without any judgment at all. The merely technical immunity of a private trust fund from execution upon a judgment recovered in an action of tort affords no reason for the real immunity of the funds of a charitable corporation where the technical considerations do not apply. That the funds of a public charity may be diverted to pay for some torts committed in the administration of the fund has often been decided. *Stewart v. Harvard College*, 12 Allen 58; *Bishop v. Trustees*, 1 El. & El. 697; *Blaechinska v. Howard Mission*, 56 Hun 322, 9 N. Y. Supp. 679. See *Davis v. Society*, 129 Mass. 367, 37 Am. Rep. 368; *Gilbert v. Corporation of Trinity House*, 17 Q. B. Div. 795. If those in charge of a hospital unlawfully permit the escape of filth upon neighboring land, or close a right of way across the premises of the hospital, may not the corporation, in some cases at least, be sued in tort? We think the question answers itself.

* * * We are unable * * * to agree with the proposition which altogether exempts a trust fund from liability for the torts of those concerned in its administration." (In *Woman's Christian Nat. Library Ass'n v. For-dyce*, 73 Ark. 625, 86 S. W. 417 [motion for rehearing] the court, after quoting in part that portion of the opinion in *Powers v. Massachusetts Homoeopathic Hospital*, supra, which is above set out, stated that Judge Lowell who wrote the opinion "further limits the charge against a trust

hereafter⁸¹ the corporation will not be liable for injury to the patient owing to the negligent performance of these professional duties. On the other hand, if the injury springs from the corporation's failure in the performance of a ministerial or administrative duty, the corporation is liable, even though the failure was due to the act of a nurse or similar professional attendant in attempting to perform the duty for the corporation.⁸² In other words, in their professional

fund to a fund unconnected with the trust property." This statement of the Arkansas court is undoubtedly based on Judge Lowell's proposition, *supra*, that "if it be sought to charge a trust fund with payment for a tort committed by the trustee and unconnected with the trust property, doubtless the argument just quoted would be unanswerable," and, following as, it is submitted, it does upon a misconstruction of such proposition, is erroneous.)

"While it may not be necessary in this case for us to decide, we have little hesitation in saying that what is known as the trust fund doctrine does not appeal to us as a satisfactory footing upon which to rest the immunity of such [charitable] associations [from liability to their beneficiaries]. The trust fund doctrine would establish absolute immunity, if carried to its logical conclusion, for all torts committed by such associations. It would apply to the omission to perform, or the negligent performance of, nonassignable duties, and, indeed, to negligence in all its conceivable forms. The immunity flowing from the acceptance of the benefits of such a charity, as held by decisions of many courts, rests upon a more logical foundation, and has met with approval of many courts of high standing, and the trend of modern decision seems to be in that direction." *Hospital of St. Vincent of Paul v. Thompson*, 116 Va. 101, 51 L. R. A. (N. S.) 1025, 81 S. E. 13.

In his dissenting opinion in *Lind-*

ler v. Columbia Hospital of Richland County, 98 S. C. 25, 81 S. E. 512, Justice Fraser said: "We think the courts ought to hold the fund [for a charity hospital], first to repair the evil done by itself, because the purpose of the trust is to do good and not evil. We know a trust fund cannot be diverted to a different purpose from that for which it was created. That is established law and we want to further the purpose of the trust. The purpose of the trust is to relieve suffering, and to increase it, when, in the administration of the trust, suffering is increased, the purpose fails. The courts that declare immunity are destroying and not maintaining the trust."

⁸¹ See § 3363, *infra*.

⁸² "It is true, I think, of nurses, as of physicians, that, in treating a patient, they are not acting as the servants of the hospital. The superintendent is a servant of the hospital; the assistant superintendents, the orderlies, and the other members of the administrative staff are servants of the hospital. But nurses are employed to carry out the orders of the physicians, to whose authority they are subject. The hospital undertakes to procure for the patient the services of a nurse. It does not undertake, through the agency of nurses, to render those services itself. The reported cases make no distinction in that respect between the position of a nurse and that of a physician (*Powers v. Mass. Hospital*, [109 Fed. 294] * * *; *Ward v. St. Vincent's Hos-*

capacity, the physicians would seem to occupy the relation of independent contractors with reference to the patient, and the nurses, in

pital, 78 N. Y. App. Div. 317, 79 N. Y. Supp. 1004; *Cunningham v. Sheltering Arms*, [135 N. Y. App. Div. 178, 119 N. Y. Supp. 1033] * * *; *Hillyer v. St. Bartholomew's Hospital*, [(1909) 2 K. B. 820] * * * at page 827); and none is justified in principle. If there are duties performed by nurses foreign to their duties in carrying out the physician's orders, and having relation to the administrative conduct of the hospital, the fact is not established by this record, nor was it in the discharge of such duties that the defendant's nurses were then serving. The acts of preparation immediately preceding the operation are necessary to its successful performance, and are really part of the operation itself. They are not different in that respect from the administration of the ether. Whatever the nurse does in those preliminary stages is done, not as the servant of the hospital, but in the course of the treatment of the patient, as the delegate of the surgeon to whose orders she is subject. The hospital is not chargeable with her knowledge that the operation is improper any more than with the surgeon's. *Schloendorff v. Society of New York Hospital*, 211 N. Y. 125, 52 L. R. A. (N. S.) 505, Ann. Cas. 1915 C 581, 105 N. E. 92 (assault upon patient in committing operation in defiance of patient's orders).

In *Hillyer v. Governors of St. Bartholomew's Hospital*, L. R. [1909] 2 K. B. 820, it was held that plaintiff could not recover for burns and bruises sustained by him as a result of the negligent treatment accorded him when, as a charity patient in defendant's hospital, he was being examined under the influence of an anæsthetic, the surgeons, nurses and

other attendants involved, although (per Kennedy, L. J.) the defendants admitted that such persons were their servants, not having been their servants (per Farwell, L. J.) within the legal meaning of that word—the surgeons not at all (quoting *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675) and the nurses and other attendants not while they were in the examination room. Master of the Rolls Cozens-Hardy held that plaintiff's appeal from an adverse judgment should be dismissed "for the reasons contained in the judgments of Farwell L. J. and Kennedy L. J., which I have read." Both of the Lord Justices approved *Evans v. Liverpool Corporation*, [1906] 1 K. B. 160, and Justice Farwell's further "reason" is given above, but what Justice Kennedy's additional "reason" is, cannot be reduced to a satisfactory formula. Said Justice Kennedy: "In my view, the duty which the law implies in the relation of the hospital authority to a patient and the corresponding liability are limited. The governors of a public hospital, by their admission of the patient to enjoy in the hospital the gratuitous benefit of its care, do, I think, undertake that the patient whilst there shall be treated only by experts, whether surgeons, physicians or nurses, of whose professional competence the governors have taken reasonable care to assure themselves; and, further, that those experts shall have at their disposal, for the care and treatment of the patient, fit and proper apparatus and appliances. But I see no ground for holding it to be a right legal inference from the circumstances of the relation of hospital and patient that the hospital authority makes itself liable in damages, if

their professional capacity, to be subordinates of such independent contractor, not of the corporation.⁸³

Again it has been said that the natural persons administering the charity in the corporation's name, particularly in the case of those attending a patient in a charity hospital, are not the servants of the corporation, within the legal meaning of the word "servants," in that the corporation receives neither pecuniary benefit nor profit from their services, and that, therefore, the corporation cannot be held liable under the doctrine of respondeat superior for injuries sustained as a result of their negligence by one availing himself of the benefit of the charity.⁸⁴

members of its professional staff, of whose competence there is no question, act negligently towards the patient in some matter of professional care or skill, or neglect to use, or use negligently, in his treatment the apparatus or appliances which are at their disposal. It must be understood that I am speaking only of the conduct of the hospital staff in matters of professional skill, in which the governors of the hospital neither do nor could properly interfere either by rule or by supervision. It may well be, and for my part I should, as at present advised, be prepared to hold, that the hospital authority is legally responsible to the patients for the due performance of their servants within the hospital of their purely ministerial or administrative duties, such as, for example, attendances of nurses in the wards, the summoning of medical aid in cases of emergency, the supply of proper food, and the like. The management of a hospital ought to make and does make its own regulations in respect of such matters of routine, and it is, in my judgment, legally responsible to the patients for their sufficiency, their propriety, and observance of them by the servants."

⁸³ See *Schloendorff v. Society of New York Hospital*, 211 N. Y. 125, 52 L. R. A. (N. S.) 505, Ann. Cas. 1915 C 581, 105 N. E. 92.

⁸⁴ "Since these charitable hospitals perform a quasi-public function in ministering to the poor and sick without any pecuniary profit to themselves, the doctrine of respondeat superior should not be applied to them in favor of those receiving their charitable services." *Morrison v. Henke*, 165 Wis. 166, 170, 160 N. W. 173.

"We think the drift of all the cases clearly indicates a general conviction that an eleemosynary corporation should not be held liable for an injury [to one accepting its charity, which is] due only to the neglect of a servant, and [is] not caused by its corporate negligence in the failure to perform a duty imposed on it by law, and we are satisfied that this general conviction rests on sound legal principles. The law which makes one responsible for his own act, although it may be done through another, and which is expressed by the primary meaning of the maxim, 'Qui facit per alium facit per se,' is based on a principle of universal justice. The law which makes one responsible for an act not his own, because the actual wrongdoer is his servant, is based on a rule of public policy. The liability of a charitable corporation for the defaults of its servants must depend upon the reasons of that rule of policy, and their application to such a corporation. The rule is distin-

The Supreme Court of Alabama, however, holds that under the law of that state, the basis of the doctrine of respondeat superior is to be found in the maxim "qui facit per alium, facit per se," and that it is immaterial that the one sought to be held liable for negligence, under such doctrine, derived no benefit or profit from the

guished as the doctrine of respondeat superior, although that phrase is used broadly in reference to any relation of principal and agent, thereby causing much confusion. Here we use it in the narrow meaning suggested by its origin. The phrase is taken from the words of the statute of Westm. II. (Car. II.). 'Si custos gaolæ non habeat per quod justicietur vel unde solvat, respondeat superior suus qui custodiam hujus modi gaolæ sibi commisit.' As Lord Coke tells us (2 Inst. 382), this law was intended only for those who 'having the custody of gaols of freehold or inheritance commit the same to another that is not sufficient.' As sheriffs originally profited through the appointment of their subofficers, the rule of the statute was applied to sheriffs, although they were not included in its letter. This statute was passed before the first Year Book was kept, at a time when the English law was 'without form.' It recognized an injustice, and declared a rule of public policy, i. e. an injury done by one who is irresponsible must be answered for by his superior, when for his own convenience and emolument that superior has given the wrongdoer the opportunity of committing the injury. This rule of public policy modified the development of the law of master and servant from the beginning, and in this way infused into the law of agency a sort of fictitious agency, depending, not on the principle of justice that makes one responsible for his own act, but on a rule of public policy which, under certain circumstances, estops one from showing that the act in question was not his own. This view is

suggested by the opinion of Best, C. J., in *Hall v. Smith*, [2 Bing. 156].

* * * The reasons for the rule have been differently stated by others.

* * * Whart. Neg. § 157, gives, as the reason of the policy, that 'he who puts in operation an agency which he controls, while he receives its emoluments, is responsible for the injuries it incidentally inflicts, relying on Lord Brougham's statement in *Duncan v. Findlater* [see § 3360], 'I am liable for what is done for me and under my orders by the men I employ, for I may turn him from that employ when I please; and the reason that I am liable is this, that by employing him I set the whole thing in motion, and what he does, being done for my benefit and under my direction, I am responsible for the consequences of doing it.' This defendant does not come within the main reason for the rule of public policy which supports the doctrine of respondeat superior. It derives no benefit from what its servant does, in the sense of that personal and private gain which was the real reason for the rule. Again, so far as the persons injured are concerned, especially if they be patients at the hospital, the defendant does not 'set the whole thing in motion,' in the sense in which that phrase is used as expressing a reason for the rule. Such patient, who may be injured by the wrongful act of a hospital servant, is not a mere third party, a stranger to the transaction. He is rather a participant. The thing about which the servants are employed is the healing of the sick. This is set in motion, not for the benefit of the defendant, but of the public. Surely, those who accept the benefit,

work which the servant or agent, actually guilty of the negligence, was engaged in doing, and, consequently, refuses to hold that this theory of nonliability is a valid one.⁸⁵

Still another theory of nonliability is the "implied-assent" one. According to this theory, a person who accepts the benefit of a char-

contributing also by their payments to the public enterprise, and not to the private pocket of the defendant, assist as truly as the defendant in setting the whole thing in motion. But the practical ground on which the rule is based is simply this: On the whole, substantial justice is best served by making a master responsible for the injuries caused by his servant acting in his service, when set to work by him to prosecute his private ends, with the expectation of deriving from the work private benefit. This has at times proved a hard rule, but it rests upon a public policy too firmly settled to be questioned. We are now asked to apply this rule, for the first time, to a class of masters distinct from all others, and who do not and cannot come within the reason of the rule. In other words, we are asked to extend the rule, and to declare a new public policy, and say: On the whole, substantial justice is best served by making the owners [administrators] of a public charity, involving no private profit, responsible, not only for their own wrongful negligence, but also for the wrongful negligence of the servants they employ only for a public use and a public benefit. We think the law does not justify such an extension of the rule to respondeat superior. It is, perhaps, immaterial whether we say the public policy which supports the doctrine of respondeat superior does not justify such extension of the rule, or say that the public policy which encourages enterprises for charitable purposes requires an exemption from the operation of a rule based on legal fiction, and which, as applied to the owners [administra-

tors] of such enterprises, is clearly opposed to substantial justice. It is enough that a charitable corporation like the defendant, whatever may be the principle that controls its liability for corporate neglect in the performance of a corporate duty, is not liable, on grounds of public policy, for injuries caused by personal wrongful neglect in the performance of his duty by a servant whom it has selected with due care; but in such case the servant is alone responsible for his own wrong. This result is justified by the opinions in *Hall v. Smith*, [2 Bing. 156] *Holliday v. St. Leonard's*, [11 C. B. (N. S.) 192] and *Railway Co. v. Artist*, [60 Fed. 365] * * * substantially on the grounds above stated, and is reached, for one reason or another, by the greater number of courts that have dealt with this particular liability of a corporation for public or charitable purposes." *Hearns v. Waterbury Hospital*, 66 Conn. 98, 31 L. R. A. 224, 33 Atl. 595. See also *Parks v. Northwestern University*, 218 Ill. 381, 2 L. R. A. (N. S.) 556, 4 Ann. Cas. 103, 75 N. E. 991, aff'g 121 Ill. App. 512.

⁸⁵ *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 10 N. C. C. A. 361, 68 So. 4.

Under the Texas rule, charitable hospitals, "with respect to injuries inflicted upon third persons and employees by the negligence of their managers, agents, and servants in the conduct of the institution, * * * come entirely within the rule of respondeat superior." *St. Paul's Sanitarium v. Williamson*, — Tex. Civ. App. —, 164 S. W. 36.

ity must be impliedly taken to have assumed the risk of injury resulting from the negligence of servants of the corporation, administering the charity, who have been properly selected and retained by it, or to have waived liability on the part of such corporation for such injury.⁸⁶ While this theory has eminent authority to support it,⁸⁷ and notwithstanding it is generally held that the fact that a corporation receives pay from beneficiaries of the charity administered who are financially able to make compensation for the benefits

⁸⁶ *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 10 N. C. C. A. 361, 68 So. 4, in which the Alabama Supreme Court rejects this theory in its unqualified form. See *infra* this section.

⁸⁷ "In several jurisdictions * * * the immunity of charitable corporations for the torts of their trustees or servants has been made dependent on the relation the plaintiff bore to the corporation. In all it is recognized that the beneficiary of a charitable trust may not hold the corporation liable for the neglect of its servants. This is unquestionably the law of this state." *Hordern v. Salvation Army*, 199 N. Y. 233, 32 L. R. A. (N. S.) 62, 129 Am. St. Rep. 889, 92 N. E. 626, citing *Collins v. New York Post Graduate Medical School & Hospital*, 59 N. Y. App. Div. 63, 69 N. Y. Supp. 106; *Joel v. Woman's Hospital in State of New York*, 89 Hun (N. Y.) 73, 35 N. Y. Supp. 37; *Pryor v. Hospital*, 15 N. Y. Supp. 621, note, and *Haas v. Missionary Soc. of Most Holy Redeemer*, 6 N. Y. Misc. 281, 26 N. Y. Supp. 868. See also *Schloendorff v. Society of New York Hospital*, 211 N. Y. 125, Ann. Cas. 1915 C 581, 105 N. E. 92, in which the court, recognizing implied waiver as one of the two grounds on which the rule of nonliability to a beneficiary of the trust had been based (the other, and the one upon which the court rested its decision, being the nonapplicability of the doctrine of respondeat superior), and citing *Hordern v. Salvation Army*, *supra*, said:

"It is said that one who accepts the benefit of a charity enters into a relation which exempts one's benefactor from liability for the negligence of his servants in administering the charity."

In *Hamburger v. Cornell University*, 99 N. Y. Misc. 564, 166 N. Y. Supp. 46, an action against a governmentally and privately endowed educational corporation for personal injuries sustained by one of its students while engaged in performing an experiment in its chemical laboratory, it is said that "when a student enters the institution and accepts the benefit of the endowment, he enters into a relation which exempts the benefactor from liability for the negligence of its servants in administering the endowment and gift. The student, who has paid a small tuition or term fee or a special fee for a special course, seems to be in like position with a patient in the [charitable] hospital who pays for bed and board. * * * For the purposes of this case the same rules should be applied as are applied to charitable or eleemosynary institutions. Colleges endowed as is Cornell, in a negligence action brought by a duly received student, should be protected, or held liable, by the same rules of law as are charitable institutions. The waiver implied from the relation between the student and the endowed college protects the defendant against a recovery."

received, does not deprive it of the charitable character which it otherwise possesses,⁸⁸ nor affect the question of its liability to the one thus making compensation for injuries sustained by him,⁸⁹ the Supreme

88 United States. *Powers v. Massachusetts Homœopathic Hospital*, 109 Fed. 294, 65 L. R. A. 372.

Maine. *Jensen v. Maine Eye & Ear Infirmary*, 107 Me. 408, 33 L. R. A. (N. S.) 141, 78 Atl. 898.

Massachusetts. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529.

Michigan. *Downes v. Harper Hospital*, 101 Mich. 555, 25 L. R. A. 602, 45 Am. St. Rep. 427, 60 N. W. 42.

Ohio. *Taylor v. Protestant Hospital Ass'n*, 85 Ohio St. 90, 39 L. R. A. (N. S.) 427, 96 N. E. 1089.

Virginia. *Hospital of St. Vincent of Paul v. Thompson*, 116 Va. 101, 51 L. R. A. (N. S.) 1025, 81 S. E. 13.

"Corporations organized solely for educational purposes to which all their revenues must be applied are charitable institutions, and, as such, are not liable for the negligent acts of their servants, notwithstanding tuition fees are received for technical knowledge imparted to their students." *Hill v. President, etc., of Tualatin Academy & Pacific University*, 61 Ore. 190, 121 Pac. 901 (action for personal injuries sustained by alleged trespasser).

A corporation maintaining a working girls' home does not, by receiving payment from the occupants of the home, ipso facto cease to be a charity and become a purely business enterprise conducted for private profit. *Thornton v. Franklin Square House*, 200 Mass. 465, 22 L. R. A. (N. S.) 486, 86 N. E. 909.

An inmate of a home for discharged prisoners cannot recover from the charitable corporation maintaining the home, for personal injuries sustained while at work in the woodyard operated by it, not for commercial

gain or profit, but as part of the charity administered. *Conklin v. John Howard Industrial Home*, 224 Mass. 222, 112 N. E. 606.

The fact that plaintiff, suing a charitable corporation for personal injuries sustained while a pay patient in defendant's hospital as a result of a nurse's negligence, formally disclaims any right of execution against any fund of the corporation held by it for charitable uses and against all income of the corporation other than that received from pay patients, and asks that the verdict be paid out of funds derived from pay patients only, does not affect the rule which denies her the right to recover. *Gable v. Sisters of St. Francis*, 227 Pa. St. 254, 136 Am. St. Rep. 879, 75 Atl. 1087. Said the court: "The argument [to the contrary] overlooks the fact that every dollar received by the defendant corporation, from whatever source, is stamped with the impress of charity. For what did these plaintiffs pay? For accommodations which the hospital was enabled to provide through the use of money charitably donated to it. The room, the bed, the furnishings and conveniences for which the plaintiff paid are all of them the direct and immediate product of the voluntary donations it received. It follows that the money that the hospital receives from its pay patients is as strictly the increment of the charitable donations it has received as would be the interest on the money given it if invested on loan. If any profit results from this source, it can only be regarded as incidental addition to the trust fund or income."

89 Michigan. *Downes v. Harper Hospital*, 101 Mich. 555, 25 L. R. A.

Court of Alabama has held that such theory was not ground for denying a recovery against a charitable corporation for personal injuries sustained by a patient in its hospital as a result of the negligence of one of its servants when such patient paid full price for the service rendered.⁹⁰

602, 45 Am. St. Rep. 427, 60 N. W. 42.

Nebraska. *Duncan v. Nebraska Sanitarium Benevolent Ass'n*, 92 Neb. 162, 41 L. R. A. (N. S.) 973, Ann. Cas. 1913 E 1127, 137 N. W. 1120.

New York. *Cunningham v. The Sheltering Arms*, 135 App. Div. 178, 119 N. Y. Supp. 1033.

South Carolina. *Lindler v. Columbia Hospital of Richland County*, 98 S. C. 25, 81 S. E. 512.

Washington. *Wharton v. Warner*, 75 Wash. 470, 135 Pac. 235.

Wisconsin. *Morrison v. Henke*, 165 Wis. 166, 171, 160 N. W. 173.

"A charitable institution conducting a hospital for benevolent purposes alone does not necessarily incur liability in damages for the death of an insane patient who committed suicide when alone in a room, though pay for the patient's room and care was accepted under an oral agreement to keep a nurse in constant attendance." *Duncan v. Nebraska Sanitarium Benevolent Ass'n*, 92 Neb. 162, 41 L. R. A. (N. S.) 973, Ann. Cas. 1913 E 1127, 137 N. W. 1120 (headnote by the court).

⁹⁰ *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 10 N. C. C. A. 361, 385, 68 So. 4. Said the court: "The principle [of implied assent], if held to be sound, must rest upon the fact that it is the giving and receiving of charity that creates the exemption, and not the nature of the institution administering it. * * * It is a principle of law, as well as morals, that men must be just before they are generous. It is a well-known fact, of which courts may take judicial notice, that many of the most noted institu-

tions of this country for the treatment of the sick were established by endowments, are not operated, for profit, accept charity patients, and are such as come within the definition of charitable institutions laid down in the books. We are unable to see upon what line of reasoning one who is willing to pay, and does pay, full price for services to be rendered, should be held to have exempted the institution from all liability merely because it is not operated for profit. With that the patient is not concerned, nor indeed is he in any mood or condition to inquire. He is seeking restoration to health. He expects to pay the full price, and can it be said with any show of reason that, because forsooth the money which he pays is not to be paid out as dividends or profits, he lays himself liable to injury by the negligence of those in whose charge he places himself, or even it may be—and the doctrine followed to its ultimate conclusion would logically so lead—to the wilful or wanton wrongful conduct of the servants in charge of the institution. We think not, clearly." (In *Gitzhoffen v. Sisters of Holy Cross Hospital Ass'n*, 32 Utah 46, 8 L. R. A. (N. S.) 1161, 88 Pac. 691, an action against a hospital corporation organized for pecuniary profit for negligent injuries sustained by plaintiff while a patient in defendant's hospital, the court held that defendant's liability was not affected by the fact that the relation between the plaintiff and the county which paid the defendant to care for and treat the plaintiff was a charitable one.)

§ 3363. Application of theories. Without attempting in each case to indicate the theory on which the particular holding is based—if for no other reason than that the court itself has not always defined such theory with clearness, exactness and precision⁹¹—it may be said generally that there is authority for the proposition that a corporation created for the purpose of maintaining a public charity, the funds of which are derived from public and private donations and are held by it exclusively for such purpose, is not liable in tort to an injured beneficiary of the charity. This doctrine has been applied to corporations for the purpose of maintaining hospitals and similar institutions, in actions against them by patients or other persons receiving treatment or care, for injuries resulting from the negligence or wrongful act of a physician, nurse or other attendant.⁹² Likewise,

⁹¹“The conclusions reached are variant and irreconcilable. Some courts hold the rule of respondeat superior applicable to the fullest extent; others deny its applicability in toto; while others take intermediate ground for various reasons. The rule of total exemption is, perhaps, without exception, based upon grounds of public policy.” *Vermillion v. Women’s College of Due West*, 104 S. C. 197, 88 S. E. 649.

⁹²**Connecticut.** *Hearns v. Waterbury Hospital*, 66 Conn. 98, 31 L. R. A. 224, 33 Atl. 595.

Massachusetts. *McDonald v. Massachusetts General Hospital*, 120 Mass. 432, 21 Am. Rep. 529. See also *Benton v. Boston City Hospital*, 140 Mass. 13, 54 Am. Rep. 436, 1 N. E. 836.

Michigan. *Downes v. Harper Hospital*, 101 Mich. 555, 25 L. R. A. 602, 45 Am. St. Rep. 427, 60 N. W. 42, followed in *Pepke v. Grace Hospital*, 130 Mich. 493, 90 N. W. 278.

New York. *Joel v. Woman’s Hospital in State of New York*, 89 Hun 73, 35 N. Y. Supp. 37; *Van Tassel v. Manhattan Eye & Ear Hospital*, 60 Hun 585, 15 N. Y. Supp. 620.

England. *Hillyer v. Governors of St. Bartholomew’s Hospital*, L. R. [1909] 2 K. B. 820.

Perhaps the foremost of the above

decisions in the point of authority, in the United States at least, is *McDonald v. Massachusetts General Hospital*, supra. This decision has been the subject of some comment, some of it being adverse. In *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. Rep. 675, it was said that the authority of this case (*McDonald v. Massachusetts General Hospital*, supra), in so far as it rested on *Holliday v. St. Leonard*, 11 C. B. (N. S.) 192, was “seriously impaired” by the decisions in *Mersey Docks v. Gibbs*, 11 H. L. 686, L. R. 1 H. L. 93; *Forman v. Mayor of Canterbury*, L. R. 6 Q. B. 214; *Coe v. Wise*, 1 Q. B. 711, 5 B. & S. 440, 458, and *Winch v. Conservators of the Thames*, L. R. 7 C. P. 458, 9 C. P. 378.

Again, as to that case, it was also said: “The above case of *McDonald v. Mass. General Hospital* has been also frequently cited and followed in other jurisdictions [than Massachusetts], and we therefore think it important * * * to call attention to what seems to be the only authority relied upon in that opinion upon the question here under consideration—that of the English court in the case of *Halliday v. St. Leonard*, 11 C. B. (N. S.) 192, decided by the Court of Common Bench in 1861. It is clear,

this doctrine has been applied in the case of other charitable corpo-

however, that in the subsequent case of *Mersey Docks v. Gibbs*, Law Rep. 1 H. L. 93 (11 H. L. 686), the principle of *Halliday v. St. Leonard*, supra, was not followed, but that in effect that authority was overruled. The principal opinion in the case of *Mersey Docks v. Gibbs* was written by Mr. Justice Blackburn, and he was also the writer of the opinion in the case of *Foreman v. Canterbury Court of Queen's Bench*, Law Rep. 1870-71, 214, wherein, speaking of the said case of *Halliday v. St. Leonard*, it is said in the opinion as follows: 'Upon looking at the facts of that case it would appear that it would have been the authority directly in point for the present defendants if the case was still an authority at all; but, upon looking at the reason of that decision, we consider it to be overruled by the decision of the House of Lords in the case of *Mersey Docks v. Gibbs*, L. R. 1 H. L. 93. It is not overruled by name, but the principle upon which that case was decided in the House of Lords does overrule it. * * *' It is therefore made clearly to appear that the English authority relied upon in the case of *McDonald v. Mass. General Hospital*, supra, had been in effect, and, so far as the principle announced therein is concerned, overruled in the case of *Mersey Docks v. Gibbs*, supra, and this is expressly so stated in the case of *Foreman v. Canterbury*, supra, by Justice Blackburn, who was also the author of the opinion in the *Mersey Docks* Case. This is significant to be here noted because of the fact that the *McDonald* Case seems to be among the early cases treating the question in this country. It seems to have been largely followed by other jurisdictions. The *McDonald* Case was decided in 1876, and the decision in the *Mersey Docks* Case

antedates the *McDonald* Case some several years, as well also, it appears, does the *Foreman* Case, supra. This does not seem to have been taken note of or called to the attention of the Massachusetts Court in the *McDonald* Case. * * * That the *McDonald* Case was rested upon the English authority which had been overruled is noted in a very recent English case (*Hillyer v. Governors of St. Bartholomew's Hospital*, Law Reports 1909, 2 K. B. 820), wherein Kennedy, L. J., uses this language: 'With the American and New Zealand cases which were cited to us by the learned counsel on both sides I do not think it necessary to deal. They are not in agreement; in one of them, *McDonald v. Mass. Gen. Hospital*, relied upon by the defendants, the judgment appears to have been influenced by an English decision of *Halliday v. St. Leonard*, Shoreditch, which has been overruled by the House of Lords, in *Mersey Docks, Trustees, v. Gibbs*. See per Blackburn, J., in *Foreman v. Mayor of Canterbury*.' The importance of directing attention to this situation at this time is further emphasized when we note the fact that the *McDonald* case has been considered a leading case, if indeed not the pioneer case upon this particular question in this country and been followed, cited, and quoted from in many subsequent decisions." *Tucker v. Mobile Infirmary Ass'n*, 191 Ala. 572, 10 N. C. C. A. 361, 68 So. 4.

"A charitable institution conducting a hospital solely for philanthropic and benevolent purposes is not liable to inmates for the negligence of nurses." *Duncan v. Nebraska Sanitarium Benevolent Ass'n*, 92 Neb. 162, 41 L. R. A. (N. S.) 973, Ann. Cas. 1913 E 1127, 137 N. W. 1120.

Charitable hospital is not liable to

rations, as, for example, corporations for the purpose of maintaining an institution for the care of children,⁹³ a working girls' home,⁹⁴ an

patient for personal injuries resulting from negligence of nurse in whose selection it used due care. *Powers v. Massachusetts Homœopathic Hospital*, 109 Fed. 294, 65 L. R. A. 372.

A charitable corporation is not liable to a patient in its hospital for the malpractice of the attending surgeon whom it has used reasonable care in selecting. *Wharton v. Warner*, 75 Wash. 470, 135 Pac. 235.

A charitable corporation is not liable for personal injuries sustained by a patient in its hospital as a result of the negligence of a nurse, selected with due care. *Lindler v. Columbia Hospital of Richland County*, 98 S. C. 25, 81 S. E. 512.

Charitable hospitals, under the Texas rule, "with respect to patients within their walls or under their care, whether the patient be one on charity or one who pays, are liable for the negligence of their physicians, nurses, and servants only when it appears that ordinary care has not been exercised in their selection and retention." *St. Paul's Sanitarium v. Williamson*, — Tex. Civ. App. —, 164 S. W. 36.

"A public charitable hospital, organized as such and open to all persons, although conducted under private management, is not liable for injuries to a patient of the hospital, resulting from the negligence of a nurse employed by it." *Taylor v. Protestant Hospital Ass'n*, 85 Ohio St. 90, 39 L. R. A. (N. S.) 427, 96 N. E. 1089.

"It may * * * be conceded that, by the way of authority, a beneficiary of the charity cannot hold the association [corporation] responsible for negligent injuries." *Hospital of St. Vincent of Paul v. Thompson*, 116 Va. 101, 51 L. R. A. (N. S.) 1025, 81 S. E. 13.

"It is the settled rule that such a [charitable] hospital is not liable for the negligence of its physicians and nurses in the treatment of patients." *Schloendorff v. Society of New York Hospital*, 211 N. Y. 125, 52 L. R. A. (N. S.) 505, Ann. Cas. 1915 C 581, 105 N. E. 92.

One who as a patient in a charity hospital is sent by those in charge thereof to an insane asylum as an insane person has no right of action against the charitable corporation maintaining the hospital even though the act complained of was a malicious one. *Butler v. Lincoln Hospital & Home*, 155 N. Y. Supp. 1001, 1002.

The doctrine has been applied to railroad companies and other large corporations maintaining a hospital for their employees, and this, although the hospital is sustained in part by contributions from employees. *Union Pac. Ry. Co. v. Artist*, 60 Fed. 365, 23 L. R. A. 581; *Eighty v. Union Pac. Ry. Co.*, 93 Iowa 538, 27 L. R. A. 296, 61 N. W. 1056; *Richardson v. Carbon Hill Coal Co.*, 10 Wash. 648, 39 Pac. 95, 6 Wash. 52, 20 L. R. A. 338, 32 Pac. 1012.

⁹³ "It is a well-established rule, upheld by a number of decisions in this and other states, that a charitable institution, from which no financial benefit accrues to its directors or organizers, is not liable for an injury to a recipient of its charity resulting from the negligence of a person employed by the institution in the furtherance of its objects, providing that due care had been exercised in selecting the employee." *Cunningham v. The Sheltering Arms*, 135 N. Y. App. Div. 178, 119 N. Y. Supp. 1033.

⁹⁴ An occupant of a working girls' home, maintained as a public charity by a charitable corporation, cannot re-

educational institution,⁹⁵ an industrial school⁹⁶ and a house of

cover from the latter for personal injuries sustained as a result of the falling of a fire escape on the home's premises where the accident was caused by the negligence of servants or agents who had been properly selected. *Thornton v. Franklin Square House*, 200 Mass. 465, 22 L. R. A. (N. S.) 486, 86 N. E. 909, following law as laid down in *Farrigan v. Pevear*, 193 Mass. 147, 7 L. R. A. (N. S.) 481, 118 Am. St. Rep. 484, 8 Ann. Cas. 1109, 78 N. E. 855.

⁹⁵ *Parks v. Northwestern University*, 218 Ill. 381, 2 L. R. A. (N. S.) 556, 4 Ann. Cas. 103, 75 N. E. 991, aff'g 121 Ill. App. 512; *Hamburger v. Cornell University*, 99 N. Y. Misc. 564, 166 N. Y. Supp. 46; *Abston v. Waldon Academy*, 118 Tenn. 24, 11 L. R. A. (N. S.) 1179, 102 S. W. 351. See also *Currier v. Dartmouth College*, 105 Fed. 886, aff'd 117 Fed. 44 (action by a student for personal injuries sustained as a result of the allegedly careless throwing down of a chimney, standing on college land, by the superintendent of the college buildings).

One corporation allowing another to use land belonging to the former for the purpose of conducting an educational institution held not liable for the negligence of such other in the management of such institution. *Corley v. American Bapt. Home Mission Society*, 97 S. C. 460, 81 S. E. 146.

⁹⁶ *Williamson v. Louisville Industrial School of Reform*, 95 Ky. 251, 44 Am. St. Rep. 243, 24 S. W. 1065. See also *Corbett v. St. Vincent's Industrial School*, 177 N. Y. 16, 68 N. E. 997. Said the court in this last cited case: "The rule which exempts the defendant from damages resulting from accidents of this character [namely, accidents to inmates of its institution while engaged in doing the

work assigned them] would seem to be founded upon the plainest principles of reason and justice. The plaintiff was really a prisoner in the custody of the defendant, deprived of his liberty, and all his conduct and movements subject to such regulations as the defendant might reasonably prescribe, just as in the case of convicts in the prisons or jails of the state. In the interest of humanity it was thought to be wise to subject such young boys to a milder punishment than is meted out to older criminals. It was the duty of the defendant, having decided to receive the plaintiff into custody, to subject him to such care and discipline as would be likely to produce a reformation in his life, and to this end his employment at some useful labor was thought to be, and doubtless was, necessary. The defendant is in no sense a business enterprise. It has no stockholders, and is not organized for money-making purposes. The fact that it has a farm upon which it employs boys confined in the institution to some extent does not change its character as a charitable institution. It appears that there were something less than 200 boys in the institution at the time this accident happened. They were sent there, just as the plaintiff was, from various counties in the state. It is not at all likely that the institution could support these boys upon the small pittance [paid by the counties sending them] of \$2 a week, or less, as it was in some cases. Their proper support was derived from the farm and some other industries where the labor of the inmates could be utilized, and, of course, the proper care of their clothing rendered it necessary to keep and maintain a laundry. If, while working in that laundry upon a machine, the plaintiff

refuge.⁹⁷ The doctrine was also applied in a Pennsylvania case to a fire insurance patrol corporation, organized for the purpose of protecting and saving property from fire.⁹⁸ There was a decision to the contrary, however, in Massachusetts, in the case of a corporation composed of officers and agents of fire insurance companies in Boston, organized for the purpose of preventing fires and saving life and property, the expenses of which were paid by compulsory assessments on fire insurance agents and organizations doing business in the city.⁹⁹

was injured, as the record shows that he was, the result is doubtless unfortunate, but it is obvious that the defendant cannot be made liable in damages for the injury."

⁹⁷ *Perry v. House of Refuge*, 63 Md. 20, 52 Am. Rep. 495, holding referred to in *State v. Rich*, 126 Md. 643, 95 Atl. 956.

⁹⁸ *Fire Ins. Patrol v. Boyd*, 120 Pa. St. 624, 1 L. R. A. 417, 6 Am. St. Rep. 745, 15 Atl. 553.

⁹⁹ *Newcomb v. Boston Protective Department*, 151 Mass. 215, 6 L. R. A. 778, 24 N. E. 39, distinguishing *Fire Ins. Patrol v. Boyd*, 120 Pa. St. 624, 1 L. R. A. 417, 6 Am. St. Rep. 745, 15 Atl. 553, on the ground that "in that case membership in the corporation was open to everybody, and the expenses were wholly paid by voluntary contributions." The corporation in the case before it, the court declared, was organized, not for the purpose of a public charity, but in the interest of the insurance companies and agencies, and for the purpose of diminishing the cost of insurance. Continuing the court said: "The chief grounds on which it is contended that the work of this corporation is a public charity are the language of the statute which refers to the preservation of life and property in general terms, and the practice of the defendant to have no regard to ownership, and to make no distinction between insured and uninsured property. But these are of

little significance in view of other provisions of the statute, and especially in view of the fact that it is impracticable for the defendant to conduct its business in any other way." See also *Bates v. Worcester Protective Department*, 177 Mass. 130, 58 N. E. 274, following *Newcomb v. Boston Protective Department*, supra. In *Coleman v. Fire Ins. Patrol of New Orleans*, 122 La. 626, 21 L. R. A. (N. S.) 810, 16 Ann. Cas. 1217, 48 So. 130 (adhered to in *Rady v. Fire Ins. Patrol of New Orleans*, 126 La. 273, 139 Am. St. Rep. 511, 52 So. 491), which approved the doctrine of the Massachusetts cases above cited, the court said: "We are unable to concur in the view that, where private corporations, engaged in the business of insuring property against fire, in their own interest, and with a view to minimizing their own losses, employ agents to save the property insured by them, or to aid in the extinguishment of the fire insured against, they are to be considered charitable organizations, merely because, in the instrument under which they are allowed to associate themselves for the employment of such agents, it is declared that the purpose is to save life, as well as property, and that no discrimination is to be made between property that is insured and that which is not, nor yet because there is no provision in the instrument for the formal declaration of dividends." See

But a charitable corporation rests under a non-delegable duty of exercising care in selecting physicians, nurses and other employees who attend to the needs of its patients¹ and it is liable, it has been held, for the negligence or wrongful acts of its physicians, nurses or other employees to the same extent as any other private corporation, if it has been guilty of negligence in employing or retaining them.² And again it would seem that a charitable corporation may be liable in damages to one whom, unlawfully and against her will, it detains in the institution maintained by it.³ Moreover, it has been held that the rule of exemption from liability does not apply to a cemetery corporation⁴ nor to a Young Men's Christian Association.⁵ So also while the Missouri Court of Appeals has held that an employee of a charitable corporation cannot recover from it for personal injuries sustained while in the discharge of his duties in its hospital,⁶ the Supreme Court of Minnesota has held that the Minnesota statute,⁷ which imposes upon all persons and corporations owning or operating dangerous machinery the duty of covering or guarding the danger-

also *Sutter v. Milwaukee Board of Fire Underwriters*, 161 Wis. 615, 155 N. W. 127.

¹ **United States.** *Powers v. Massachusetts Homœopathic Hospital*, 109 Fed. 294, 65 L. R. A. 372.

Massachusetts. *Thornton v. Franklin Square House*, 200 Mass. 465, 22 L. R. A. (N. S.) 486, 86 N. E. 909.

New York. *Cunningham v. The Sheltering Arms*, 135 App. Div. 178, 119 N. Y. Supp. 1033.

South Carolina. *Lindler v. Columbia Hospital of Richland County*, 98 S. C. 25, 81 S. E. 512.

Texas. *St. Paul's Sanitarium v. Williamson*, — Tex. Civ. App. —, 164 S. W. 36.

Washington. *Wharton v. Warner*, 75 Wash. 470, 135 Pac. 235.

England. *Hillyer v. Governors of St. Bartholomew's Hospital*, L. R. [1909] 2 K. B. 820.

² *Glavin v. Rhode Island Hospital*, 12 R. I. 411, 34 Am. St. Rep. 675, considered in § 3361, *supra*.

The finding of the jury, in an action against a charitable corporation for burns received by a patient in its hos-

pital from a hot water bottle which had been placed in her bed, that the corporation failed to exercise ordinary care in the selection and retention of those of its employees who were charged with the duty of caring for the patient held to be sustained by the evidence. *St. Paul's Sanitarium v. Williamson*, — Tex. Civ. App. —, 164 S. W. 36.

³ *Gallon v. House of Good Shepherd*, 158 Mich. 361, 24 L. R. A. (N. S.) 286, 133 Am. St. Rep. 387, 122 N. W. 631. See also *Smith v. Sisters of Good Shepherd*, 27 Ky. L. Rep. 1107, 87 S. W. 1083, in which it was held that the verdict for defendant, a charitable corporation, sued by plaintiff for false imprisonment and cruel treatment, was in accord with the weight of the evidence.

⁴ *Donnelly v. Boston Catholic Cemetery Ass'n*, 146 Mass. 163, 15 N. E. 505.

⁵ *Chapin v. Holyoke Y. M. C. A.*, 165 Mass. 280, 42 N. E. 1130.

⁶ *Whittaker v. St. Luke's Hospital*, 137 Mo. App. 116, 117 S. W. 1189.

⁷ Section 1813, R. L. 1905.

ous parts thereof as far as practicable, applies to charitable corporations owning and operating such machinery as well as to all other persons or corporations similarly situated, and such a corporation will be liable to a servant for personal injuries resulting from its failure to discharge this statutory duty.⁸ There is also authority for the proposition that a charitable corporation will be liable in an action ex delicto where the person injured was, at the time, a stranger to it⁹

⁸ *McInerny v. St. Luke's Hospital Ass'n of Duluth*, 122 Minn. 10, 46 L. R. A. (N. S.) 548, 141 N. W. 837.

⁹ *Bruce v. Central M. E. Church*, 147 Mich. 230, 10 L. R. A. (N. S.) 74, 11 Ann. Cas. 150, 110 N. W. 951, distinguishing *Downes v. Harper Hospital*, 101 Mich. 555, 25 L. R. A. 602, 45 Am. St. Rep. 427, 60 N. W. 42. (In *Whittaker v. St. Luke's Hospital*, 137 Mo. App. 116, 117 S. W. 1189, *Bruce v. Central M. E. Church*, supra, was said to be "a case weakened as authority by the difference of opinion among the judges regarding the ground of liability, and not easy to reconcile with prior decisions of the same court"); *Hordern v. Salvation Army*, 199 N. Y. 233, 32 L. R. A. (N. S.) 62, 139 Am. St. Rep. 889, 92 N. E. 626. See also *Powers v. Massachusetts Homœopathic Hospital*, 109 Fed. 294, 300, 65 L. R. A. 372. Compare, however, *Hill v. President, etc., of Tualatin Academy & Pacific University*, 61 Ore. 190, 121 Pac. 901.

A charitable corporation is liable, in the same manner as any other corporation, for personal injuries sustained by a third person as a result of the negligence of its servant in the care and management of a horse or team while the latter is being employed for its purposes, even though there is neither proof nor allegation that there was lack of care or diligence on its part in the selection or retention of such servant. *Basabo v. Salvation Army*, 35 R. I. 22, 42 L. R. A. (N. S.) 1144, 85 Atl. 120. Although the court, in disposing of this

case, makes the statement that "in view of the principles above set forth, this court is of the opinion that both upon reason and upon authority, so far as the cases directly apply to the case at bar, the defendant corporation, although it is a charitable corporation, is liable, as any other corporation, for injuries to third persons caused by the negligence of its servants and agents in the care and management of its horses and teams while employed for its purposes, even though it is not shown or alleged that there has been any lack of care or diligence on the part of the defendant in the selection or retention of such servants or agents," it is believed, in view of the court's further statement that "we are clearly of the opinion that the true legal relation of master and servant existed between the defendant and the drivers in its employ at the time of the alleged injury," that, in using the word "agents" as it appears in the first quoted statement, the court was ruling on a question not involved in the determination of the case, and that the only proposition for which the case is authority, strictly speaking, is the one that the corporation is liable when there existed the relation of master and servant within the legal meaning of that phrase.

Where the driver of a hospital ambulance is the servant of the charitable corporation maintaining the hospital, such corporation will be liable to a third person injured as a result of the negligent manner in which the

as far, at least, as his having been a beneficiary of the charity being administered.

ambulance is driven. Kellogg v. Church Charity Foundation of Long Island, 203 N. Y. 191, 38 L. R. A. (N. S.) 481, Ann. Cas. 1913 A 883, 96 N. E. 406, reversing judgment for plaintiff on the ground that the evidence showed that the relation of master and servant did not exist between the corporation and the driver of the ambulance, and that there was

no evidence that the corporation's surgeon riding in the ambulance participated in the driver's negligence. Contra, Noble v. Hahnemann Hospital of Rochester, 112 N. Y. App. Div. 663, 98 N. Y. Supp. 605 which, although directly opposed in principle to Kellogg v. Church Charity Foundation of Long Island, *supra*, was not referred to in the opinion therein.

CHAPTER 53

CRIMES AND PENALTIES

- § 3364. In general.
- § 3365. Corporation as "person," etc., within criminal statute.
- § 3366. Legislative authority for act as defense.
- § 3367. Unauthorized and ultra vires acts.
- § 3368. Crimes with basis in misfeasance.
- § 3369. Crimes involving malice or intent.
- § 3370. Crimes involving personal violence.
- § 3371. Nuisances.
- § 3372. Applicability of usual penalty.
- § 3373. Criminal prosecution when penalty for act expressly provided.
- § 3374. Miscellaneous crimes.
- § 3375. Instituting prosecution.
- § 3376. Process.
- § 3377. Presumption of innocence, burden of proof and sufficiency of evidence.
- § 3378. Corporations in hands of receivers.
- § 3379. Statutes imposing penalties—Applicability to corporations.

§ 3364. In general. While it has often been said, principally, perhaps, on the authority of a statement credited to Lord Holt,¹ that anciently a corporation as an entity was not indictable under the common law,² it is altogether probable that there never was a time when

1 "A corporation is not indictable, but the particular members of it are." Sutton's Case, 12 Mod. 559 (by Lord Holt).

2 "It is said * * * by Blackstone, that a corporation cannot commit treason, felony, or other crime, in its corporate capacity, citing the case of Sutton's Hospital, 10 Coke 32. The original authority is simply, that a corporation cannot commit treason." State v. Morris & E. R. Co., 23 N. J. L. 360, 364 (by Green, C. J.).

Corporations cannot commit treason nor be outlawed "for they have no souls." Sutton's Hospital Case, 10 Coke 23, 32.

"The reason that no indictment

could formerly be found against a corporation for a crime seems to have been founded, although some writers give a different reason, entirely upon the fact that, as a defendant could not then appear by attorney or agent, the indicted corporation could not be brought into court. It could not come itself into court, and it could not appear by an agent or attorney, and consequently there was no way in which the court could proceed against the corporation. But as soon as parties were permitted to appear in some courts by attorney, although not so permitted in others, it was held that a corporation was liable to indictment in a court in which they were not allowed to appear by at-

in no case and under no circumstances would an indictment lie against a body corporate.³ Not that the criminal law in all of its fullness and

torney, the practice being, when the corporation was indicted in such a court, to remove the indictment by certiorari into a court where such corporation might appear by attorney, and there be called upon to plead." *People v. Clark*, 8 N. Y. Cr. 169, 179, 14 N. Y. Supp. 642. (That a corporation might appear by attorney was, however, recognized in the case of *Sutton's Hospital*, 10 Coke 23, 32, decided in 1613!)

3 "While it is conceded that a corporation cannot, from its nature, be guilty of treason, felony, or other crime involving *malus animus* in its commission, it is believed that there is no authority, ancient or modern, which denies the liability of a corporation aggregate to indictment, except an anonymous case, said to have been decided by Chief Justice Holt, in the Court of King's Bench, in the 13 Will. 3 (1701). The case is reported, in 12 Mod. 559, briefly as follows: 'Note per Holt, Chief Justice. A corporation is not indictable, but the particular members of it are.' It may well be doubted whether this is not one of those cases which extorted from Lord Holt the bitter complaint of his reporters, that the stuff which they published would make posterity think ill of his understanding, and that of his brethren on the bench.' Aside from the apocryphal character of the report, it is hardly credible that so learned and accurate a judge as Lord Holt should have laid down the broad proposition imputed to him by his reporter. It is certain that while he was Chief Justice of the King's Bench, there were cases before that court of indictments against quasi corporations for neglect to repair roads and bridges. *Regina v. The County of Wilts*, 1 Salk. 359; *The*

Queen v. The Inhabitants of Cluworth, 6 Mod. 163, S. C.; 1 Salk. 359, and in *The Queen v. Saintiff*, 6 Mod. 255, Lord Holt himself held, that if a common footway be in decay, an indictment must of necessity lie for it, because an action will not lie without a special damage. It seems to be true, moreover, as was stated by Talfourd, Sergeant, *arguendo*, in *The Queen v. Railway Co.*, 3 Queen's Bench 227, that although there was at that time no direct authority in England for the position, that a corporation aggregate is indictable in the corporate name, yet the course of precedents has been uniform for centuries, and the doctrine has frequently been taken for granted, both in arguments and by the judges. The case of *Langforth Bridge*, Cro. Car. 365 (1635); *Regina v. The Inhabitants of the County of Wilts*, 1 Salk. 359 (1705); *The King v. Inhabitants of the West Riding of Yorkshire*, 2 Blae. Rep. 685 (1770); *Rex v. The Inhabitants of Great Boughton*, 5 Burr. 2700 (1771); *The King v. The Inhabitants of Clifton*, 5 D. & E. 499 (1794); *Rex v. The Corporation of Liverpool*, 3 East 86 (1802); *Rex v. Mayor of Stratford upon Avon*, 14 East 348 (1811); *Rex v. The City of Gloucester*, Dougherty's Crown Circ. Ass. 259. Notwithstanding the frequent instances to be found in the books of indictments against aggregate corporations for neglect of duty imposed by law, the liability of a corporation to indictment was not expressly adjudicated in Westminster Hall until the * * * case of *The Queen v. The Birmingham and Gloucester Railway Co.*, 9 Car. & Payne 469, 3 Queen's Bench 223. In that case, it was directly adjudged that a corporation aggregate may be indicted

to its farthest limit has ever been or can ever be extended to include corporations; always there have been as there are to-day obstacles in the way of so enforcing it—obstacles arising from the inherent nature of a corporation.⁴ “A corporation has no mind; hence, it can have no guilty intent. It has no physical body; hence, it cannot be arrested nor subjected to any form of corporal punishment.” Thus has run certain of the argument against holding corporations amenable to criminal prosecution.⁵ Manifestly, an incorporeal, soulless creature

by their corporate name for disobedience to an order of justices requiring such corporation to execute works pursuant to a statute. The same principle has been repeatedly recognized in the American courts, both before and since the decision in *The Queen v. The Birmingham and Gloucester Railway Company*. *Mower v. Leicester*, 9 Mass. 250; *Howard v. North Bridgewater*, 16 Pick. 190; *The Squahanna and Bath Turnpike Co. v. The People*, 15 Wend. 267; *Freeholders v. Strader*, 3 Harr. 108.” *State v. Morris & E. R. Co.*, 23 N. J. L. 360, 364 (by Green, C. J.).

“Lord Holt is reported as having said that a corporation is not indictable, but the particular members of it are. This doctrine, however, if it has ever obtained, is not now recognized in any jurisdiction.” *Southern Ry. Co. v. State*, 125 Ga. 287, 114 Am. St. Rep. 203, 5 Ann. Cas. 411, 54 S. E. 160. Compare the statement in *McDaniel v. Gate City Gas-Light Co.*, 79 Ga. 58, 3 S. E. 693, that “The defendant is a corporation. We do not understand that in this state a corporation can be indicted for an offense,” declared obiter in *Southern R. Co. v. State*, 125 Ga. 287, 114 Am. St. Rep. 203, 5 Ann. Cas. 411, 54 S. E. 160, in which the court held to the contrary.

In an early Virginia case in which an information charged a turnpike company with a nuisance in obstructing a public highway, the General Court held “that a corporation, such

as the [defendant] President, Directors and Company of the Swift Run Gap Turnpike Company, cannot be impleaded by its artificial name for the criminal offense stated in the information.” *Com. v. Swift Run Gap Turnpike Co.*, 2 Va. Cas. 362, 363.

4“Of course, there are certain crimes of which a corporation cannot be guilty; as, for instance, bigamy, perjury, rape, murder, and other offenses, which will readily suggest themselves to the mind. Crimes like these just mentioned can only be committed by natural persons, and statutes in relation thereto are for this reason never construed as referring to corporations; but when a statute in general terms prohibits the doing of an act which can be performed by a corporation, and does not expressly exempt corporations from its provisions, there is no reason why such statute should be construed as not applying to them, when the punishment provided for its infraction is one that can be inflicted upon a corporation,—as, for instance, a fine.” *United States v. John Kelso Co.*, 86 Fed. 304, 306.

5“It was in the early history of the law held that, as a corporation was soulless, it could do no wrongful or immoral act, and could not, therefore, be liable in tort. This doctrine has long since become obsolete, and it has long been well settled that a corporation is liable civiliter for all torts committed by its authority, express or implied. With the growth of corpora-

cannot "commit" a crime in the same sense nor in the same manner as a natural person, but that a corporation, notwithstanding its incor-

tions came the necessity for this rule, and its adaptability to changed circumstances is an excellence of the common law. So far does the rule extend that a corporation is liable civilly for every intended or negligent wrong it may do, although the act may be *ultra vires*. If it be incidental to or connected with its business, or if it ratify the transaction, as by accepting the benefit, it must respond in damages, although the act be done, as it must, by an agent. In time, it came to be admitted that a corporation was liable to be indicted for a neglect of duty, or a mere nonfeasance; but it was claimed that its nature did not admit of its doing positive wrong, and that, therefore, it was not liable criminally for a misfeasance, whereby a wrong was done by a violation of its duty. This same reason, however, if sound, applied equally to civil as well as criminal injuries; and it soon became known from experience that * * * if a corporation had no hands with which to strike, it may employ the hands of others. This distinction was therefore properly disregarded as unsound. If the argument be sound that a corporation is not liable to indictment for any offense, because the criminal act was not warranted by its corporate powers, then the same reasoning would result in its non-liability for all wrongs, civil as well as criminal. Such a rule would lead to its absolute impunity for all wrongs, which the experience of the day shows would produce great injustice both to individuals and the public. If it be said that the individuals who might do the act would be liable, it may be said that this is true as to every servant or agent who does a wrong, but because this is so the

principal is not exempt. Indeed, it has been and should be rather the policy of the law, because that is likely to the better protect from the commission of wrong, to look rather to the principal than the agent, and it seems to us especially should this be so in the case of corporations for whose benefit the act is done, or, being connected with its business, is negligently omitted to be done; its directors in charge or its workmen being perhaps unknown and irresponsible. The object should be to reach and punish the real power in the matter, and thus prevent a repetition of the offense. Experience showed the necessity of modifying the old rules; and the decided tendency of modern decision has been to extend the application of all legal remedies, both civil and criminal, to corporations, and subject them thereto as in the case of individuals, so far as is possible. It is therefore now well settled in the courts of this country, as well as in England, that they are indictable for misfeasance as well as a nonfeasance of duty unlawful in itself, and injurious to the public. It has therefore been held that they may be indicted for a nuisance, whether arising from misfeasance or nonfeasance, or for an injury otherwise to the public, unlawful in itself, and arising either from commission, or the omission to perform a legal duty. They may be indicted for erecting and continuing a building; for leaving railroad cars in a street; for neglecting to repair a highway; for permitting stagnant water to remain on their premises; for libel; for 'Sabbath-breaking' by doing work on Sunday in violation of a statute; and in many other instances. It is true there are crimes of which from their very

poreality and soullessness, can be held responsible for certain crimes committed in its behalf by the natural persons who are its agents cannot be doubted as a rule which obtains to-day⁶ and which was first

nature, as perjury, for example, they cannot be guilty. There are crimes to the punishment for which, for a like reason, they cannot be subjected, as in the case of a felony. But wherever the offense consists in either a misfeasance or a nonfeasance of duty to the public, and the corporation can be reached for punishment as by a fine and the seizure of its property, precedent authorizes, and public policy requires, that it should be liable to indictment. Any other rule would in many cases preclude adequate remedy, and leave irresponsible servants to answer for the offense, rather than those who are really most at fault. * * * If it be said that such a rule may subject the property of innocent stockholders for the acts of the directors to which they are not actual parties, and of which they have no knowledge, the answer is that they select the directors, and it is their business to have those who will see that the corporate business is so conducted as not to injure others or infringe upon public right and good order in the community. If the penalty prescribed for the act be both fine and imprisonment, then, so far as the punishment cannot, from the nature of the offender, be carried out, the statute is, of course, inoperative." *Com. v. Pulaski County Agricultural & Mechanical Ass'n*, 92 Ky. 197, 17 S. W. 442.

⁶ The rule that one who advises or commands the commission of a crime is himself liable therefor applies to corporations. *State v. Southern R. Co.*, 145 N. C. 495, 13 L. R. A. (N. S.) 966, 59 S. E. 570.

"A corporation, being responsible for the acts of its agent, is indictable and punishable just as a natural per-

son would be for any unlawful act done by any of its servants as its agent and with its consent, if the act done by such servant in the conduct of the corporation's business is forbidden by law, and its commission is punishable as a crime." *Rose v. State*, 4 Ga. App. 588, 62 S. E. 117.

The only punishment which can be visited upon a corporation being a fine, a criminal prosecution against a corporation is in effect no more than an action for the recovery of a penalty, with this difference, that, in view of the Sixth Amendment to the Federal Constitution the trial must be had in the district wherein the crime was committed. *John Gund Brewing Co. v. United States*, 204 Fed. 17, 21.

A railroad company, which, under the statute, took the franchise of a similar company, obtained through foreclosure proceedings, cum onere, is subject to indictment for nonfeasance which, had it been that of the mortgagor company before the sale of its franchise, would have been ground for indictment against it. *New York & G. L. R. Co. v. State*, 50 N. J. L. 303, 13 Atl. 1, aff'd 53 N. J. L. 244, 23 Atl. 168.

"A foreign corporation doing business in this state is no less subject to its laws, criminal as well as civil, because its principal place of business happens to be in another state." *State v. Paggett*, 8 Wash. 579, 36 Pac. 487.

A statute which, after providing for the examination of turnpike roads and the making of complaints of their nonrepair to the attorney general or district attorney, whose duty it shall be to prosecute the owning company in the name of the people of the state, declares that "such corpora-

formulated in England long prior to the American Revolution.⁷

As to the matter of intent, if a corporation cannot have a guilty mind⁸ and for that reason cannot commit crimes in which a *malus animus* is a necessary ingredient, it is not on that account to be accorded immunity from prosecution for crimes to the commission of which a *mens rea* is not essential.⁹ If it cannot be arrested, it can at

tion, if convicted of having suffered their road to be out of repair, etc., shall be fined in a sum not exceeding two hundred dollars," contemplates a criminal prosecution and not a civil action. "The corporation is to be convicted; that must be done by a jury; and if convicted, the statutes say, the corporation shall be fined in a sum not exceeding \$200, which fine must be imposed by the court. The finding the facts of a case by a jury, and the fixing the amount to be paid by the defendants by the court, is contrary to all rules of proceeding in civil suits, but is in perfect accordance with proceedings upon indictments." *People v. Goshen & M. Turnpike Road*, 11 Wend. (N. Y.) 597.

In view of the fact that the Nebraska Maximum Freight Rate Law characterizes its violation as an "offense," describes the means of its enforcement as a "prosecution," refers to the verdict as a "conviction," and calls the judgment a "fine," the legislature will be understood as having intended that the proceedings against a railroad company on its failure to observe the provisions of the law should be criminal and not civil. *State v. Missouri Pac. R. Co.*, 64 Neb. 679, 90 N. W. 877.

Criminal prosecution rather than civil action held to lie for violation of Nebraska Railway Commission Law. *Western U. Tel. Co. v. State*, 86 Neb. 17, 124 N. W. 937.

7 "That a corporation, as such, may be indicted and tried, and thus punished criminally for a public offense which it can commit, is no new propo-

sition. Some crimes a corporation cannot commit. It has no soul, and so can have no actual wicked intent. It cannot be guilty of treason, or murder, or criminal conspiracy [see, however, as to a corporation's capacity to criminally conspire, § 3374, *infra*]. Other offenses it may and does commit when it does or omits to do some act, the doing or non-doing of which constitutes the offense, without regard to the intent. So a corporation may be punished criminally, if such acts are made public offenses, for obstructing a highway, polluting a stream, or taking illegal interest. This law and this distinction are older than Blackstone, and will be conceded without authorities." *State v. First Nat. Bank*, 2 S. D. 568, 51 N. W. 587.

⁸ See § 3369, *infra*.

⁹ "There is a large class of offenses * * * wherein the crime consists in purposely doing the things prohibited by statute. In that class of crimes we see no good reason why corporations may not be held responsible for and charged with the knowledge and purposes of their agents, acting within the authority conferred upon them." *New York Cent. & H. River R. Co. v. United States*, 212 U. S. 481, 53 L. Ed. 613.

"The case of *State v. Great Works M. & M. Co.*, 20 Me. 41, supports the proposition that a corporation is not amenable to prosecution for a positive act of misfeasance, involving a specific intention to do an unlawful act, and it must be conceded there are to be found dicta in many other

least be summoned.¹⁰ If it cannot be executed or imprisoned, it can at least be fined.¹¹ "There are crimes of which, from their very nature, as perjury for example, they [corporations] cannot be guilty. There are crimes to the punishment for which, for a like reason, they cannot be subjected, as in the case of felony; but wherever the offense consists in either a misfeasance or a nonfeasance of duty to the public, and the corporation can be reached for punishment as by a fine and seizure of its property, precedent authorizes and public policy requires that it should be liable to indictment,"¹² and, in this connection, it is immaterial that the corporate officers and agents are themselves severally liable to indictment for the crime with which the corporation is charged.¹³

cases to the same effect. In a general sense it may be said that no crime can be committed without a joint operation of act and intention. In many crimes, however, the only intention required is an intention to do the prohibited act—that is to say, the crime is complete when the prohibited act has been intentionally done; and the more recent and better considered cases hold that a corporation may be charged with an offense which only involves this kind of intention, and may be properly convicted when, in its corporate capacity, and by direction of those controlling its corporate action, it does the prohibited act. In such a case the intention of its directors that the prohibited act should be done is imputed to the corporation itself." *United States v. John Kelso Co.*, 86 Fed. 304, 305.

¹⁰ See § 3376, *infra*.

¹¹ See § 3372, *infra*.

¹² *Com. v. Pulaski County Agricultural & Mechanical Ass'n*, 92 Ky. 200, 17 S. W. 442.

¹³ "It is true that the doctrine of holding corporations responsible for violation of penal laws is one developed by gradual evolution; but it is none the less the law, and is of healthful necessity and utility." *Southern Exp. Co. v. State*, 1 Ga. App. 700, 58 S. E. 67.

"The whole growth of the modern law tends to subject corporations, as nearly as may be, to the same pains and penalties imposed upon individuals. Of course, if the law imposed a death penalty or personal imprisonment, a corporation could not be subjected thereto." *Joplin Mercantile Co. v. United States*, 213 Fed. 926, 936, Ann. Cas. 1916 C 470.

In Indiana, where the criminal law is wholly of statutory origin, "corporations are only indictable where the legislature has specifically provided that they may be proceeded against." *State v. French Lick Springs Hotel Co.*, 42 Ind. App. 282, 85 N. E. 724, 82 N. E. 801 (on petition for rehearing).

¹³ "It is said * * * that the individuals who concur in making the order or in doing the work are individually responsible. And so is every servant or agent by whose agency a tort is committed, but it has never been supposed that the principal is therefore exempt from liability. On the contrary, the principle and the policy of the law has ever been to look to the principal rather than to the mere agent; and in the case of corporations, it is the clear dictate of sound law not only, but of public policy, to look rather to the corporation at whose instance and for whose

§ 3365. Corporation as "person," etc., within criminal statute. The extent to which corporations are subject to statutes made applicable to "persons," "residents" and "citizens" has received treatment in a preceding chapter.¹⁴ The general rule to-day would seem to be, as laid down by the Supreme Court of Colorado, that "prima facie, the word 'person' in a penal statute which is intended to inhibit an act, means 'person in law' (that is, an artificial as well as a natural person), and therefore includes corporations, if they are within the spirit and purpose of the statute."¹⁵ Thus it has been

benefit the wrong is perpetrated, than to the individual directors by whose order the wrong was done, who may be entirely unknown, or to the laborers by whom the work was performed, who, in a great majority of cases, would be alike unknown and irresponsible." *State v. Morris & E. R. Co.*, 23 N. J. L. 360, 369 (by Green, C. J.).

That the corporation's servant who actually does the criminal act may be punished is no defense to the liability of the corporation therefor. *Rose v. State*, 4 Ga. App. 588, 62 S. E. 117.

"An officer of a corporation, through whose act the corporation commits an offense against the laws of the state, is himself also guilty of the same offense." *Overland Cotton Mill Co. v. People*, 32 Colo. 263, 105 Am. St. Rep. 74, 75 Pac. 924. See also *United States v. Winslow*, 195 Fed. 578, 581.

Where a corporation is guilty of a violation of a city ordinance, the corporation and its officers and directors are all subject to prosecution therefor. *People v. Detroit White Lead Works*, 82 Mich. 471, 9 L. R. A. 722, 46 N. W. 735.

¹⁴ See §§ 53-56.

¹⁵ *Overland Cotton Mill Co. v. People*, 32 Colo. 263, 105 Am. St. Rep. 74, 75 Pac. 924, holding that a corporation is a "person" within the meaning of the Colorado statute prohibiting "any person" from employing children under the age of 14 years in any mill or factory.

Corporations are not always included in the word "person" as used in statutes, and whether they are included in such word as used in a particular statute is to be determined by ascertaining the legislative intention, the latter, in turn, being determined "by the aid of the context and the general scope and purpose of the act." *Standard Oil Co. v. State*, 117 Tenn. 618, 10 L. R. A. (N. S.) 1015, 100 S. W. 705, holding that a corporation is not a "person" within the meaning of section 3 of the Tennessee Anti-Trust Law which makes any "person or persons" violating the provisions of such law subject to punishment by fine and imprisonment or by fine or imprisonment, it clearly appearing from the law as a whole and from section 3 in particular that it was the legislative intention that such section should apply to natural persons only.

By the special charter of a canal company it was provided "that, if any person or persons shall wilfully, maliciously, or contrary to law, take, remove, break down, dig under, or otherwise injure any part of said canal * * * such person or persons shall forfeit and pay to such corporation a sum not less than fifty dollars, nor more than five thousand dollars. * * * And, such offender or offenders shall be further liable to indictment for such trespass * * * and on conviction thereof, shall be sentenced to pay a fine to the use of

held that a railroad company is subject to indictment under a statute providing that if "any person" shall obstruct a public road, he shall be guilty of a misdemeanor; ¹⁶ that section 6 of the federal act relating

the state," etc. Held, considering other provisions of the charter not set out, that a city which had filled up a portion of the canal was not, by reason thereof, liable for the penalty provided. *Cumberland & O. Canal Corporation v. Portland*, 56 Me. 77, 78. While this case is not strictly in point so far as decision is concerned, the following broad statements of the court do touch upon the question involved: "The question presented, is whether a suit for the penalty given by this section can be maintained against a corporation, by whose servants the acts prohibited have been done. The language of the section manifestly refers only to individuals—persons—offenders, those who could 'wilfully, maliciously, or contrary to law,' do the several acts forbidden. But malice and wilfulness cannot be predicated of a corporation, though they may well be of its members."

A corporation is not subject to indictment under the Ohio statute relating to nuisances, it not being a "person" within the meaning of that word as used in such statute. "Criminal laws are to be construed strictly in favor of the accused. In its primary sense, the word 'person' means a natural person only. I know of no criminal statute in Ohio where the word has been held to apply to a corporation; nor do I know of any case where an attempt has before been made in this state to indict a corporation. We have no common-law crimes in Ohio, and the whole theory and machinery of our administration of criminal law seem adapted only to the prosecution and punishment of natural persons. There is no provision of law for bringing an indicted party into court by summons, or other-

wise than by actual arrest of his person. Under such a state of legislation and practice, the legislature could not have intended, in the use of the word 'person,' which is found in almost every criminal law of the state, to authorize an indictment against a corporation for this particular offense, without any special or further provision as to the liability of corporations, or the mode of proceeding against them." *State v. Cincinnati Fertilizer Co.*, 24 Ohio St. 611, 614.

The privilege accorded to "persons," by the Fifth Amendment to the Federal Constitution, of refusing to answer incriminating questions does not extend to corporations. *Orvig Dampskibsselskap Actieselskabet v. New York & B. Co.*, 229 Fed. 293.

A corporation, not being a "citizen" within the ordinary meaning of the word, an indictment which charges a corporation with polluting a stream to the damage "of divers other citizens" is faulty. *United States Board & Paper Co. v. State*, 174 Ind. 460, 91 N. E. 953.

¹⁶ Under a statute providing that "if any person shall obstruct any public road by felling any tree or trees across the same, or placing any other obstruction therein, he shall be guilty of a misdemeanor, and liable to indictment * * * and, on conviction thereof, be fined," etc., a railroad company is subject to indictment for obstructing a public road by building an embankment across such road at a point where its railway intersects the same, and failing to keep the crossing in repair. *St. Louis, A. & T. R. Co. v. State*, 52 Ark. 51, 54, 11 S. W. 1035. See also *Palatka & L. R. R. Co. v. State*, 23 Fla. 546, 11 Am. St. Rep. 395, 3 So. 158.

to oleomargarine which requires "wholesale dealers" in such commodity to keep certain books and to make certain returns, and provides that "any person" who shall wilfully violate any of its provisions shall be subject to fine and imprisonment is applicable to corporations;¹⁷ that a criminal prosecution may be maintained against a corporation under a statute providing that "a person who, by himself or by his servant or agent" sells short-weight merchandise, shall be deemed guilty of a misdemeanor and, upon conviction, be punished by a fine or by imprisonment or by both a fine and imprisonment;¹⁸ and that a bank may be indicted for usury under a statute declaring "every person" who shall receive usury guilty of a misdemeanor.¹⁹ Again, it has been held that a corporation may be indicted under a revenue law punishing the issuance of papers without proper stamps, with intent to evade the law,²⁰ and under a statute punishing contractors for exacting more than eight hours' labor from laborers on public work.²¹ A corporation is subject to indictment under a statute providing that "if any tenant shall, during his term or after its expiration, wilfully and unlawfully demolish, destroy, injure or damage any tenement house, uninhabited house, or other outhouse, belonging to his landlord or upon his premises, * * * he shall be guilty of a misdemeanor." ²²

When, as is sometimes the case, it is expressly provided, either in the criminal or the civil code, that the word "person" in legislative enactments may be held to include corporations,²³ unless it appears that the legislative intention was to the contrary,²⁴ the courts will often not experience even the little difficulty that they do, in the absence of such a provision, in bringing a corporation within the

¹⁷ *United States v. Union Supply Co.*, 215 U. S. 50, 54 L. Ed. 87, rev'g the judgment of the district court which followed *United States v. Braun & Fitts*, 158 Fed. 456, earlier decided by such court.

¹⁸ *State v. Belle Springs Creamery Co.*, 83 Kan. 389, L. R. A. 1915 D 515, 111 Pac. 474.

¹⁹ *State v. Security Bank of Clark*, 2 S. D. 538, 51 N. W. 337.

²⁰ *United States v. Baltimore & O. R. Co.*, 7 Am. L. Reg. (N. S.) 757, Fed. Cas. No. 14,509.

²¹ *United States v. John Kelso Co.*, 86 Fed. 304.

²² *State v. Rowland Lumber Co.*, 153 N. C. 610, 69 S. E. 58.

²³ Under the express provisions of section 8 of the Sherman Anti-Trust Act, the word "person" as used in the act includes a corporation.

²⁴ A "contrary intention" appears within the meaning of such rule, in the case of section 41 of the English Lotteries Act of 1823 which provides that a person violating it shall be "deemed a rogue and vagabond," etc., "rogue and vagabond" not being applicable to a limited company. *Hawke v. E. Hukton & Co., Ltd.*, [1909] 2 K. B. 93.

meaning of the word.²⁵ In England it has been held, in view of the statutory rule "that in the construction of every enactment relating to an offense punishable on indictment or on summary conviction the expression 'person' shall, unless the contrary intention appears, include a body corporate," that a limited joint stock company, incorporated under the Companies Acts, was within the operation of a statute providing that "no person shall sell to the prejudice of the purchaser any article of food or any drug which is not of the nature, substance, and quality of the article demanded by such purchaser, under a penalty not exceeding twenty pounds."²⁶

But in invoking this statutory rule of construction the last clause thereof must not be lost sight of. The rule, as has been said, "cannot be of universal application, especially in the construction of criminal statutes, for the reason that there are some crimes for which a corporation cannot be punished. For example, if all the members of a corporation should be guilty of a criminal homicide in pursuance of a resolution of the corporation, the corporation would not be liable to indictment for the murder. The true rule is that corporations are to be considered as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute."²⁷ Applying the statutory rule, however, it has been held that an indictment, under the statute, will lie against a corporation for obtaining money by false pretenses by selling short-weight merchandise,²⁸ and that corporations are subject to a statute prohibiting the furnishing of liquors to minors,²⁹ or habitual drunkards,³⁰ or selling such liquors without a license,³¹ and that a railroad

²⁵ In Indiana, whose law recognizes no common-law crimes but only those of statutory origin, it has been held that the provision of the Civil Code that the word "person" should extend to bodies politic and corporate did not apply to the Criminal Code. *Paragon Paper Co. v. State*, 19 Ind. App. 314, 49 N. E. 600.

²⁶ *Pearks, Gunston & Tee, Ltd. v. Ward*, [1902] 2 K. B. 1.

²⁷ *Stewart v. Waterloo Turn Verein*, 71 Iowa 226, 60 Am. Rep. 786, 32 N. W. 275.

²⁸ *State v. Ice & Fuel Co. (N. C.)*, 81 S. E. 737. See also *State v. Belle Springs Creamery Co.*, 83 Kan. 389, L. R. A. 1915 D 515, 111 Pac. 474.

²⁹ *Southern Exp. Co. v. State*, 1 Ga. App. 700, 58 S. E. 67.

³⁰ An incorporated society, not for profit, held, in view of the statute permitting the word "person" to be extended to include corporations, to be a person within the meaning of the statute prohibiting, under penalty, any "person" from selling intoxicating liquor to a person in the habit of becoming intoxicated. *Stewart v. Waterloo Turn Verein*, 71 Iowa 226, 60 Am. Rep. 786, 32 N. W. 275.

³¹ "Person" as used in a statute forbidding any person to sell intoxicating liquors without a license has been held to include an incorporated social club. *State v. Delaware Saen*.

company running its cars on Sunday may be indicted under a statute declaring that, if "a person" shall be found laboring at any trade or calling on Sunday, "he" shall be fined.³² The Supreme Court of Canada has held, under such a statutory rule of construction, that a corporation was included in the word "everyone" in a statute providing that "everyone who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes, or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to avoid such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty."³³ Again, the Supreme Court of Massachusetts has held, in view of such a statutory rule of construction and of the evil intended to be reached by a statute providing that "whoever, himself or by his servant or agent, * * * has in his * * * possession, with intent to sell, * * * adulterated milk or milk to which water or any foreign substance has been added * * * shall * * * be punished by a fine," etc., that the word "whoever" in such statute should be construed to include a corporation.³⁴

§ 3366. Legislative authority for act as defense. What has been said in treating of the liability of a corporation for torts, with respect to the effect of charter or statutory authority,³⁵ applies also when a corporation is indicted for an act as constituting a crime. An act which is strictly within the powers conferred upon a corporation by its charter, if the grant of power is constitutional, cannot be made the basis of a criminal prosecution against the corporation, even though it would constitute a nuisance or other offense if done by an individual, or if done by a corporation without legislative authority.³⁶ For

gerbund, Inc., 5 Boyce (Del.) 162, 91 Atl. 290, aff'd (Del.), 95 Atl. 1078 (mem. dec.).

³² State v. Baltimore & O. R. Co., 15 W. Va. 362, 36 Am. Rep. 803.

Applying the rule of ejusdem generis in the construction of the words "other person whatsoever" in section 1 of the Ontario "Act to prevent the profanation of the Lord's Day," the Ontario Court of Appeal has held that a street railway company does not come within such designation. Attorney General v. Hamilton St. R. Co., 24 Ont. App. 170.

³³ Union Colliery Co. v. Queen, 31 Can. Sup. Ct. 81, 2 B. R. C. 222.

³⁴ Com. v. Graustein & Co., 209 Mass. 38, 95 N. E. 97.

³⁵ See § 3366.

³⁶ Indiana. State v. Louisville, N. A. & C. Ry. Co., 86 Ind. 114.

Maine. State v. Portland & K. R. Co., 57 Me. 402.

New York. People v. Law, 34 Barb. 502.

Pennsylvania. Pittsburgh & A. Bridge Co. v. Com., 8 Atl. 217; Danville, H. & W. R. Co. v. Com., 73 Pa. St. 29.

example, a railroad company is not indictable for nuisance in operating its railroad near a public highway, and thereby frightening the horses of persons traveling along the highway, if it is acting within the powers conferred by its charter.³⁷ The same is true of a street railroad company constructing and operating a railroad in the streets of a city as authorized by its charter.³⁸

In determining, however, whether the charter of a corporation authorizes it to do an act which, if unauthorized, would constitute a public nuisance, the charter would be strictly construed. An indictment against a corporation for nuisance cannot be defeated on the ground that the act is authorized by its charter, if the powers conferred by the charter can be exercised without creating a nuisance.³⁹ For example, a corporation cannot conduct a lottery for the purpose of selling property, in violation of a general law making the conducting of a lottery a misdemeanor, under authority conferred by its charter to sell and dispose of property placed in its hands for sale, "in any mode or manner the corporation shall deem best."⁴⁰

It is also necessary, in order that the charter of a corporation may justify an act which, if unauthorized, constitutes an offense, that the corporation shall have kept strictly within the powers conferred by its charter, and that it shall have acted with due care to do as little injury as possible.⁴¹ Thus, a corporation authorized to maintain a bridge over a public highway, and to occupy a part of the same with piers, abutments, etc., is indictable for nuisance if it uses a part of the highway for the storage of lumber or other materials for making

England. *Rex v. Pease*, 4 B. & Ad. 30, 1 N. & M. 690.

³⁷ *Rex v. Pease*, 4 B. & Ad. 30, 1 N. & M. 690.

³⁸ *State v. Louisville, N. A. & C. Ry. Co.*, 86 Ind. 114.

³⁹ *Iowa. State v. Chicago, M. & St. P. Ry. Co.*, 77 Iowa 442, 4 L. R. A. 298, 42 N. W. 365.

Maine. *State v. Inhabitants of Freeport*, 43 Me. 198.

North Carolina. *State v. Krebs*, 64 N. C. 604.

Pennsylvania. *Pittsburgh & A. Bridge Co. v. Com.*, 8 Atl. 217.

England. *Reg. v. Great North of England Ry. Co.*, 9 Q. B. 315.

⁴⁰ *State v. Krebs*, 64 N. C. 604.

⁴¹ **Kentucky.** *Louisville & N. R. Co. v. Com.*, 13 Bush 388, 26 Am. Rep. 205.

Maine. *State v. Inhabitants of Freeport*, 43 Me. 198.

Massachusetts. *Com. v. Proprietors of Newburyport Bridge*, 9 Pick. 142.

Pennsylvania. *Pittsburgh & A. Bridge Co. v. Com.*, 8 Atl. 217.

Tennessee. *Memphis, P. P. & B. R. Co. v. State*, 87 Tenn. 746, 11 S. W. 946; *Louisville & N. R. Co. v. State*, 3 Head 523, 75 Am. Dec. 778.

West Virginia. *State v. Monongahela River R. Co.*, 37 W. Va. 108, 16 S. E. 519.

England. *Reg. v. Great North of England Ry. Co.*, 9 Q. B. 315.

repairs when needed.⁴² And a railroad company, bridge company or other corporation for the purpose of constructing a work of public utility is liable to indictment for nuisance if it intentionally or negligently constructs its works in such a way as to cause unnecessary injury or inconvenience to the public.⁴³

§ 3367. Unauthorized and ultra vires acts. While a corporation is neither responsible nor indictable for the acts of its agents in excess of their authority and not in the course of their employment, an indictment may be maintained against a corporation for an act of its agent done in the course of his employment, without showing that the act was expressly authorized,⁴⁴ and even though it may have been contrary to instructions.⁴⁵ Thus, notwithstanding a mill corporation instructs the subordinate officer, having general authority in the matter of the hiring of employees, not to violate the state child labor law,

⁴² *Pittsburgh & A. Bridge Co. v. Com.* (Pa. St.), 8 Atl. 217.

⁴³ *State v. Louisville, N. A. & C. Ry. Co.*, 86 Ind. 114; *State v. Inhabitants of Freeport*, 43 Me. 198; *Northern Cent. Ry. Co. v. Com.*, 90 Pa. St. 300; *Louisville & N. R. Co. v. State*, 3 Head (Tenn.) 523, 75 Am. Dec. 778.

Where the charter of a railroad or bridge company authorizes it to erect a bridge across tide waters, provided it does not "prevent" the navigation thereof, it is not liable to indictment for erecting a bridge which merely impedes navigation to some extent. *State v. Portland & K. R. Co.*, 57 Me. 402.

⁴⁴ A resolution of the corporation's board of directors authorizing the doing of an unlawful act is not always necessary to corporate liability for the penalty provided for such act. *Stewart v. Waterloo Turn Verein*, 71 Iowa 226, 60 Am. Rep. 786, 32 N. W. 275.

A penal action cannot be maintained against a corporation for acts of its agents not authorized or ratified by it, and not done by the agent in the

course of his employment; but authority may be inferred from the circumstances. *Com. v. Ohio & P. R. Co.*, 1 Grant's Cas. (Pa.) 329.

⁴⁵ A corporation "necessarily acts only through its agents. If the obstruction [of a public highway] is the act of its agents, it is the act of the corporation, provided the agent did the act in the course and scope of his duty as an agent. It is immaterial that the agent was, by the rules of the company, instructed not to permit such obstruction to continue for a time deemed by the corporation to be unreasonable. If such agent disobey the reasonable requirement of the corporation, it becomes liable for the nuisance, because the agent was within the scope of his duty in operating the train and in stopping it across a public road. This principle is necessary to be enforced in regard to acts of misfeasance by corporations of this character. Otherwise the public would be required to look alone to subordinates, in general unknown and irresponsible." *State v. Louisville & N. R. Co.* (Tenn.), 19 S. W. 229.

it is responsible for his employing a child under the age prescribed thereby.⁴⁶

In a Tennessee case, in which a railroad company was indicted for obstructing a public highway by permitting a train to remain standing across the same for an unreasonable time, a conviction was sustained, notwithstanding the existence of rules and regulations forbidding the employees of the company to permit such an obstruction. "Being a corporation," said the court, "it necessarily acts only through its agents. If the obstruction is the act of its agent, it is the act of the corporation; provided the agent did the act in the course and scope of his duty as agent. It is immaterial that the agent was by the rules of the company, instructed not to permit such obstruction to continue for a time deemed by the corporation to be unreasonable. If such agent disobeys the reasonable requirement of the corporation, it becomes liable for the nuisance, because the agent was within the scope of his duty in operating the train and in stopping it across a public road. This principle is necessary to be enforced in regard to acts of misfeasance by corporations of this character. Otherwise, the public would be required to look alone to subordinates in general unknown and irresponsible."⁴⁷ Nor, unless it be in a case where the crime, such as, perhaps, homicide,⁴⁸ was clearly and wholly beyond its authorized powers,⁴⁹ can the corporation claim that the criminal act was *ultra vires* and that on this account, if on no other, it is not subject to prosecution therefor.⁵⁰ "A corporation indicted for an offense

⁴⁶Overland Cotton Mill Co. v. People, 32 Colo. 263, 105 Am. St. Rep. 74, 75 Pac. 924.

⁴⁷State v. Louisville & N. R. Co., 91 Tenn. 445, 19 S. W. 229. See also Com. v. Ohio & P. R. Co., 1 Grant's Cas. (Pa.) 329 (which was an action to recover a penalty); Rex v. Medley, 6 C. & P. 292 (where directors of a gas company were held indictable for a nuisance caused by the act of their superintendent and engineer).

⁴⁸See § 3370, *infra*.

⁴⁹"A corporation may be indicted either for nonfeasance or misfeasance, the obvious and general limitations upon this liability being in the former case that it shall be capable of doing the act for nonperformance of which it is charged, and that in the second

case the act for the performance of which it is charged shall not be one of which performance is clearly and totally beyond its authorized powers." People v. Rochester Railway & Light Co., 195 N. Y. 102, 21 L. R. A. (N. S.) 998, 133 Am. St. Rep. 770, 16 Ann. Cas. 837, 88 N. E. 22.

⁵⁰"It is further objected, that a corporation aggregate cannot be liable to indictment for any crime, because the commission of the criminal act is not warranted by their corporate powers. This argument, pushed to its legitimate conclusion, would exempt a corporation from all liability for wrongs, civil as well as criminal. It is most aptly answered by Mr. Binney, in his argument in *The Chestnut Hill Turnpike Co. v. Rutter*, 6 Binney 12.

punishable by statute will not, if guilty, be permitted to escape punishment by showing that the act constituting the offense was *ultra vires*. The doctrine of *estoppel* applies in such a case with full force."⁵¹

§ 3368. Crimes with basis in misfeasance. It is probable that the crimes for the commission of which corporations were first held to be liable were those resulting from nonfeasance.⁵² Even in this country, the courts were originally inclined to differentiate between crimes resulting from nonfeasance and those with their basis in misfeasance, and to hold that while a corporation might be guilty of the one class of crimes, it could not be guilty of the other.⁵³ But even if it were

'According to the doctrine contended for, if they do an act within the scope of their corporate powers it is legal, and they are not answerable for the consequences. If the act be not within the range of their corporate powers, they had no right by law to do it: it was not one of the objects for which they were incorporated, and therefore 'it is no act of the corporation at all. This doctrine leads to absolute impunity for every species of wrong, and can never be sanctioned by any court of justice.' " State v. Morris & E. R. Co., 23 N. J. L. 360, 369 (by Green, C. J.). See also Com. v. Pulaski County Agricultural & Mechanical Ass'n, 92 Ky. 197, 17 S. W. 442.

"Since a corporation can and does act only through some authorized agent or agents, such agents, in case they violate the laws of the state or the ordinances of a municipality, may be arrested and punished the same as any other individual offender may be arrested, tried, and punished. Again, for *ultra vires* acts the agents responsible for them are usually the only ones who are made to suffer punishment, and for acts not *ultra vires*, if prohibited and illegal, they ordinarily may be punished, although the corporation may also be punished as a joint offender." American Fork City v. Charlier, 43 Utah 231, 134 Pac. 739.

⁵¹ Louisville R. Co. v. Com., 130 Ky. 738, 132 Am. St. Rep. 408, 114 S. W. 343.

⁵² Corporations were indictable for nonfeasance long before they were subject to indictment for misfeasance, "probably because, as the members of the corporation actively participating in the doing of the wrongful acts could be punished, the ends of justice were subserved." *People v. Clark*, 8 N. Y. Cr. 169, 179, 14 N. Y. Supp. 642. But see *Standard Oil Co. v. State*, 117 Tenn. 618, 10 L. R. A. (N. S.) 1015, 100 S. W. 705, in which it is said that "corporations could, under the common law, commit crimes, both of nonfeasance and in the discharge of their common duties, and of misfeasance in a violation of statutes and rules of the common law, through their agents acting within the apparent scope of their authority and in the interest of their principal, the criminal intent of the agent being imputed to the corporation."

⁵³ Corporations are "created by law for certain beneficial purposes. They can neither commit a crime or misdemeanor, by any positive or affirmative act, nor incite others to do so, as a corporation. While assembled at a corporate meeting, a majority may by a vote entered upon their records, require an agent to commit a battery; but if he does so, it can-

possible in every case to determine accurately to which class of offenses the offense charged belonged,⁵⁴ the courts to-day are less and less finding it necessary to attempt it,⁵⁵ the modern view being that a cor-

not be regarded as a corporate act, for which the corporation can be indicted. It would be stepping aside altogether from their corporate powers. If indictable as a corporation for an offense, thus incited by them, the innocent dissenting minority become equally amenable to punishment with the guilty majority. Such only as take part in the measure, should be prosecuted as individuals, either as principals, or as aiding and abetting or procuring an offense to be committed, according to its character or magnitude. It is a doctrine then, in conformity with the demands of justice, and a proper distinction between the innocent and the guilty, that when a crime or misdemeanor is committed under color of corporate authority, the individuals acting in the business, and not the corporation, should be indicted." *State v. Great Works Milling & Manufacturing Co.*, 20 Me. 41, 37 Am. Dec. 38. (The doctrine of this case was said, in *State v. Portland*, 74 Me. 268, 43 Am. Rep. 586, 589, to have been denied in *State v. Vermont Cent. R. Co.*, 27 Vt. 103 and *State v. Morris & E. R. Co.*, 23 N. J. L. 360, 366 [as to this last case see note 55, *infra*, this section], and to have been disregarded in *State v. Freeport*, 43 Me. 198 and *State v. Portland & K. R. Co.*, 57 Me. 402.)

⁵⁴ "The distinction between a non-feasance and a misfeasance is often one more of form than of substance. There are cases where it would be difficult to say whether the offence consisted in the doing of an unlawful act, or in the doing of a lawful act in an improper manner. In the case at bar, it would be no great refinement to say, that the defendants are indicted for not constructing their

draws in a suitable manner, and thereby obstructing navigation, which would be a nonfeasance, and not for unlawfully placing obstructions in the river, which would be a misfeasance. The difficulty in distinguishing the character of these offences strongly illustrates the absurdity of the doctrine that a corporation is indictable for a nonfeasance, but not for a misfeasance." *Com. v. Proprietors of New Bedford Bridge*, 2 Gray (Mass.) 339, 346.

⁵⁵ "It is insisted, that although a corporation is liable to indictment for neglect of duty or mere nonfeasance, it cannot be indicted for any offence requiring for its commission a direct and positive act. I am aware of but two cases in which this question has been directly presented for judicial decision. In the case of *The State v. The Great Works Milling and Man. Co.*, 20 Maine Rep. 41, the defendants were indicted for a nuisance in the erection of a dam across the Penobscot river. At June term, 1841, the Supreme Court of Maine decided that the indictment could not be sustained, on the ground that where a crime or misdemeanor is committed by any positive or affirmative act, under color of corporate authority, the individuals acting, and not the corporation, should be indicted. In *The Queen v. The Great North of England Railway Co.*, 9 Queen's Bench 315, the defendants were indicted for cutting through and obstructing a highway, by works performed in a course not conformable to the powers conferred on the company by act of parliament. The indictment, after solemn argument and deliberate advisement, was sustained by the unanimous opinion of the Court of Queen's Bench, the

poration is not immune from prosecution for a particular offense

court thus sustaining the principle, that a corporation aggregate may be indicted for a misfeasance. These two authorities being directly in conflict, it may be necessary to consider the principle involved in the inquiry. It being conceded that an indictment will lie against a corporation aggregate for a nonfeasance, or for any cause whatever, all preliminary and formal objections arising out of the invisibility and intangibility of the body aggregate, the impossibility of arresting it, its inability to appear, its incapacity for punishment, and the injustice of punishing innocent stockholders for the acts of others, are at once disposed of. These objections apply, it is obvious, with equal force to indictments for acts of nonfeasance. If they are invalid as to the one, they are equally so as to the other. But it is said, that although a corporation may omit to perform acts made obligatory upon it by law, and thus be liable for nonfeasance, yet from its very nature it cannot use force, and therefore cannot commit any act involving force, and which must be charged to have been committed *vi et armis*. This argument rests entirely upon the disability of the corporation to commit any act of trespass or positive wrong, and applies to its capacity to commit civil as well as criminal injuries. It is the very argument by which it was sought to be established that no action for a trespass or tort would lie against a corporation. But it has been well said, that if a corporation has itself no hands with which to strike, it may employ the hands of others; and it is now perfectly well settled, contrary to the ancient authorities, that a corporation is liable civiliter for all torts committed by its servants or agents by authority of the corporation,

express or implied. * * * The earlier authorities, denying the liability of corporations civiliter for torts, are nearly all traceable to the dictum of Chief Justice Thorpe, in *Liber Ass.* 100, pl. 67, that 'a writ of trespass lies not against a commonalty, for, he said, a man shall never have a *capias* or exigent against a commonalty.' From this view of the law, it would seem that the difficulty in holding corporations liable civiliter for their tortious acts was originally supposed to consist not in the inability of the corporations to commit the wrong, but in the incapacity of the courts to administer the remedy. The result of the modern cases is, that a corporation is liable civiliter for torts committed by its servants or agents precisely as a natural person; and that it is liable as a natural person for the acts of its agents done by its authority, express or implied, though there be neither a written appointment under seal, nor a vote of the corporation constituting the agency or authorizing the act. The doctrine is founded on sound principle, and applies, so far at least as the present objection is concerned, as well to the criminal as to the civil liability of the corporation." *State v. Morris & E. R. Co.*, 23 N. J. L. 360, 366 (by Green, C. J.).

"It is manifest that whether a corporation can be convicted of a criminal offense depends, not upon technical name, treason, felony, or misdemeanor, attached to the crime, but is one of whether the crime is such that the corporation is capable of committing it." *Joplin Mercantile Co. v. United States*, 213 Fed. 926, 935, *Ann. Cas.* 1916 C 470.

"Where corporations are as much within the mischief aimed at by a penal statute as individuals, both the

merely because the offense is one which is classified as a misfeasance.⁵⁶

prohibition of the statute and the method of its enforcement should be extended alike to each of them." *Com. v. New York Cent. & H. River R. Co.*, 206 Mass. 417, 19 Ann. Cas. 529, 92 N. E. 766.

⁵⁶ In *State v. Baltimore & O. R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803, 808, the court, in considering the development of the law of criminal liability of corporations, said: "It is now very generally held that a corporation may be indicted for a nuisance; and though in some cases, in which indictments have been sustained against them, it might be possible perhaps to sustain them, on the ground that in permitting the nuisance which had been erected by their agents, they violated a public duty, and thus some of these cases might be regarded as indictments for nonfeasance, yet they were not based on such a view, but were placed on the broad ground that corporations are indictable, not merely for nonfeasance of duty, but for misfeasance of their agents; and the distinction between nonfeasance and misfeasance by their agents is distinctly repudiated. Thus in the case of *Regina v. Great North of England Railway Co.*, 9 Ad. & E. (N. S.) 319, decided in 1846, it was held that a railroad company might be indicted for cutting through and obstructing a public highway. Lord Denman, C. J., in delivering the opinion of the court, says: 'The question is whether an indictment will lie at common law against a corporation for a misfeasance, it being admitted in conformity with undisputed decisions that an indictment may be maintained against a corporation for nonfeasance. All preliminary difficulties, as to the serving of process, the mode of appearing and pleading, and enforcing judgment, are by this omission swept away. But

the argument is, that for a wrong act a corporation is not amenable to an indictment, though for a wrong admission [omission] it undoubtedly is, assuming, in the first place, that there is a plain and obvious distinction between the two species of offense * * * but if the distinction were easily discoverable, why should a corporation be liable for the one species of offense and not the other? The startling incongruity of allowing the exemption is one strong argument against it. The law is often entangled in technical embarrassments; but there is none here. It is as easy to charge a person or a body corporate with erecting a bar across a public road as with the non-repair of it; and they may as well be compelled to pay a fine for the act as for the omission. Some dicta occur in old cases that "a corporation cannot be guilty of treason or felony," and it might be added "of perjury or offenses against the person." The Court of Common Pleas lately held that a corporation might be sued in trespass. *Maud v. Monmouthshire Canal Co.*, 4 Man. & G. 452; but nobody has sought to fix them with acts of immorality. These plainly derive their character from the corrupted mind of the person committing them and are violations of the social duties belonging to men and subjects. A corporation, which as such has no such duties, cannot be guilty in these cases; but it may be guilty of commanding acts to be done to the nuisance of the community at large. The late case of *Regina v. Birmingham & Gloucester Ry. Co.*, 3 Q. B. 223, was confined to the state of things then before the court, which amounted to a nonfeasance only; but was by no means intended to deny the liability of a corporation for misfeasance. We

§ 3369. Crimes involving malice or intent. It has been said that a corporation cannot be guilty of an offense which involves the element of malice or evil intent,⁵⁷ but the extent to which this is true is by no

are told that this remedy is not required because the individuals who concur in voting the order, or in executing the work, may be made answerable for it by criminal proceedings. Of this there is no doubt; but the public knows nothing of the former; and the latter, if they can be identified, are commonly persons of the lowest rank, wholly incompetent to make any reparation for the injury. There can be no effectual means of deterring from an oppressive exercise of power for the purpose of gain, except the remedy by an indictment against those who truly commit it, that is, the corporation acting by its majority; and there is no principle which places them beyond the reach of the law for such proceedings. I have quoted this opinion at length, because it lays down clearly principles which have been generally adopted in this country."

"It * * * is now admitted law that not only may corporations * * * be indicted for nonfeasance, but for such deeds of misfeasance as are complete by the mere doing of the thing prohibited." *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823, 835. See also *First Nat. Bank of Carlisle, Pennsylvania v. Graham*, 100 U. S. 699, 25 L. Ed. 750; *Com. v. Illinois Cent. R. Co.*, 152 Ky. 320, 45 L. R. A. (N. S.) 344, *Ann. Cas.* 1915 B 617, 153 S. W. 459; *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280, 52 N. E. 445; *Nashville & D. R. R. Turnpike Co. v. State*, 96 Tenn. 249, 34 S. W. 4.

As a general rule, an indictment will lie against a corporation for its failure to perform a public duty with which it is charged. *Com. v. Hancock*

Free Bridge Corporation, 2 Gray (Mass.) 58, 67.

In Indiana, where the criminal law is wholly of statutory origin, a corporation is not subject to a criminal prosecution for a misfeasance (*State v. Ohio & M. R. Co.*, 23 Ind. 362) except as provided by statute.

⁵⁷ *Massachusetts. Com. v. Proprietors of New Bedford Bridge*, 2 Gray 339.

Missouri. *State v. Delmar Jockey Club*, 200 Mo. 34, 98 S. W. 539, 92 S. W. 185.

New Jersey. *State v. Morris & E. R. Co.*, 23 N. J. L. 360 (per Green, C. J.).

New York. *People v. Dunlap*, 32 Misc. 390, 66 N. Y. Supp. 161.

Pennsylvania. *Delaware Division Canal Co. v. Com.*, 60 Pa. St. 367, 100 Am. Dec. 570; *Com. v. Punxsutawney St. Passenger R. Co.*, 24 Pa. Co. Ct. 250.

England. *Reg. v. Great North of England Ry. Co.*, 9 Q. B. 315; *Reg. v. Birmingham & G. Ry. Co.*, 3 Q. B. 223.

"By the general principles of the criminal law, if a matter is made a criminal offence, it is essential that there should be something in the nature of mens rea, and, therefore, in ordinary cases a corporation cannot be guilty of a criminal offence, nor can a master be liable criminally for an offence committed by his servant. But there are exceptions to this rule in the case of quasi criminal offences, as they may be termed, that is to say, where certain acts are forbidden by law under a penalty, possibly even under a personal penalty, such as imprisonment, at any rate in default of payment of a fine; and the reason for this is, that the legislature has thought it so important to

means clear. It is well settled that a corporation may be held liable in a civil action for wrongs of its officers and agents involving the element of malice, and that it may be subjected to exemplary or punitive damages, and the assertion that they cannot be indicted for any offenses which derive their criminality from evil intent may well be questioned.⁵⁸ Indeed, the latter tendency of the cases is to the effect that they may be indicted for offenses involving the element of malice or a specific intent.⁵⁹ So, although malice is an element of criminal

prevent the particular act from being committed that it absolutely forbids it to be done; and if it is done the offender is liable to a penalty whether he had any mens rea or not, and whether or not he intended to commit a breach of the law. Where the act is of this character, then the master, who, in fact, has done the forbidden thing through his servant, is responsible and is liable to a penalty. There is no reason why he should not be, because the very object of the legislature was to forbid the thing absolutely. It seems to me that exactly the same principle applies in the case of a corporation. If it does the act which is forbidden, it is liable." *Pearks, Gunston & Tee, Ltd. v. Ward*, [1902] 2 K. B. 1, 11 (by Channell, J.).

⁵⁸ *State v. Passaic County Agr. Society*, 54 N. J. L. 260.

"We think that a corporation may be liable criminally for certain offenses, of which a specific intent may be a necessary element. There is no more difficulty in imputing to a corporation a specific intent in criminal proceedings than in civil. A corporation cannot be arrested and imprisoned in either civil or criminal proceedings; but its property may be taken, either as compensation for a private wrong or as punishment for a public wrong." *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280, 52 N. E. 445.

"The rules of evidence in relation to the manner of proving the fact of

intention are necessarily the same in a criminal as in a civil case, and the same evidence which in a civil case would be sufficient to prove a specific or malicious intention upon the part of a corporation defendant would be sufficient to show a like intention upon the part of a corporation charged criminally with the doing of an act prohibited by the law." *United States v. John Kelso Co.*, 86 Fed. 304, 306.

⁵⁹ "A corporation * * * is capable of forming a guilty intent and capable of having the knowledge necessary [to the commission of the act penalized], provided the officers of the corporation capable of voicing the will of the corporation have such knowledge or intent." *Grant Bros. Const. Co. v. United States*, 13 Ariz. 388, 114 Pac. 955.

"At times courts have halted somewhat at the suggestion that a corporation could commit a crime whereof the element of intent was an essential ingredient. But this doctrine, * * * with certain limitations, may now be regarded as established, and there is nothing therein which is either unjust or illogical. Of course, it has been fully recognized that there are many crimes so involving personal, malicious intent and acts so ultra vires that a corporation manifestly could not commit them. * * * But a corporation, generally speaking, is liable in civil proceedings for the conduct of the agents through whom it conducts its business so long as they act within the scope of their

libel, an indictment against a corporation for libel has been sustained.⁶⁰ Again, it has been held that a corporation was punishable for a criminal contempt of court (publishing an article in a newspaper concerning a pending trial, which was calculated to prejudice the jury and prevent a fair trial), although a criminal contempt involves a specific intent as a necessary element.⁶¹ Judge Hough, of the United States Circuit Court for New York, has said: "It seems to me as easy and logical to ascribe to a corporation an evil mind as it is to impute to it a sense of contractual obligation. There is an obvious physical difficulty in rendering a corporation amenable to corporal punishment, but there is no more intellectual difficulty in considering it capable of homicide or larceny than in thinking of it as devising a plan to obtain usurious interest. The limitation of power does not depend upon the difficulty of imputing evil intent, but upon the impossibility of visiting upon corporations the punishments usually prescribed for greater crimes. The same law that creates the corporation may create the crime, and to assert that the legislature cannot punish its own creature because it cannot make a creature capable of violating the law does not, in my opinion, bear discussion."⁶²

§ 3370. Crimes involving personal violence. It has been said that a corporation cannot be guilty of an offense involving the element of

authority, real or apparent, and it is but a step further in the same direction to hold that in many instances it may be charged criminally with the unlawful purposes and motives of such agents while so acting in its behalf." *People v. Rochester Railway & Light Co.*, 195 N. Y. 102, 21 L. R. A. (N. S.) 998, 133 Am. St. Rep. 770, 16 Ann. Cas. 837, 88 N. E. 22.

The contention "that corporations cannot be convicted of an offense where the intent is an ingredient, is no longer tenable. They are as fully liable in such cases as individuals." *State v. Rowland Lumber Co.*, 153 N. C. 610, 69 S. E. 58.

⁶⁰ *State v. Atchison*, 3 Lea (Tenn.) 729, 31 Am. Rep. 663.

"The very basis of the action for libel or for malicious prosecution is the evil intent, the malice, of the party defendant. It is difficult, therefore, to see how a corporation

may be amenable to civil suit for libel and malicious prosecution and private nuisance, and mulcted in exemplary damages, and at the same time not be indictable for like offenses, where the injury falls upon the public." *State v. Passaic County Agr. Society*, 54 N. J. L. 260.

⁶¹ *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280, 52 N. E. 445.

See, generally, as to contempt, Chap. 55.

⁶² *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823, 836.

Whether a corporation has capacity for the knowledge which forms an element of the crime with which it is charged is a question of law; whether it actually possessed such knowledge is a mixed question of law and fact. *United States v. New York Herald Co.*, 159 Fed. 296, 297.

personal violence, as assault and battery, riots, etc;⁶³ and there seems to be no reported case in which an indictment for such an offense has been maintained against a corporation under a general statute. As appears in another part of this work, however,⁶⁴ a corporation may be held liable in a civil action for an assault and battery committed by its officers or agents, and subjected to exemplary damages, and there would seem to be no good reason why it may not be indicted, under an appropriate statute, and fined for such an offense.⁶⁵

The same may be said of homicide. While the ordinary general statute on the subject of even the lesser degrees of homicide cannot, it seems, be construed to include corporations,⁶⁶ it would seem altogether possible so to frame the statute defining and providing the punishment for certain forms of manslaughter that a corporation would be liable to indictment thereunder.⁶⁷

⁶³ *Com. v. Proprietors of New Bedford Bridge*, 2 Gray (Mass.) 339; *Delaware Division Canal Co. v. Com.*, 60 Pa. St. 367, 100 Am. Dec. 570; *Com. v. Punxsutawney St. Passenger R. Co.*, 24 Pa. Co. Ct. 25; *Reg. v. Great North of England Ry. Co.*, 9 Q. B. 315; *Reg. v. Birmingham & G. Ry. Co.*, 3 Q. B. 223. See also *Com. v. Illinois Cent. R. Co.*, 152 Ky. 320, 45 L. R. A. (N. S.) 344, Ann. Cas. 1915 B 617, 153 S. W. 459.

⁶⁴ See § 3341 et seq.

⁶⁵ As doubting that a corporation can in no circumstances be liable criminally for offenses against the person, see *State v. Baltimore & O. R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803, 811.

⁶⁶ Where the statute defines homicide as "the killing of one human being by the act, procurement or omission of another" and classifies manslaughter as a form of homicide, a corporation cannot be indicted for manslaughter, the word "another" in the definition of homicide meaning "another human being." *People v. Rochester Railway & Light Co.*, 195 N. Y. 102, 21 L. R. A. (N. S.) 998, 133 Am. St. Rep. 770, 16 Ann. Cas. 837, 88 N. E. 22. See also *Com. v.*

Illinois Cent. R. Co., 152 Ky. 320, 45 L. R. A. (N. S.) 344, Ann. Cas. 1915 B 617, 153 S. W. 459.

Manslaughter "is so far ultra vires as to contravene all accepted rules in the criminal law for making it the act of the principal." *Com. v. Punxsutawney St. Passenger R. Co.*, 24 Pa. Co. Ct. 25, 26.

Notwithstanding the statutory rule that "person" may include a corporation, a corporation cannot be indicted for involuntary manslaughter as that crime is defined at common law. *Com. v. Illinois Cent. R. Co.*, 152 Ky. 320, 45 L. R. A. (N. S.) 344, Ann. Cas. 1915 B 617, 153 S. W. 459.

⁶⁷ "We have no doubt that a definition of certain forms of manslaughter might have been formulated which would be applicable to a corporation, and make it criminally liable for various acts of misfeasance and non-feasance when resulting in homicide." *People v. Rochester Railway & Light Co.*, 195 N. Y. 102, 21 L. R. A. (N. S.) 998, 133 Am. St. Rep. 770, 16 Ann. Cas. 837, 88 N. E. 22. See also *Com. v. Illinois Cent. R. Co.*, 152 Ky. 320, 45 L. R. A. (N. S.) 344, Ann. Cas. 1915 B 617, 153 S. W. 459.

A corporation, guilty of negligence

§ 3371. Nuisances. The rule that a corporation is subject to indictment for criminal misfeasance⁶⁸ has been applied frequently in the case of public nuisances,⁶⁹ for nuisance in obstructing a navigable

resulting in the loss of human life, was held subject to indictment under a statute providing that "everyone who has in his charge or under his control anything whatever, whether animate or inanimate, or who erects, makes or maintains anything whatever which, in the absence of precaution or care, may endanger human life, is under a legal duty to avoid such danger, and is criminally responsible for the consequences of omitting, without lawful excuse, to perform such duty." *Union Colliery Co. v. Queen*, 31 Can. Sup. Ct. 81, 2 B. R. C. 222.

As to statutory remedy by indictment in case of wrongful death, see *Maine Rev. St. 1883*, c. 51, § 68, as amended by *Acts 1891*, c. 124, § 1; *Massachusetts Pub. St. 1882*, c. 112, §§ 212, 213, *New Hampshire Pub. St. 1891*, c. 191, § 8, amending *Gen. L. 1878*, c. 282, § 14.

⁶⁸ See § 3368, *supra*.

⁶⁹ A corporation is subject to prosecution for the creation and maintenance of a public nuisance. *Morris & E. R. Co. v. Prudden*, 20 N. J. Eq. 530, 536; (*Attorney General v. New Jersey R. & Transp. Co.*, 3 N. J. Eq. 136; *Delaware Division Canal Co. v. Com.*, 60 Pa. St. 367, 100 Am. Dec. 570; *Com. v. Punxsutawney St. Passenger R. Co.*, 24 Pa. Co. Ct. 25; *State v. Paggett*, 8 Wash. 579, 36 Pac. 487); at least when intent is not a necessary ingredient of the offense. *Com. v. Paducah*, 6 Ky. L. Rep. 292 (Abstract); *State v. Western North Carolina R. Co.*, 95 N. C. 602, 610.

"It is not necessary that the charters of turnpike, canal and railroad companies should, in terms, subject them to indictment for neglect of a positive duty enjoined upon them

towards the public at large, in order to bring them within the reach of criminal proceedings. The neglect of an ascertained duty towards the public may create a nuisance, for which they may be indicted at common law." *State v. Morris Canal & Banking Co.*, 22 N. J. L. 537, 539.

"It is true that there are crimes (perjury for example) of which a corporation cannot, in the nature of things, be guilty. There are other crimes, as treason and murder, for which the punishment imposed by law cannot be inflicted upon a corporation. Nor can they be liable for any crime of which a corrupt intent or *malus animus* is an essential ingredient. But the creation of a mere nuisance involves no such element. It is totally immaterial whether the person erecting the nuisance does it ignorantly or by design, with a good intent or an evil intent; and there is no reason why for such an offence a corporation should not be indicted." *State v. Morris & E. R. Co.*, 23 N. J. L. 360, 370 (by Green, C. J.).

"There is a strong reason, which does not seem to have been adverted to in the reported cases, why the corporation, and not the individual directors or laborers, should be indicted for the creation of a nuisance. The principal object of an indictment for a nuisance, is to compel it to be abated; and regularly a part of the judgment upon conviction is, that the nuisance be abated. * * * If the rights of the corporation are to be concluded by the judgment, as in the present case, a valuable building, erected by the company at great cost for their own convenience, is to be ordered to be torn down as an encroachment upon the highway, there

river by building a bridge or dam across the same.⁷⁰ Thus, it has been

is peculiar propriety in making the corporation itself a party, and giving it an opportunity of being heard in defence. To condemn the property of the corporation to destruction upon an indictment against an irresponsible individual who was employed in the construction of the work, but who has no interest in the company, and who perhaps is hostile to its interests, savors strongly of the injustice of condemning them unheard. And it is not clear how the sentence is to be executed against the corporation, who are in possession, and in no sense parties to the proceeding." *State v. Morris & E. R. Co.*, 23 N. J. L. 360, 370 (by Green, C. J.).

Under the express provisions of the Indiana statute (Burns' Rev. St. 1901, § 1970) a corporation may be prosecuted for "erecting, continuing or maintaining a public nuisance or for obstructing a public highway or navigable stream." See *Acme Fertilizer Co. v. State*, 34 Ind. App. 346, 107 Am. St. Rep. 190, 72 N. E. 1037.

See also *State v. Baltimore, O. & C. R. Co.*, 120 Ind. 298, 22 N. E. 307; *State v. Sullivan County Agr. Society*, 14 Ind. App. 369, 42 N. E. 963.

The fact that a corporation is without funds, and is therefore unable to perform duties imposed upon it for the benefit of the public, is no defense when it is indicted for a nuisance resulting from its neglect. *Waterford & W. Turnpike v. People*, 9 Barb. (N. Y.) 174.

⁷⁰ *Com. v. Proprietors of New Bedford Bridge*, 2 Gray (Mass.) 339. In this case the court said: "The indictment in the present case is for a nuisance. The defendants contend that it cannot be maintained against them, on the ground that a corporation, although liable to indictment for nonfeasance, or an omission to per-

form a legal duty or obligation, are not amenable in this form of prosecution for a misfeasance, or the doing of any act unlawful in itself and injurious to the rights of others. There are dicta in some of the early cases which sanction this broad doctrine, and it has been thence copied into text-writers, and adopted to its full extent in a few modern decisions. But, if it ever had any foundation, it had its origin at a time when corporations were few in number, and limited in their powers, and in the purposes for which they were created. Experience has shown the necessity of essentially modifying it; and the tendency of the more recent cases in courts of the highest authority has been to extend the application of all legal remedies to corporations, and assimilate them, as far as possible, in their legal duties and responsibilities, to individuals. To a certain extent, the rule contended for is founded in good sense and sound principle. Corporations cannot be indicted for offences which derive their criminality from evil intention, or which consist in a violation of those social duties which appertain to men and subjects. They cannot be guilty of treason or felony; of perjury or offences against the person. But beyond this, there is no good reason for their exemption from the consequences of unlawful and wrongful acts committed by their agents in pursuance of authority derived from them. Such a rule would, in many cases, preclude all adequate remedy, and render reparation for an injury, committed by a corporation, impossible; because it would leave the only means of redress to be sought against irresponsible servants, instead of against those who truly committed the wrongful act by commanding it to be done. There is no principle of law which would

held that an indictment will lie against a railroad company, or other corporation, for a nuisance in obstructing a public highway by cutting through the same, stopping cars thereon, building stations or other structures thereon, or other positive acts,⁷¹ and for polluting a water-

thus furnish immunity to a corporation. If they commit a trespass on private property, or obstruct a way to the special injury and damage of an individual, no one can doubt their liability therefor. In like manner, and for the same reason, if they do similar acts to the inconvenience and annoyance of the public, they are responsible in the form and mode appropriate to the prosecution and punishment of such offences. * * * If, therefore, the defendants have been guilty of a nuisance, by obstructing unlawfully a navigable stream, an indictment may well be maintained against them." Quoted in *State v. Belle Springs Creamery Co.*, 83 Kan. 389, L. R. A. 1915 D 515, 111 Pac. 474.

Contra State v. Great Works Milling & Manufacturing Co., 20 Me. 41, 37 Am. Dec. 38, 39, wherein it was held that a corporation cannot commit a misdemeanor by positive or affirmative act and therefore cannot be indicted for the creation of a public nuisance by erecting a dam across a river whereby the navigation of the latter is obstructed.

⁷¹ *Kentucky*. *Chesapeake & O. R. Co. v. Com.*, 88 Ky. 368, 11 S. W. 87; *Cincinnati R. Co. v. Com.*, 80 Ky. 137.

Massachusetts. *Com. v. Vermont & M. R. Co.*, 4 Gray 22.

Missouri. *State v. White*, 96 Mo. App. 34, 69 S. W. 684.

New Jersey. *State v. Morris & E. R. Co.*, 23 N. J. L. 360.

North Carolina. *State v. Western North Carolina R. Co.*, 95 N. C. 602.

Pennsylvania. *Northern Cent. Ry. Co. v. Com.*, 90 Pa. St. 300.

Tennessee. *State v. Louisville & N. R. Co.*, 91 Tenn. 445, 19 S. W. 229.

Vermont. *State v. Vermont Cent. R. Co.*, 27 Vt. 103.

England. *Reg. v. Great North of England Ry. Co.*, 9 Q. B. 315.

See also *Palatka & R. R. Co. v. State*, 23 Fla. 546, 11 Am. St. Rep. 395, 3 So. 158; *Com. v. Nashua & L. R. Corporation*, 2 Gray (Mass.) 54.

"Railroad companies are unquestionably liable to an indictment for obstructing a highway, contrary to the powers granted to them in their charters. Though it has sometimes been said that an aggregate corporation cannot be indicted for a misfeasance, but only for a nonfeasance; yet we apprehend the law is otherwise, especially if the offense charged does not essentially consist in a corrupt intent, which does not seem to be involved as a necessary element in the offense" of obstructing a highway. *State v. Vermont Cent. R. Co.*, 30 Vt. 108, 109.

"That a corporation may be indicted has been repeatedly held in England and America, and is well settled in this state. It can no more omit its duty to individuals, or the public, than natural persons. Railway companies are liable to indictment for obstructing a public highway contrary to the powers granted in their act. For instance, obstructing a carriage turnpike road by the piers of a railway bridge. So, also, for cutting off a public highway, and obstructing travel upon it, without and before constructing a substitute, in the manner required by their act. Undoubtedly, so long as the company keeps within its charter, it is not liable." *Louisville & N. R. Co. v. State*, 3 Head (Tenn.) 523, 75 Am. Dec. 778.

A railroad company is subject to

course by casting or discharging offensive matter into the water.⁷²

§ 3372. Applicability of usual penalty. Even if it be conceded that a corporation has the capacity to commit a particular crime, it cannot be indicted therefor if the punishment prescribed for the crime cannot be imposed upon a corporation. A corporation, therefore, could not be indicted for a felony, because, if for no other reason, the punishment for felony is death or imprisonment, to neither of which penalties a corporation can be subjected.⁷³

If the penalty prescribed for an offense is both fine and imprisonment, the statute cannot be applied to corporations in so far as regards the imprisonment, but the inability to punish by imprisonment does not prevent an indictment against a corporation and its punishment by fine.⁷⁴ According to Justice Holmes of the Supreme Court of the

indictment for its failure to reconstruct a public road, occupied by it, as required by statute. *Pittsburgh, V. & C. R. Co. v. Com.*, 101 Pa. St. 192.

It may be indicted for its failure to comply with the statutory requirement that it put a highway crossed by its tracks into a usable condition. *People v. New York Cent. & H. River R. Co.*, 74 N. Y. 302.

That the New Jersey rule that an indictment will lie against a railroad company for obstructing a street has not been changed by statute, see *Staté v. Lackawanna R. Co.*, 86 N. J. L. 62, 90 Atl. 1103.

Notwithstanding the fact that the charter of a railroad company does not require its trains to give warning signals at highway crossings, the habitual failure of such trains so to do is an offense against the public for which an indictment will lie against the company. *Louisville & N. R. Co. v. Com.*, 13 Bush (Ky.) 388, 26 Am. Rep. 205.

⁷² *State v. City of Portland*, 74 Me. 268, 43 Am. Rep. 586.

In *Rex v. Medley*, 6 C. & P. 292, an indictment was sustained against a gas company for nuisance in so conducting its works as to convey large

quantities of noisome liquids into the River Thames, thereby polluting the water and destroying fish.

⁷³ A corporation "may be indicted or informed against, and in such event may, by special process, be brought into court, and may be tried and convicted of certain offenses, and be fined in a specific sum of money, and the fine may be collected upon execution if there is any corporate property or assets. This is as far as the state can enforce its criminal laws against the artificial legal entity called a corporation." *American Fork City v. Charlier*, 43 Utah 231, 134 Pac. 739.

⁷⁴ *Com. v. Pulaski County Agricultural & Mechanical Ass'n*, 92 Ky. 197, 201, 17 S. W. 442.

"That the statute provides for imprisonment if the fine imposed is not paid is not an objection which a corporation can urge against its enforcement. True, the corporation cannot be imprisoned, but the fine can be collected through the means provided for the collection of money judgments." *Overland Cotton Mill Co. v. People*, 32 Colo. 263, 105 Am. St. Rep. 74, 75 Pac. 924.

Where the criminal code provides that "a public offense, of which the only punishment is a fine, may be

United States, "if we free our minds from the notion that criminal statutes must be construed by some artificial and conventional rule, the natural inference, when a statute prescribes two independent penalties, is that it means to inflict them so far as it can, and that, if one of them is impossible, it does not mean, on that account, to let the defendant escape."⁷⁵ In this connection, the fact that the failure of a corporation to perform a certain act is made punishable as a misdemeanor, only one of the penalties for which, namely, a fine, is enforceable against a corporation, does not render the statute inimical to the constitutional provision that laws of a general nature shall have uniform operation.⁷⁶

§ 3373. Criminal prosecution when penalty for act expressly provided. When the charter of a corporation or some other statute imposes a duty for the benefit of the public, and prescribes a particular penalty for its failure to perform the same, such penalty is cumulative, and does not prevent an indictment at common law, or under a general statute, unless it affirmatively appears, from negative words or other-

prosecuted by a penal action," etc., a penal action may be maintained against a corporation which is guilty of violating a statute that provides that its violation shall be punished by fine or imprisonment or both, since the only punishment that can be imposed upon a corporation is a fine. *W. H. Small & Co. v. Com.*, 134 Ky. 272, 120 S. W. 361.

Under the statutes of Kentucky an appeal by the commonwealth will lie from a verdict of acquittal on the trial of a corporation indicted for a nuisance since the only punishment which could have been inflicted on the defendant was a fine and the enforcement of such orders of abatement of the nuisance as might have been entered. *Com. v. Louisville & N. R. Co.*, 17 Ky. L. Rep. 563, 32 S. W. 164.

⁷⁵ *United States v. Union Supply Co.*, 215 U. S. 50, 54 L. Ed. 87.

"It is true that, when the statute imposes a penalty of a fine or imprisonment, only the fine can be placed upon a corporation. But this is no

reason why that should not be imposed. The corporation should not be wholly exempted from punishment, because it cannot be imprisoned. The remedy is that the officer or agent may be indicted jointly with the corporation as a coprincipal or accessory, as the case may be, as has been done in the enforcement of the statutes against illegal trusts." *State v. Ice & Fuel Co. (N. C.)*, 81 S. E. 737.

⁷⁶ *Southern R. Co. v. State*, 125 Ga. 287, 114 Am. St. Rep. 203, 5 Ann. Cas. 411, 54 S. E. 160.

"That an individual guilty of an offense may be both fined and imprisoned, and a corporation likewise guilty only fined, does not affect the validity of the statute. The apparent discrimination grows out of conditions that cannot be avoided, and the corporation that is favored by the discrimination cannot complain." *W. H. Small & Co. v. Com.*, 134 Ky. 272, 120 S. W. 361. See also *State v. Belle Springs Creamery Co.*, 83 Kan. 389, L. R. A. 1915 D 515, 111 Pac. 474.

wise, that the prescribed penalty, whether it be by indictment ⁷⁷ or otherwise, was intended to be exclusive.⁷⁸

Thus, it has been held that a turnpike company may be indicted, under statutes enacted subsequently to the granting of its charter, for failure to keep its road in repair, notwithstanding a provision in its charter imposing a fine, for failure to repair, upon the person intrusted with the repair of the road, one-half of the fine to go to the prosecutor and the other to the county; ⁷⁹ and that an indictment will lie against a railroad company for building an embankment across a public highway and neglecting to keep the same in good repair, under a statute making it a misdemeanor, punishable by indictment, for any person to obstruct a highway, notwithstanding a subsequent statute providing for a civil proceeding to recover a penalty against railroad companies for failure to construct highway crossings and keep them in repair.⁸⁰

⁷⁷ *Syracuse & T. Plank Road Co. v. People*, 66 Barb. (N. Y.) 25.

⁷⁸ *St. Louis, A. & T. Ry. Co. v. State*, 52 Ark. 51, 11 S. W. 1035; *Waterford & W. Turnpike v. People*, 9 Barb. (N. Y.) 161; *Susquehanna & B. Turnpike Road Co. v. People*, 15 Wend. (N. Y.) 267; *White's Creek Turnpike Co. v. State*, 16 Lea (Tenn.) 24. See also *State v. Godwinsville & P. M. Road Co.*, 49 N. J. L. 266, 60 Am. Rep. 611, 10 Atl. 666.

An indictment against a corporation for the nonperformance of a statutory duty is not precluded by the fact that the performance of such duty might be compelled by mandamus, the two remedies not being inconsistent. *People v. New York Cent. & H. River R. Co.*, 74 N. Y. 302, 307.

Nor will the fact that the act constituting the crime would sustain quo warranto proceedings against the corporation relieve it from criminal liability therefor. *State v. Delmar Jockey Club*, 200 Mo. 34, 98 S. W. 539, 92 S. W. 185, wherein the court said: "If a corporation, through its servants and agents, may be guilty of such abuses of its franchise as will

subject it to ouster by quo warranto, we can conceive of no reason why such servants and agents, if the acts and abuses committed by them be in violation of the criminal statutes, may not at the same time be prosecuted by indictment or information. The one is not a bar to the other proceeding. Nor are we prepared to give assent to the contention that the defendant corporation could not be held to answer for such wrongful acts until its agents, guilty of the criminal offense, be tried and convicted."

⁷⁹ *White's Creek Turnpike Co. v. State*, 16 Lea (Tenn.) 24. But see the early Virginia case of *Com. v. Swift Run Gap Turnpike Co.*, 2 Va. Cas. 361, 362, in which it was held that where the charter of a turnpike company makes the person employed by the company to keep its road in repair, rather than the company itself, liable for the nonrepair of such road, an information will not lie against the company therefor.

⁸⁰ *St. Louis, A. & T. Ry. Co. v. State*, 52 Ark. 51, 11 S. W. 1035.

A railroad company is indictable according to the rules of the common law for its failure to perform its

§ 3374. Miscellaneous crimes. The application of these principles on which are based the views as to a corporation's liability to or immunity from, criminal prosecution, may be further illustrated by concrete examples. Thus it has been held that an indictment will lie against a corporation for violation of a law regulating sales of intoxicating liquors;⁸¹ for permitting gaming on its fair grounds;⁸² for a violation of the federal statute which prohibits the depositing of obscene matter in the mail;⁸³ for keeping a disorderly house;⁸⁴ for criminal libel;⁸⁵ for violating, in its capacity of federal contractor, the federal eight-hour labor law;⁸⁶ for a violation of the Sabbath labor law;⁸⁷ for a violation of the usury laws of the state in which it is located;⁸⁸ for issuing unstamped papers with intent to evade the revenue law;⁸⁹ for a violation of the laws relative to the procuring of a license to do business;⁹⁰ also for the giving of re-

statutory duty of keeping in repair the bridge over its road where the latter is crossed by a public highway; and its liability to indictment is not affected by the provision in its charter that if it neglects to perform this duty, the person in charge of the repair or maintenance of the highway may, after 20 days' notice to the company, do the work or cause it to be done and recover the value thereof from the company. *New York & G. L. R. Co. v. State*, 50 N. J. L. 303, 13 Atl. 1, *aff'd* 53 N. J. L. 244, 23 Atl. 168.

⁸¹ *Southern Exp. Co. v. State*, 1 Ga. App. 700, 58 S. E. 67 (furnishing liquor to a minor).

⁸² *Com. v. Pulaski County Agricultural & Mechanical Ass'n*, 92 Ky. 197, 17 S. W. 442 (agricultural association).

But in Indiana, where the criminal law is wholly of statutory origin and "a corporation cannot be indicted for a crime, except as provided by statute," it has been held that the quashal of an indictment against an agricultural society for keeping a tenement for gaming was proper. *State v. Sullivan County Agr. Society*, 14 Ind. App. 369, 42 N. E. 963.

⁸³ *United States v. New York Herald Co.*, 159 Fed. 296.

⁸⁴ *State v. Passaic County Agr. Society*, 54 N. J. L. 260, 23 Atl. 680.

⁸⁵ "The evil intent of its agents who write and print the libel being attributable to it." *People v. Star Co.*, 135 N. Y. App. Div. 517, 120 N. Y. Supp. 498. See also *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280, 52 N. E. 445; *Banner Pub. Co. v. State*, 16 Lea (Tenn.) 176, 57 Am. Rep. 214; *State v. Atchison*, 3 Lea (Tenn.) 729, 31 Am. Rep. 663.

⁸⁶ *United States v. John Kelso Co.*, 86 Fed. 304.

⁸⁷ *State v. Baltimore & O. R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803.

⁸⁸ *State v. First Nat. Bank*, 2 S. D. 568, 51 N. W. 587 (a national bank).

⁸⁹ *United States v. Baltimore & O. R. Co.*, 7 Am. L. Reg. (N. S.) 757, Fed. Cas. No. 14,509.

⁹⁰ Notwithstanding a peddler's license can issue, under the Kentucky law, only in the name of a natural person, a corporation is subject to indictment for peddling without a license when it peddles through an unlicensed agent, it being possible for the corporation to protect itself in

bates;⁹¹ for offenses under the Bankruptcy Act;⁹² for conspiracy;⁹³

the matter by procuring the issuance of a license to such agent. *Standard Oil Co. v. Com.*, 107 Ky. 606, 55 S. W. 8. See also *Crall & Ostrander v. Com.*, 103 Va. 855, 49 S. E. 638.

An agent of a corporation, engaged in the carrying on of his principal's business, is subject to prosecution for the corporation's failure to take out the license prescribed by city ordinance. *Williams v. Talladega*, 164 Ala. 633, 51 So. 330; *Nashville, C. & St. L. Ry. Co. v. Attalla*, 118 Ala. 362, 24 So. 450.

⁹¹ *New York Cent. & H. River R. Co. v. United States*, 212 U. S. 481, 53 L. Ed. 613, holding that the Elkins Act is not unconstitutional in depriving innocent stockholders of a rebating corporation of their property without due process of law.

⁹² A bankrupt corporation can be guilty of a violation of section 29b of the Bankruptcy Act which prohibits, under penalty of imprisonment, the fraudulent concealment of assets by a bankrupt, notwithstanding its corporate character will prevent its punishment thereunder. *United States v. Young & Holland Co.*, 170 Fed. 110, quoting *Cohen v. United States*, 157 Fed. 651, 653.

⁹³ *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823, 835; *State v. Eastern Coal Co.*, 29 R. I. 254, 132 Am. St. Rep. 817, 17 Ann. Cas. 96, 70 Atl. 1. See also *United States v. Young & Holland Co.*, 170 Fed. 110, 111.

A corporation is subject to indictment under the federal statutes for conspiring to introduce intoxicating liquors into the Indian country which was formerly the Indian Territory. *Joplin Mercantile Co. v. United States*, 213 Fed. 926, 929, 936, Ann. Cas. 1916 C 470. But see *People v. Duke*, 19 N. Y. Misc. 292, 44 N. Y. Supp. 336,

338, in which the court said, obiter: "Could a corporation, in the contemplation of the common law, ever have been one of the two or more persons whose guilty agreement constituted at common law the offense of conspiracy? It is true that a corporation has power to make contracts, but its power to do so is limited 'to such contracts as were either expressly allowed in its charter, or fairly to be implied from the language used.' *Dwight, Persons*, 367. By various devices, changed from time to time by statute or by judicial declaration, the assent of the artificial person—which is one of the essential elements of a valid contract—is presumed, under certain circumstances, to have been given. Resort to legal device is necessary to uphold contracts to which a corporation is a party; otherwise, corporations would be incapable of the slightest undertaking. But no such rule or reasoning can be invoked to supply the elements of criminal intent, which is one of the material elements of conspiracy, and generally of all crimes. There are some acts for which indictments will lie against corporations. These acts have, I think, been so far limited to acts of misfeasance and of nonfeasance. But, in so far as crime generally is concerned, the artificial person, called the 'corporation,' cannot be held to have capacity to commit it. If, then, a corporation has not the power to conspire, the corporate acts of a dozen corporations could not form the basis of an indictment for conspiracy." And compare *People v. Dunbar Contracting Co.*, 165 N. Y. App. Div. 59, 151 N. Y. Supp. 164, aff'd 215 N. Y. 416, 109 N. E. 554, in which the court held that "upon both principle and authority a corporation may be indicted and convicted for conspiracy

and hence may be counted in computing the number necessary to the commission of such crime.⁹⁴

Cutting down timber and thereby obstructing a river, in violation of a statute, is a crime for which an indictment will lie against a corporation.⁹⁵ And a railroad company may be indicted for disobeying an order by the proper authorities to construct arches or bridges to connect lands severed by the construction of its road, as required by its charter or by statute.⁹⁶

When the legislature has provided that the doing of an act prohibited by statute, no penalty for the violation of the statute being imposed, shall be a misdemeanor, a turnpike company, the special charter of which provides that its gates shall not be nearer together than five miles, may be indicted for collecting toll at two of its gates which were not such distance apart.⁹⁷ A corporation created for the purpose of constructing and maintaining a toll bridge, and required by its charter to keep the same at all times in good, safe and passable repair, may be indicted for failure to light the same at night when necessary for the safety and convenience of the public.⁹⁸

But though a company "answer never so falsely, still there is no remedy against them for perjury."⁹⁹ Nor, under the law of Maine, can a corporation be guilty of larceny.¹

and similar crimes of which specific intent is the necessary and controlling element."

A corporation may be a party to a criminal conspiracy under an anti-trust statute which makes natural persons who are parties thereto criminally liable even though it is not subject to criminal prosecution thereunder. *Standard Oil Co. v. State*, 117 Tenn. 618, 10 L. R. A. (N. S.) 1015, 100 S. W. 705.

⁹⁴ "Independent of statute upon principle and in furtherance of sound public policy, both corporations and their officers and agents who engage in * * * [a criminal] conspiracy must be held to be parties to it, and be counted in computing the necessary number to constitute it." *Standard Oil Co. v. State*, 117 Tenn. 618, 10 L. R. A. (N. S.) 1015, 100 S. W. 705.

A demurrer will not lie to an indictment against corporate officers and

agents charged with a criminal conspiracy in restraint of trade on the ground that the defendants are one with the corporation, which, under the common law, could not have been guilty of such offense, and that their acts are the acts of the corporation. *People v. Duke*, 19 N. Y. Misc. 292, 44 N. Y. Supp. 336.

⁹⁵ *State v. White Oak River Corporation*, 111 N. C. 661, 16 S. E. 331.

⁹⁶ *Reg. v. Birmingham & G. Ry. Co.*, 3 Q. B. 223.

⁹⁷ *Nashville & D. R. R. Turnpike Co. v. State*, 96 Tenn. 249, 34 S. W. 4.

⁹⁸ *Com. v. Central Bridge Corporation*, 12 Cush. (Mass.) 242.

⁹⁹ *Wych v. Meal*, 3 Pr. Wms. 310, 311, 24 Eng. Rep. 1078, 1079 (decided in 1734).

A corporation cannot swear. *Sutton's Hospital Case*, 10 Coke 1, 23, 32.

¹ *Androscoggin Water Power Co. v. Bethel Steam Mill Co.*, 64 Me. 441, 443.

§ 3375. Instituting prosecution. It has been said, generally, that the fact that there is no previous complaint nor binding over, in the prosecution of a corporation, is immaterial, and that the appropriate first step in such a prosecution is the finding of an indictment.²

Under the law of Georgia, a corporation—in the absence of any element of waiver, at least—can be prosecuted only on an indictment or presentment by a grand jury, and not on an accusation by the prosecutor in a city court.³ So also, under the provisions of the Constitution of Arkansas, no criminal prosecution, except for the removal of county officers from office, can be instituted in a circuit

² United States v. Correspondence Institute of America, 125 Fed. 94.

Proceedings under a statute providing for bringing a corporation before an examining magistrate are not a condition precedent to the power of a grand jury to indict a corporation, but are only intended to provide a means for bringing the corporation before the examining magistrate, after presentment by grand jury, and are only necessary because a corporation cannot be arrested on bench warrant, as a natural person can; and a corporation may be indicted in the first instance as an individual may be indicted. State v. Security Bank of Clark, 2 S. D. 538, 51 N. W. 337.

An indictment against a corporation must allege the corporate existence of the defendant. Madisonville, H. & E. R. Co. v. Com., 140 Ky. 225, 130 S. W. 1084; Standard Oil Co. v. Com., 122 Ky. 440, 91 S. W. 1128. Contra, State v. Dry Fork R. Co., 50 W. Va. 235, 40 S. E. 447.

In a prosecution of a corporation, under the Indiana statute, for maintaining a nuisance, the allegation that the defendant is a corporation is a part of the description of the offense and the burden of proving such fact is on the state. Acme Fertilizer Co. v. State, 34 Ind. App. 346, 107 Am. St. Rep. 190, 72 N. E. 1037. See also Paragon Paper Co. v. State, 19 Ind. App. 314, 49 N. E. 600.

“Corporate existence can be shown, though not charged in the bill.” State v. Rowland Lumber Co., 153 N. C. 610, 69 S. E. 58.

A count against a corporation for criminal libel may be joined with a count against a natural person for the same crime. State v. Atchison, 3 Lea (Tenn.) 729, 31 Am. Rep. 663, 664. Said the court: “It is true the corporation may not be imprisoned, but the fact that the same measure of punishment cannot be inflicted in this way cannot vitiate the indictment; the judgment is of the same character, that is, a fine and costs. That imprisonment might possibly be inflicted in one case and not in the other, cannot in the least affect the validity of the indictment. The principle of such an objection is that joinder of different offenses might embarrass the parties in their defense. The fact that one could not be imprisoned after conviction, certainly can have no influence in the conduct of the trial on the question of guilty or not guilty.”

A plea of not guilty puts in issue the allegation of the defendant's corporate existence. Madisonville, H. & E. R. Co. v. Com., 140 Ky. 225, 130 S. W. 1084; Standard Oil Co. v. Com., 122 Ky. 440, 91 S. W. 1128.

³ Progress Club v. State, 12 Ga. App. 174, 76 S. E. 1029.

court by information, and, even though it be a misdemeanor for a railroad company to fail to erect a signboard at a crossing as required by statute, the prosecution for the offense when instituted in the circuit court must be based on a presentment or indictment, and an information on which it is predicated will be dismissed notwithstanding the grand jury has requested that it be framed and has returned it into court indorsed a true bill by its foreman, such action on the grand jury's part not giving it any validity as a basis for the prosecution.⁴ But under the statutes of South Dakota, "there are three modes in which a criminal proceeding against a corporation may originate: First. By indictment by a grand jury, in the first instance. Second. Through the return of a presentment by a grand jury, and a hearing before a magistrate. Third. By an information filed before magistrate, and a preliminary examination."⁵

§ 3376. Process. It has been said that at common law a corporation charged with a criminal offense was brought into court "by the issue of a summons and its service upon the principal or head officer of the company, and if it did not appear, as it only could appear, by a duly constituted attorney, a distringas was awarded, under which its goods and lands were seized to compel an appearance."⁶

A corporation being subject to indictment in a proper case and the law never being powerless to enforce its commands, it follows that an indicted corporation may be brought into court by compulsion if necessary.⁷ And where the statutes make no specific provision relative to the matter, a court having general jurisdiction to try an indicted corporation "may, as a necessary incident to such jurisdiction, issue any appropriate writ for the purpose of bringing the defendant before it."⁸ Undoubtedly the proper manner of bringing an indicted

⁴ *Texas & St. L. R. Co. v. State*, 41 Ark. 488, 490.

⁵ *State v. Taylor*, 34 S. D. 13, Ann. Cas. 1916 E 1285, 147 N. W. 72.

⁶ *State v. Western North Carolina R. Co.*, 89 N. C. 584, 585.

⁷ *Com. v. Lehigh Valley R. Co.*, 165 Pa. St. 162, 27 L. R. A. 231, 30 Atl. 836.

"It is a general rule that, where there is power in a court to hear and determine a case, there is also a power to issue proper process to enforce its orders. * * * And the power of the court to obtain control over a cor-

poration in either a civil or a criminal case by any appropriate process has been maintained. * * * There is at least no question, either on principle or on authority, that a summons served upon its proper officers is the correct process to bring a corporation into court either upon complaint or indictment." *Com. v. New York Cent. & H. River R. Co.*, 206 Mass. 417, 19 Ann. Cas. 529, 92 N. E. 766. But see *People v. Equitable Gas-Light Co.*, 6 N. Y. Cr. 189, 5 N. Y. Supp. 19.

⁸ *United States v. John Kelso Co.*, 86 Fed. 304, 307.

corporation into court, no statute providing otherwise, is by summons,⁹ and when a summons has been duly served on such a corporation and it fails to appear, a judgment by default may be entered against it.¹⁰

Where an indicted corporation voluntarily appears by attorney, a compliance with the statute providing the means of securing an involuntary appearance is not essential to the court's jurisdiction.¹¹

The federal statute (4 Fed. St. Ann. 498, § 716) providing that the courts of the United States "shall have power to issue writs of scire facias" and "all writs not specifically provided for by statute, which may be necessary for the exercise of their respective jurisdictions, and agreeable to the usages and principles of law," was undoubtedly enacted to meet cases in such courts when there has been no specific process provided by statute. *John Gund Brewing Co. v. United States*, 204 Fed. 17. See also *United States v. Standard Oil Co. of Indiana*, 154 Fed. 728.

"A corporation having existence only as a legal conception, and incapable of being present in court except as represented by attorney, would seem, from its nature, to be subject to the same process in criminal and civil actions, and we see no reason why it should not be." *State v. Western North Carolina R. Co.*, 89 N. C. 584, 586.

⁹*Com. v. New York Cent. & H. River R. Co.*, 206 Mass. 417, 19 Ann. Cas. 529, 92 N. E. 766; *Boston, C. & M. R. Co. v. State*, 32 N. H. 215, 228; *State v. Western North Carolina R. Co.*, 89 N. C. 584. See also *State v. Norfolk & S. R. Co.*, 152 N. C. 758, 67 S. E. 42. Compare *People v. Equitable Gas-Light Co.*, 6 N. Y. Cr. 189, 5 N. Y. Supp. 19.

Where a corporation is indicted under the law of Delaware, the court will order the issuance of a *capias*, the latter to be served upon the defendant in the same manner as a writ of summons is served under the pro-

visions of the General Corporation Act. *State v. Charles M. Scott Packing Co.*, 27 Del. 517, 89 Atl. 369.

"Information" in a statute requiring a copy of the information to be served upon the defendant corporation held not to include the affidavit on which the information is based so as to require the service of a copy of such affidavit. *Paragon Paper Co. v. State*, 19 Ind. App. 314, 49 N. E. 600.

¹⁰*Boston, C. & M. R. Co. v. State*, 32 N. H. 215; *Com. v. Lehigh Valley R. Co.*, 165 Pa. St. 162, 27 L. R. A. 231, 30 Atl. 836.

Service of summons issued upon an indictment against a corporation cannot be sustained as having been made on an agent of the defendant and as being sufficient, therefore, to sustain a default judgment against it when the only basis of the alleged agency is a single transaction in which the defendant paid the customary commission to the one upon which service was made for information furnished by it and for its aid in consummating a sale to a third person; and, in this connection, it is immaterial that a copy of the indictment was sent to the defendant by its alleged agent, the question being whether the summons was served upon a representative of the defendant and not whether the latter had actual notice of the indictment in time to have answered it. *Good Roads Machinery Co. v. Com.*, 146 Ky. 690, 143 S. W. 18.

¹¹*State v. Passaic County Agr. Society*, 54 N. J. L. 260, 23 Atl. 680.

A corporation appearing by attorney and demurring to an indictment

§ 3377. Presumption of innocence, burden of proof and sufficiency of evidence. On the trial of a corporation, charged with crime, the same rules relative to the presumption of innocence, burden of proof and sufficiency of evidence would seem to apply as if the defendant were a natural person. Thus it has been said that "when a corporation is charged with a violation of a penal statute, it occupies precisely the same situation that a natural person does. It is presumed innocent until proven guilty. The state must establish its guilt by evidence showing such fact beyond a reasonable doubt; and, where circumstantial evidence is relied upon to establish guilt, the circumstances must be not only consistent with the idea of defendant's guilt, but inconsistent with any other reasonable hypothesis."¹²

against it thereby waives any irregularity in or insufficiency of the service of process upon it. *Southern Ry. Co. v. State*, 125 Ga. 287, 114 Am. St. Rep. 203, 5 Ann. Cas. 411, 54 S. E. 160.

An indicted corporation for which an appearance is entered by an attorney has the burden of proving that such appearance was unauthorized. *State v. Passaic County Agr. Society*, 54 N. J. L. 260, 23 Atl. 680.

¹² *State v. Northern Pac. R. Co.*, 41 Mont. 557, 111 Pac. 141.

To hold that proof that the criminal act was done by the agents of the corporation is "sufficient to sustain an indictment against a corporation for the misfeasance of its agents in every case, would be to disregard the maxim that the accused is always presumed to be innocent; and clear proof of guilt on the part of the accused must be produced, before a conviction can properly be had. The act of misfeasance may, in a particular case, be of such a character, that though done by an authorized agent within the scope of his general employment and for the benefit of the corporation, yet it may give rise to but a suspicion that it has been directed or approved by the corporation. And if the act be of such character, independent proof must in such case be produced of the approval of

the corporation, before it can be found guilty in a criminal proceeding. In such case it would clearly not be necessary to prove that the corporation by a distinct act, such as a vote of its directors, either directed the act to be done or subsequently approved of its being done. For if this was required, it would amount to an absolute exemption of a corporation, from all liability criminally for the wrongs of its agents; for criminal acts are never so formally directed or approved. Still in such a case the approval of the corporation must be satisfactorily proven. But such approval may be shown satisfactorily otherwise than by proving such direct act of approval. The criminal act being in such a case done by an authorized agent acting within the scope of his authority, the mere doing of the act, even though done willfully, sufficiently shows, we incline to think, the assent and approval of the corporation to make them liable in a civil suit; and it gives rise to a suspicion in a criminal proceeding against the corporation, which, if corroborated by evidence that similar acts have been done by the agents of the corporation repeatedly, would be sufficient proof of their approval to justify a conviction. It is but a reasonable inference that acts which are habitually done

§ 3378. Corporations in hands of receivers. Where a receiver has been appointed for a corporation and the latter has been thereby deprived of the management and control of its business and property, it cannot be held liable for crimes subsequently committed in connection with the conduct of the business or the use of the property.¹³

by the authorized agents of a corporation are done with their approval; and this is indeed almost the only manner in which the approval by the corporation of the acts of its agents can ever be proven. The tacit appropriation by a corporation of the benefits of the acts of its agents, repeatedly occurring, is full and satisfactory proof of the assent of the corporation to the doing of such acts." *State v. Baltimore & O. R. Co.*, 15 W. Va. 362, 36 Am. Rep. 803, 817.

¹³ *State v. Wabash Ry. Co.*, 115 Ind. 466, 1 L. R. A. 179, 17 N. E. 909 (platform built across street by servants of receiver); *State v. Minneapolis & St. L. Ry. Co.*, 88 Iowa 689, 56 N. W. 400 (obstruction of highway).

"We think it would be manifestly unjust, and contrary to every elementary and settled principle of the criminal law, to hold a natural person or a corporation liable for an act which, according to the laws of the state where it is committed, is criminal, when the corporation or individual did not have the power to commit the act, and which act was committed by receivers who, by the appointment and authority of the court, had temporary charge of the assets of the individual or corporation when the act was committed. It would shock every man's sense of justice to lay down such a principle, and it would make the innocent suffer for the wrongdoing of others over whom they had no power or control. The alleged nuisance was committed, if at all, in the operation of the railway company by the receivers, who were appointed by the federal court, and the corporation had no right, through its offi-

cers or agents, to interfere with the receivers in the discharge of their duties. Any such interference would have been a contempt of the court which appointed the receivers, and subjected the corporation to a fine.

* * * The law will not punish a man, or hold him to answer an indictment, for an act which he did not and could not himself commit, or in the commission of which he did not participate. Whenever property has been seized by an officer of the court by virtue of its process, it is to be considered as in the custody of the court, and under its control for the time being, and this principle applies to property which has been taken into possession by receivers, who are considered as acting for the court, and also, in a certain sense and in civil cases, in behalf of the corporation. A receiver is a ministerial officer of a court of chancery, appointed as an indifferent person between the parties to a suit merely to take possession of and preserve, *pendente lite*, the fund or property in litigation, when it does not seem equitable to the court that either of the litigants should have possession of it. He holds the property for the benefit of all the parties interested. His title and possession is that of the court, and any attempt to disturb his possession or to interfere with him when he is acting under the authority and orders of the court is contempt, and punishable accordingly." *State v. Norfolk & S. R. Co.*, 152 N. C. 758, 67 S. E. 42 (obstruction of highway by cars left standing therein).

"The question * * * in this case is, do the facts agreed by the

Hence it will be reversible error on the trial of an indicted corporation to exclude its evidence that, at the time of the commission of the crime with which it was charged, it was in the hands of a receiver and had been divested of all control over its property.¹⁴

§ 3379. Statutes imposing penalties—Applicability to corporations. There are some cases in which the courts, applying the general rule that penal statutes are to be strictly construed, have held that corporations are not within a statute imposing a penalty, unless it applies to them in express terms, or unless an intention on the part of the legislature to include them is obvious upon the face of the statute. According to this view, it has been held that corporations were not included in a statute imposing a penalty upon "any person or persons" who should wilfully, maliciously or contrary to law, take,

parties sustain this indictment? It is not questioned but what the acts which have been done in blocking up the highway would sustain the indictment if done by the railroad company, or by men in their employ, over whom they had a control; but the case finds that the railroad and all the trains thereon were in the hands of a receiver appointed by a court of equity, and that the railroad company had no right or power to interfere with such trains or the conductors, or men managing them, but the same were wholly under the control of the receivers. A railroad company are only indictable for a nuisance by reason of an improper management and conduct in running their road, in a way which neither their charter nor the general railroad law will sanction. But if the railroad and all its concerns are in the hands of a receiver, and the company are under an injunction not to intermeddle with its concerns, it would seem difficult to maintain the proposition that still the company should be liable to an indictment for the acts of the receiver or of his agents. To hold the company liable in such a case, would be indeed monstrous, as they had no power to control or prevent the acts complained of as a

nuisance. No man or corporation should be made criminally responsible for acts which they have no power to prevent." *State v. Vermont Cent. R. Co.*, 30 Vt. 108, 109 (obstruction of highway by stopping of trains therein).

A railroad is not liable for the statutory penalty for the failure of its train to give the required crossing signals when its property was in the exclusive possession of a receiver at the time. *Arkansas Cent. R. Co. v. State*, 72 Ark. 250, 79 S. W. 773. Said the court: "The possession of the receiver was not the possession of the [company] * * * but was antagonistic thereto, and it [the company] * * * had no right to possess, control, or manage its trains to any extent and in any manner while in the hands of the receiver, and consequently it was not responsible for the negligence of the receiver and his servants or agents in operating the railroad, and their failures to ring a bell or whistle at public crossings."

¹⁴*Paducah, T. & A. R. Co. v. Com.*, 17 Ky. L. Rep. 1161, 34 S. W. 1068, 33 S. W. 822 (indictment of railroad company for failure to keep water-closet at depot as required by statute).

remove or break down a canal or any works connected therewith, and providing that "such offender or offenders" should be also liable to indictment and fine;¹⁵ nor in a statute imposing a penalty upon "any person" who should take, carry away or otherwise convert logs to his own use, without the consent of the owner, or alter or destroy any mark made thereon with intent to claim the same;¹⁶ nor, yet again, in a statute imposing a penalty upon the "owner, agent, or superintendent of any manufacturing establishment" who should employ children under a certain age in more than a certain number of hours work per day.¹⁷ The rule of strict construction, however, does not contemplate an unreasonable construction nor a construction that will defeat the legislative intent,¹⁸ and a statute of the character of those under discussion is to be construed reasonably, and in accordance with what appears to have been the intention of the legislature, and, in the opinion of some of the courts, as applicable to corporations, though they may not be mentioned therein, or otherwise necessarily included therein, if they are within its purpose. Applying this doctrine, it has been held that a corporation is liable under a statute imposing a

¹⁵ *Cumberland & O. Canal Corporation v. Portland*, 56 Me. 77. See also *State v. Cincinnati Fertilizer Co.*, 24 Ohio St. 611.

¹⁶ *Androscoggin Water Power Co. v. Bethel Steam-Mill Co.*, 64 Me. 441.

¹⁷ *Benson v. Monson & B. Mfg. Co.*, 9 Mete. (Mass.) 562. In this case it was said: "The provisions of acts imposing penalties are not to be extended by construction, beyond their obvious meaning and intent, as manifest upon the face of the statute. Corporations are not, in terms, included in the statute on which this action is brought."

¹⁸ See 2 Lewis' *Sutherland Statutory Construction* (2nd Ed.), § 528.

A statute imposing a penalty upon a corporation for wrongful acts or for negligence must not be construed so as to defeat its operation in cases which are manifestly within the intention of the legislature. *Western U. Tel. Co. v. Hamilton*, 50 Ind. 181.

In *Southern Indiana Loan & Savings Inst. v. Doyle*, 26 Ind. App. 102, 59 N. E. 179 (followed in *Studebaker*

Bros. Mfg. Co. v. Morden, 159 Ind. 173, 64 N. E. 594), the court held that it would not only be a liberal construction but also a construction which would be inconsistent with the language used that would include a corporation in the designation "any person" used in a statute providing that "any person being the owner or holder of any mortgage recorded in the state * * * or the officer of any bank, loan association or other corporation, being the owner or holder of any mortgage so recorded, or any administrator, executor, guardian, trustee or other person whose duty it shall be to release any mortgage so recorded, who shall refuse, neglect or fail to release such mortgage of record when the debt or obligation which such mortgage was made to secure, shall have been paid or discharged, and he shall have been requested to release the same, shall forfeit and pay to the mortgagor or person having the right to demand the release of such mortgage," a sum specified.

penalty upon "any person" who shall sell intoxicating liquors to a person in the habit of becoming intoxicated,¹⁹ and under a statute imposing a penalty upon any person who shall mark an unpatented article as patented.²⁰ "Corporations," it has been said by the Supreme Court of Iowa, "are to be considered as persons when the circumstances in which they are placed are identical with those of natural persons expressly included in a statute."²¹

While a penal action cannot be maintained against a corporation for acts of its agents not authorized or ratified by it, and not done by the agent in the course of his employment, authority may be inferred from circumstances.²² Moreover, a corporation may be liable to a penalty for an act of its agent, if done in the course of his employment, although contrary to instructions.²³

¹⁹ *Stewart v. Waterloo Turn Verein*, 71 Iowa 226, 60 Am. Rep. 786.

²⁰ *Hotchkiss v. Samuel Cupples Wooden-Ware Co.*, 53 Fed. 1018.

A manufacturing corporation is liable for the act of its superintendent in wrongfully affixing trade-marks to the manufactured articles. *Thompkins v. Butterfield*, 25 Fed. 556. See also *Pharmaceutical Society v. London & P. Supply Ass'n*, 5 App. Cas. 857, where the question of the application of penal statutes to corporations is discussed.

²¹ *Stewart v. Waterloo Turn Verein*, 71 Iowa 226, 60 Am. Rep. 786.

See, generally, § 54, *supra*.

²² *Com. v. Ohio & P. R. Co.*, 1 Grant's Cas. (Pa.) 329.

In an action against a corporation to recover a penalty for illegally issuing notes, it is sufficient to show that the officer representing the corporation was an officer de facto. *McGargell v. Hazleton Coal Co.*, 4 Watts & S. (Pa.) 424.

²³ *St. Louis & S. F. Ry. Co. v. Ryan*, 56 Ark. 245, where it was held that a railroad ticket agent was acting within the scope of his authority in making an excessive charge of passenger fare, and that the company was liable for the statutory penalty therefor, although the agent acted contrary to orders.

CHAPTER 54

MONOPOLIES AND TRUSTS

- § 3380. Common-law definition of monopoly.
- § 3381. Regrating, engrossing and forestalling.
- § 3382. Monopoly in modern sense.
- § 3383. Disfavor attaching to monopolies.
- § 3384. Grants of exclusive privileges.
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- § 3386. Anti-trust statutes generally.
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- § 3400. Action for treble damages—In general.
- § 3401. — Persons who may sue and be sued; venue; limitations; pleading, etc.
- § 3402. Violation of anti-trust statute as defense to action.
- § 3403. Section 3 of Clayton Act.

§ 3380. Common-law definition of monopoly. According to Lord Coke, a monopoly is “an institution by the king, by his grant, commission, or otherwise, to any persons or corporations, of or for the sole buying, selling, making, working or using of anything, whereby any persons or corporations are sought to be restrained of any freedom or liberty they had before, or hindered in their lawful trade.”¹ Sergeant Hawkins defined a monopoly as “an allowance by the king to a particular person or persons of the sole buying, selling, making, working, or using of anything, whereby the subject in general is restrained from the freedom of manufacturing or trading which he

¹ 3 Coke's Inst. 181. Quoted in *D* 734, and paraphrased by Justice Standard Oil Co. v. United States, Field in his dissenting opinion in the 221 U. S. 1, 55 L. Ed. 619, 641, 34 L. Slaughter House Cases, 16 Wall. (U. R. A. (N. S.) 834, Ann. Cas. 1912 S.) 36, 21 L. Ed. 394.

had before. Monopoly differs from ingrossing only in this, that monopoly is by patent from the king, and ingrossing by the act of the subject between party and party."² Justice Story, in his dissenting opinion in the Charles River Bridge case, declared that "a monopoly, as understood in law * * * is an exclusive right granted to a few, of something which was before of common right,"³ and, in this connection, it should be stated that the element of "common right" in Justice Story's definition has entered into the decision in more than one case involving the validity of a grant of exclusive privileges.⁴

§ 3381. Regrating, engrossing and forestalling. The old English offenses of regrating, engrossing and forestalling are, as such, unknown both to the law of this country and to the law of present-day England,⁵

² 1 Hawkins, Pleas of the Crown 624, quoted in Standard Oil Co. v. United States, 221 U. S. 1, 55 L. Ed. 619, 642, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734.

Blackstone's definition is very similar to that of Hawkins. See 4 Bl. Com. * 159.

³ Charles River Bridge v. Warren Bridge, 11 Pet. (U. S.) 420, 605, 9 L. Ed. 773. Justice McLean in his opinion in the same case, in which he concurred with the majority of the court, defined (11 Pet. [U. S.] at p. 567, 9 L. Ed. at p. 832) a monopoly as "that which has been granted without consideration; as a monopoly of trade, or of the manufacture of any particular article, to the exclusion of all competition. It is withdrawing that which is a common right from the community, and vesting it in one or more individuals to the exclusion of all others."

⁴ See § 3384, *infra*.

"From the earliest times there has gone, hand in hand with the struggle against odious monopolies—those which denied the right of the citizen to engage in those business enterprises which on principles of national justice should be open to all—an express recognition of the legality of those monopolies which related to business

enterprises in which the citizen had no natural right to engage, as the business of operating a ferry." Patterson v. Wollmann, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040.

⁵ "Practically all there is left of the ancient law of regrating, forestalling and engrossing are the statutes and decisions against 'corners.' While the modern 'corner' may include some of the elements of all three of the ancient offenses, it is perhaps more closely akin to the statutory offense of engrossing than to the offenses of regrating and forestalling. The ancient statutory offense of engrossing was confined to 'buying, contracting or promise-taking * * * any corn growing in the fields, or any other corn or grain, etc., * * * to the intent to sell the same again.' The ancient offense was complete whether committed by one person or by several in combination. The co-operation of several added nothing to the offense, but it is needless to say that the co-operation of several to commit the offense might make them guilty, not only of the offense of engrossing, but of the entirely distinct offense of conspiracy. It is no longer either an offense or contrary to public policy to buy or contract for any of the articles named with intent to sell

but, since "modern legislatures are still seeking a solution of the same problem—how to maintain the right to freely buy and sell the necessities and conveniences of life in a market which is free from artificial and conventional restrictions,"⁶ and since ancient decisions involving such offenses have helped to shape the modern law of combinations, a brief consideration of what are now obsolete laws will not be out of place at this point.

Aside from the fact that Lord Kenyon was of the opinion⁷ that the offenses of regrating, engrossing and forestalling existed at common law prior to the statute of Edward VI (1547-1553)⁸ which defined such offenses and provided for the imposition of severe penalties upon persons guilty thereof, that statute itself seems to have recognized their existence thereunder in its preamble which began "Albeit divers good statutes heretofore have been made against forestallers of merchandises and victuals, yet for that good laws and statutes against regrators and ingrossers of the same things have not been heretofore sufficiently made and provided, and also for that it hath not been perfectly known what person should be taken for a forestaller, regrator or ingrosser, the said statutes have not taken good effect, according to the minds of the makers thereof." Under that statute "whatsoever person or persons that after the said first day of May shall by any means regrate, obtain or get into his or their hands or possession, in any fair or market, any corn, wine, fish, butter, cheese, candles, tallow, sheep, lambs, calves, swine, pigs, geese, capons, hens, chickens, pigeons, conies, or other dead victual whatsoever, that shall be brought to any fair or market within this realm or Wales to be sold, and do sell the same again in any fair or market holden or kept in the same place, or in any other fair or market within four miles thereof, shall be accepted, reputed and taken for a regrator or regrators." As to engrossing, it was provided by the statute "that whatsoever person or persons that after the said first day of May shall engross or get into his or their hands by buying, contracting or promise-taking, other than by demise, grant or lease of land or title, any corn growing in the

again; on the contrary, such dealing is directly encouraged; but it is held to be against public policy—if not an indictable offense—for two or more to combine together for the purpose of 'cornering' the market, and contracts and agreements creating such combinations will not be enforced. The modern 'corner' is therefore covered by the law governing conspira-

cies rather than by the ancient law and decisions concerning the offense of engrossing." 1 Eddy on Combinations, § 71.

⁶ State v. Duluth Board of Trade, 107 Minn. 506, 23 L. R. A. (N. S.) 1260, 121 N. W. 395.

⁷ See infra, this section.

⁸ Stat. L. 5 and 6 Edw. VI, c. 14.

fields, or any corn or grain, butter, cheese, fish, or other dead victuals whatsoever, within the realm of England, to the intent to sell the same again, shall be accepted, reputed and taken an unlawful engrosser or engrossers." Defining forestalling, the statute declared "that whatsoever person or persons that after the first day of May next coming shall buy, or cause to be bought, any merchandise, victual, or any other thing whatsoever, coming by land or by water toward any market or fair, to be sold in the same, or coming toward any city, port, haven, creek or road of this realm or Wales, from any ports beyond the sea, to be sold, (3) or make any bargain, contract or promise, for the having or buying of the same, or any part thereof so coming as aforesaid, before the said merchandise, victuals, or other things, shall be in the market, fair, city, port, haven, creek or road ready to be sold; (4) or shall make any motion by word, letter, message or otherwise, to any person or persons, for the enhancing of the price or dearer selling of any thing or things above mentioned, (5) or else dissuade, move or stir any person or persons coming to the market or the fair, to abstain or forbear to bring or convey any of the things above rehearsed to any market, fair, city, port, haven, creek or road to be sold as is aforesaid, (6) shall be deemed, taken and adjudged a forestaller." Providing further, the statute made it an offense for any person, having sufficient corn and grain for his own necessities, to buy any additional corn in any fair or market when he did not bring to the same market on the same day as much corn as he should buy and sell the same at the market price, and also an offense to buy live stock and sell the same again alive unless the one so buying and selling should keep and feed the same for at least five weeks.⁹

This statute reached only the actual necessities of life, but by a subsequent statute of Edward VI,¹⁰ it was provided that no person should buy or engross any kind of tanned leather with the intent to sell the same again upon pain of forfeiting the leather or the just price thereof.

Subsequently, during the reign of George III, parliament passed an act¹¹ whereby it was sought to repeal all statutes prohibiting regrating, engrossing and forestalling. The preamble of this act contained an acknowledgment that, so far from achieving beneficial results, such statutes were, from an economic standpoint, working posi-

⁹ The statute also contained certain provisos not necessary to be here noticed. For the text of the remaining sections of the statute, see 1 Eddy, Combinations, p. 40, note.

¹⁰ Stat. L. 7 Edw. VI, vol. 5, c. 15.

¹¹ 12 Geo. III, c. 71.

tive injury.¹² But Lord Kenyon, at least, did not take kindly to the repeal of the statutes, and finding that the offenses of regrating, engrossing and forestalling existed under the common law, and that, "thank God, the provisions of the common law were not destroyed,"¹³ proceeded to punish such offenses accordingly,¹⁴ and, incidentally, to take issue with the views of Adam Smith, as expressed by him in his *Wealth of Nations*, on the subject of regrating.¹⁵ Indeed, it required still another act of parliament—and such an act was passed in 1844¹⁶—to persuade some of the courts of England that it was contrary to the public policy of the realm to punish regrating, engrossing and forestalling unless the element of fraud was present.¹⁷

§ 3382. Monopoly in modern sense. With the passing of the years and the superseding of the old political and economic conditions by the new, there has come a change, brought about in part, perhaps, by the looseness of the layman's terminology,¹⁸ in the legal concept of

¹² Such preamble reads as follows: "Whereas it hath been found by experience that the restraints laid by several statutes upon the dealing in corn, meal, flour, cattle, and sundry other sorts of victuals, by preventing a free trade in the said commodities, have a tendency to discourage the growth, and to enhance the price of the same; which statutes, if put in execution, would bring great distress upon the inhabitants of many parts of this kingdom, and in particular upon those of the cities of London and Westminster."

¹³ *Rex v. Busby*, Peake's Add. Nisi Prius Cas. 189.

¹⁴ *Rex v. Busby*, Peake's Add. Nisi Prius Cas. 189; *King v. Wadington*, 1 East 143.

¹⁵ See *Rex v. Busby*, Peake's Add. Nisi Prius Cas. 189.

¹⁶ 7 and 8 Vict. c. 24.

¹⁷ For an elaborate discussion of the subject considered in this section, and the relation of the ancient law prohibiting, regrating, engrossing and forestalling to the modern law of monopolies, trusts and combinations, see 1 Eddy, *Combinations*, c. 2, p. 33 et seq.

¹⁸ "The terms 'monopolies and trusts' are perhaps in cases like this, too often applied at the bar to all business enterprises requiring and employing great aggregations of wealth, and in the vague sense in which, at the hustings, they are used to arouse envy and jealousy, forgetting the manifest necessity of such aggregations of wealth to produce the commodities, and their transportation, which our civilization and comfort require. Every railroad corporation is in one sense a monopoly. It has franchises giving rights and powers not common to all citizens. It alone can operate its own railroad, though subject to reasonable regulation by the state. All monopolies, in a strict sense, rest upon some grant by the sovereign power of an exclusive franchise or privilege. And with modern facilities for transportation and communication, all the statutes and learning respecting 'forestalling,' 'regrating,' and 'engrossing' have become archaic, and even the meaning of those terms will hardly now be recognized." *State of Minnesota v. Northern Securities Co.*, 123 Fed. 692, 705, decree rev'd 194 U. S. 48, 48 L. Ed. 870.

a monopoly.¹⁹ "The technical monopoly, as distinguished from the practical monopoly of modern times, was a license or privilege, granted by the sovereign, to an individual for the sole buying and selling, making, working, or using, of anything whatsoever whereby the people in general were excluded from the liberty of manufacturing and trading, which they had before enjoyed."²⁰ Prohibitions against the creation of monopolies by individuals were unknown in the time of Lord Coke.²¹ The monopolies of to-day, however, "against which the legislatures, courts, and people inveigh, are generally such as result indirectly from the legislative grant of some exclusive privilege, or the right to carry on a business which is dependent upon the existence of some special privilege or franchise."²² A practical monopoly may exist without

"We take it as being well settled that all the combinations among dealers in provisions or other articles of prime necessity are deemed in law contrary to public policy, and contracts to effect or carry out such combinations are held void. * * * Combinations of this character are commonly called 'monopolies,' but they are not the technical monopolies known to the common law. 4 Bl. Comm. c. 12, § 9. The doctrine that they are illegal probably had its origin in the laws against forestalling, regrating, and engrossing [see § 3381, supra],—offenses which, at a very early day in England, were made punishable by statutes which have since been repealed. They were probably offenses at common law, though their precise nature, as defined in that system, seems to be obscure." *Queen Ins. Co. v. State*, 86 Tex. 250, 22 L. R. A. 483, 24 S. W. 397.

¹⁹ "Generalizing * * * , the situation is this: 1. That by the common law, monopolies were unlawful because of their restriction upon individual freedom of contract and their injury to the public. 2. That as to necessities of life, the freedom of the individual to deal was restricted where the nature and character of the dealing was such as to engender the presumption of intent to bring about

at least one of the injuries which it was deemed would result from monopoly,—that is, an undue enhancement of price. 3. That to protect the freedom of contract of the individual, not only in his own interest, but principally in the interest of the common weal, a contract of an individual by which he put an unreasonable restraint upon himself as to carrying on his trade or business was void. And that at common law the evils consequent upon engrossing, etc., caused those things to be treated as coming within monopoly and sometimes to be called monopoly, and the same considerations caused monopoly, because of its operation, and effect, to be brought within and spoken of generally as impeding the due course of, or being in restraint of, trade." *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734.

²⁰ *State v. Duluth Board of Trade*, 107 Minn. 506, 23 L. R. A. (N. S.) 1260, 121 N. W. 395. And see § 3380, supra.

²¹ *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734; *Harris v. Com.*, 113 Va. 746, 38 L. R. A. (N. S.) 458, Ann. Cas. 1913 E 597, 73 S. E. 561.

²² See § 3384, infra.

the aid of a legislative grant, as it may result from the control of a trade or industry, brought about by means of contracts and combinations between competitors,"²³ and thus be more nearly analogous to the old offense of engrossing²⁴ than identical with the monopoly of Elizabeth's day.²⁵ "The idea of monopoly," says the Supreme Court of the United States, "is not now confined to a grant of privileges. It is understood to include a 'condition produced by the acts of mere individuals.'"²⁶ Modern law declares a monopoly to be created "when, as a result of efforts to that end, previously competing businesses are so concentrated in the hands of a single person or corporation, or a few persons or corporations acting together, that they have power to practically control the prices of commodities and thus to practically suppress competition."²⁷ Indeed monopoly's dominant

²³ *State v. Duluth Board of Trade*, 107 Minn. 506, 23 L. R. A. (N. S.) 1260, 121 N. W. 395.

²⁴ See §§ 3380, 3381, *supra*.

In an early Massachusetts statute (Laws 1778-1779, c. 31) monopoly and forestalling were expressly treated as one and the same thing. See *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734.

²⁵ See § 3380, *supra*.

²⁶ *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129, 49 L. Ed. 689.

The Texas statute (Vernon's Sayles' Tex. Civ. St. 1914, vol. 4, art. 7797) defines a "monopoly" as "a combination or consolidation of two or more corporations when effected in either of the following methods: 1. When the direction of the affairs of two or more corporations is in any manner brought under the same management or control for the purpose of producing, or where such management or control tends to create a trust as defined in the first article of this chapter. 2. Where any corporation acquires the shares or certificates of stock or bonds, franchise or other rights, or the physical properties, or any part thereof, of any other corporation or corporations, for the purpose of preventing or lessening, or where the effect of such acquisition

tends to affect or lessen competition, whether such acquisition is accomplished directly or through the instrumentality of trustees or otherwise."

²⁷ *Attorney-General v. National Cash Register Co.*, 182 Mich. 99, Ann. Cas. 1916 D 638, 148 N. W. 420, quoting *United States v. American Tobacco Co.*, 164 Fed. 700 (per Circuit Judge Noyes, concurring), *rev'd and remanded with directions* 221 U. S. 106, 55 L. Ed. 663.

That, in the opinion of the Minnesota Supreme Court, this definition satisfies "the federal statute and the Constitution and statute of Minnesota," see *State v. Duluth Board of Trade*, 107 Minn. 506, 23 L. R. A. (N. S.) 1260, 121 N. W. 395.

"Any combination, the tendency of which is to prevent competition in its broad and general sense and to control, and thus at will enhance prices to the detriment of the public, is a legal monopoly." Opinion of Justice Barrett, in *People v. North River Sugar Refining Co.*, 54 Hun (N. Y.) 354, 377, note, 5 L. R. A. 386, 7 N. Y. Supp. 406.

"All combinations among persons or corporations for the purpose of raising or controlling the prices of merchandise, or any of the necessities of life, are monopolies, and intolerable, and

thought at the present time, according to the Supreme Court of the United States, "is * * * 'the notion of exclusiveness or unity;' in other words, the suppression of competition by the unification of interest or management, or it may be through agreement and concert of action. And the purpose is so definitely the control of prices that monopoly has been defined to be 'unified tactics with regard to prices.' " ²⁸

§ 3383. Disfavor attaching to monopolies. Monopolies have never, so far as any record shows, stood high in popular esteem. In the year 483 A. D., Zeno, Emperor of the East, issued to the Praetorian Prefect of Constantinople the following edict: "We command that no one may presume to exercise a monopoly of any kind of clothing, or of fish, or of any other thing serving for food, or for any other use,

ought to receive the condemnation of all courts." *Richardson v. Buhl* ("Diamond Match Case"), 77 Mich. 632, 658, 6 L. R. A. 457, 43 N. W. 1102 (per Sherwood, C. J.).

"The monopoly which the law views with disfavor is the manipulation of a business in which the public are interested in such a way as to enable one or a few to control and regulate it in their own interest and to the detriment of the public by exacting unreasonable charges." *Lough v. Outerbridge*, 143 N. Y. 271, 282, 25 L. R. A. 674, 42 Am. St. Rep. 712, 38 N. E. 292.

²⁸ *National Cotton Oil Co. v. Texas*, 197 U. S. 115, 129, 49 L. Ed. 689. See also *Walter A. Wood Mowing & Reaping Co. v. Greenwood Hardware Co.*, 75 S. C. 378, 9 L. R. A. (N. S.) 501, 9 Ann. Cas. 902, 55 S. E. 973; *Jones v. Carter*, 45 Tex. Civ. App. 450, 101 S. W. 514; *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901, 9 Ann. Cas. 667, 56 S. E. 264; *Charleston Gas Co. v. Kanawha Gas Co.*, 58 W. Va. 22, 112 Am. St. Rep. 936, 6 Ann. Cas. 154, 50 S. E. 876.

"It is possible for there to be a monopolizing by a combination of

competitors. Such combinations have been divided into 'combinations by agreement,' or 'loose combinations,' in which each member of the combination remains in the field, notwithstanding the combination, as in the [*Addyston Pipe & Steel Case*] * * *, and 'combinations by fusion,' or 'corporate combinations,' as in the *Standard Oil and Tobacco Cases*. Possibly in cases of the former class, where there is no exclusion of outsiders, it is not proper to say that there is a monopolizing, as in that contingency there is no exclusion. At most it may not be proper to say more than that there is a combination in restraint of trade. But in the latter case, notwithstanding there is no exclusion of outsiders, there is no reason for not characterizing what has been done as monopolizing, for in such case there is exclusion. The members of the combination are excluded for the benefit of the single corporation into which they are fused." *Patterson v. United States*, 222 Fed. 599, 619, suggesting that Mr. Justice McKenna must have had monopolizing by fusion in mind when, in delivering the opinion of the Supreme Court, he made the statements quoted in the text.

whatever its nature may be, either of his own authority, or under a rescript of an Emperor already procured, or that may hereafter be procured, or under an Imperial decree, or under a rescript signed by Our Majesty: nor may any persons combine or agree in unlawful meetings, that different kinds of merchandise may not be sold at a less price than they may have agreed upon among themselves. Workmen and contractors for buildings, and all who practice other professions, and contractors for baths are entirely prohibited from agreeing together that no one may complete a work contracted for by another, or that a person may prevent one who has contracted for a work from finishing it: full liberty is given to any one to finish a work begun and abandoned by another, without apprehension of loss, and to denounce all acts of this kind without fear and without costs. And if any one shall presume to practice a monopoly, let his property be forfeited and himself condemned to perpetual exile. And in regard to the principals of other professions, if they shall venture in the future to fix a price upon their merchandise, and to bind themselves by agreements not to sell at a lower price, let them be condemned to pay 40 pounds of gold. Your court shall be condemned to pay 50 pounds of gold if it shall happen through avarice, negligence, or any other misconduct, the provisions of this salutary constitution for the prohibition of monopolies and agreements among the different bodies of merchants, shall not be carried into effect.”²⁹ Opposed, however, to the position taken by Emperor Zeno was that assumed by Elizabeth, Queen of England. Whatever may have been her secret opinion of

²⁹ Per A. H. Marsh in 8 Can. L. T. 299 (Dec. 1888); reproduced in 23 Am. Law Rev. 261 (March-April, 1889). See reference to such edict in 4 Bl. Com. * 160.

In the edict of 1776, which was prepared by his minister, Turgot, wherein he gave freedom to trades and professions, Louis XVI of France recited the contributions that had been made by the guilds and trade companies and said: “It was the allurements of these fiscal advantages undoubtedly that prolonged the illusion and concealed the immense injury they did to industry and their infraction of natural right. This illusion had extended so far that some persons asserted that the right to

work was a royal privilege which the king might sell, and that his subjects were bound to purchase from him. We hasten to correct this error and to repel the conclusion. God in giving to man wants and desires rendering labor necessary for their satisfaction, conferred the right to labor upon all men, and this property is the first, most sacred, and imprescriptible of all.” In consequence of this fact, he regarded it “as the first duty of his justice, and the worthiest act of benevolence, to free his subjects from any restriction upon this inalienable right of humanity.” See note to Slaughter House Cases, 16 Wall. (U. S.) at bottom of page 110, 21 L. Ed. at bottom of page 419.

the justice of monopolies, she, in practice, made grants thereof to those within the range of her favor with such lavish hand that at one time a member of the House of Commons expressed his surprise that bread itself was not a monopolized commodity.³⁰ Indeed, it was the freedom with which she made grants of monopolies that, from the standpoint of any future English sovereign who might see in such grants an easy method of paying debts owing, "killed the goose that laid the golden egg." For even in the spacious times of the great Elizabeth, the pleasure of the titular ruler of England was not of necessity the law of the realm, and it was during her reign that the courts of England first declared the grant of a monopoly—the monopoly involved being that of manufacturing playing cards—to be contrary to the common law and void.³¹

"The struggle of the English people against monopolies * * * finally ended in the passage [in the year 1624] of the statute of 21st James I, by which it was declared that 'all monopolies and all commissions, grants, licenses, charters and letters patent, to any person or persons, bodies, politic or corporate, whatsoever, of or for the sole buying, selling, making, working, or using of anything' within the realm or the Dominion of Wales, were altogether contrary to the laws of the realm and utterly void, with the exception of patents for new inventions for a limited period, and for printing, then supposed to belong to the prerogative of the King, and for the preparation and manufacture of certain articles and ordnance intended for the prosecution of war. The common law of England, as is thus seen, condemned all

³⁰ 4 Hume's History of England (Harper's Ed.), 335, 336.

"The abuse of the power by Queen Elizabeth so stirred the people to righteous wrath and indignation that 'the coach of the chief minister to the crown was surrounded by an indignant populace, who cursed the monopolies and exclaimed that the prerogative should not be suffered to touch the old liberties of England.' Macaulay's History of England, vol. 1, p. 50. In the Long Parliament Sir John Culpepper bitterly declared that the monopolists 'are a nest of wasps, a swarm of vermin, that have overspread the land. Like the frogs of Egypt they have gotten possession of our dwellings, and we have scarce

a room free from them. They sup in our cup; they dip in our dish; they sit by our fire. We find them in the dye pot, wash-bowl, and powdering pot. They share with the butler in his box. They will not bait us a pin. We may not buy our clothes without their brokage. These are the leeches that have sucked the commonwealth so hard that it is almost hectical. Mr. Speaker, I have echoed to you the cries of the kingdom. I will tell you their hopes. They look to Heaven for a blessing on this Parliament.'" State v. Duluth Board of Trade, 107 Minn. 506, 23 L. R. A. (N. S.) 1260, 121 N. W. 395.

³¹ Darcy v. Allin (Monopolies Case), 11 Coke 84, decided in 1602.

monopolies in any known trade or manufacture, and declared void all grants of special privileges whereby others could be deprived of any liberty which they previously had, or be hindered in their lawful trade. The statute of James I, to which I have referred, only embodied the law as it had been previously declared by the courts of England although frequently disregarded by the sovereigns of that country.”³²

§ 3384. Grants of exclusive privileges. The statute of 21st James I³³ came to this country as a part of the body of the common law,³⁴ and it cannot be questioned that monopolies—using that word in its strict sense³⁵—are as obnoxious to the law of the United States generally,³⁶ and to the laws of the several states of the Union in par-

³² Field, J., in his dissenting opinion in the *Slaughter House Cases*, 16 Wall. (U. S.) 36, 21 L. Ed. 394.

In his concurring opinion in *Butchers' Union Slaughter House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter House Co.* (*Butchers' Union Case*), 111 U. S. 746, 28 L. Ed. 585, Mr. Justice Bradley declared that the Monopolies Case and the statute of 21 James I “form one of the constitutional landmarks of British liberty, like the Petition of Right, the Habeas Corpus Act, and other great constitutional Acts of Parliament. They established and declared one of the inalienable rights of freemen which our ancestors brought with them to this country,” namely, the right to follow any of the common occupations of life.

³³ See § 3383, *supra*.

³⁴ Per Field and Bradley, JJ., dissenting in the *Slaughter House Cases*, 16 Wall. (U. S.) 36, 21 L. Ed. 394. But see note 63, § 3385, *infra*.

Under the head of “Monopolies,” there is found in “*The General Laws and Liberties of the Massachusetts Colony: Revised & Re-printed. By Order of the General Court Holden at Boston, May 15th, 1672*” (Reprint published by order of the Boston City Council, 1887), on page 119, the

following: “It is Ordered, Decreed, and by this Court Declared; That there shall be no Monopolies granted or allowed amongst us, but of such new inventions that are profitable to the Country, and that for a short time. [1641]” See Justice Story’s reference to this act in his dissenting opinion in *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 606, 9 L. Ed. 773.

³⁵ See § 3382, *supra*.

³⁶ In his concurring opinion in the *Butchers' Union Case* (*Butchers' Union Slaughter House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter House Co.*, 111 U. S. 746, 28 L. Ed. 585), Mr. Justice Field said: “As in our intercourse with our fellow-men certain principles of morality are assumed to exist, without which society would be impossible, so certain inherent rights lie at the foundation of all governmental action, and upon a recognition of them alone can free institutions be maintained. These inherent rights have never been more happily expressed than in the Declaration of Independence, that new evangel of liberty to the people: ‘We hold these truths to be self-evident,’ that is, so plain that their truth is recognized upon their mere statement, ‘that all

ticular, as they were to the law of Old England.³⁷ Indeed, more than one of the state constitutions interdicts monopolies in no uncertain terms.³⁸

men are endowed'; not by edicts of Emperors or decrees of Parliament or Acts of Congress, but 'by their Creator, with certain inalienable rights,' that is, rights which cannot be bartered away or given away or taken away except in punishment of crime; 'and that among these are life, liberty and the pursuit of happiness, and to secure these,' not grant them but secure them, 'governments are instituted among men, deriving their just powers from the consent of the governed.' Among these inalienable rights, as proclaimed in that great document, is the right of men to pursue their happiness, by which is meant the right to pursue any lawful business or vocation, in any manner not inconsistent with the equal rights of others, which may increase their prosperity or develop their faculties, so as to give to them their highest enjoyment. The common business and callings of life, the ordinary trades and pursuits, which are innocuous in themselves and have been followed in all communities from time immemorial, must, therefore, be free in this country to all alike upon the same conditions. The right to pursue them, without let or hindrance, except that which is applied to all persons of the same age, sex and condition, is a distinguishing privilege of citizens of the United States, and an essential element of that freedom which they claim as their birthright. It has been well said that, 'The property which every man has in his own labor, as it is the original foundation of all other property, so it is the most sacred and inviolable. The patrimony of the poor man lies in the strength and dexterity of his own hands, and to hinder his employing this strength and dexterity

in what manner he thinks proper, without injury to his neighbor, is a plain violation of this most sacred property. It is a manifest encroachment upon the just liberty both of the workman and of those who might be disposed to employ him. As it hinders the one from working at what he thinks proper, so it hinders the others from employing whom they think proper.' Adam Smith, *Wealth of Nations*, bk. 1, ch. 10."

³⁷ But see *Stewart v. Erie & W. Transp. Co.*, 17 Minn. 372 (Gil. 348) in which it was said that "a monopoly is not necessarily unlawful, for it may be created, permitted, or tolerated by law. But we agree with the plaintiff's counsel, and with the cases by him cited, that it is against the general policy of the law to destroy or interfere with free competition, or to permit such destruction or interference. * * * An unauthorized monopoly is, therefore, against public policy as destroying and interfering with free competition. But if the right to exercise a monopoly be conferred by public authority, that fact is conclusive upon the question of public policy."

³⁸ "Monopolies," according to the Constitution of Wyoming (Const. 1889, art. 1, § 30), "are contrary to the genius of a free state and shall not be allowed." An identical declaration is found in the Constitution of Tennessee (Const. 1870, art. 1, § 22), and a declaration, identical except that the words "ought not to be allowed" are used instead of the words "shall not be allowed," in the Constitution of North Carolina (Const. 1876, art. 1, § 31). The Constitution of Texas (Const. 1876, art. 1, § 26) and the Constitution of Oklahoma

There is a class of grants, however, which, although resembling monopolies, are distinguishable therefrom and are frequently held valid. "In the whole period of that historic struggle, in the forum and on the field, which marked the birth, growth, and full maturity of the genius of English free government," says one of the federal courts,³⁹ "the denunciation against monopolies was never leveled at any claim of right to exclusive privilege held under an act of parliament. In the Slaughterhouse Cases,⁴⁰ * * * it was said by Mr. Justice Miller in delivering the opinion of the court: 'We think it may be safely affirmed that the parliament of Great Britain, representing the people in their legislative functions, and the legislative bodies of this country, have from time immemorial to the present day continued to grant

(Const. 1907, art. 2, § 32) each declares that "monopolies are contrary to the genius of a free government, and shall never be allowed," and the Constitution of Arkansas (Const. 1874, art. 2, § 19) that they "are contrary to the genius of a republic, and shall not be allowed." In the Constitution of Maryland (Const. 1867, Declaration of Rights, art. 41) it is declared that "monopolies are odious, contrary to the spirit of a free government and the principles of commerce, and ought not to be suffered."

The Louisiana Constitution of 1879, which was adopted subsequently to the decision in the Slaughter House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394, wherein, notwithstanding a vigorous dissent, it was held that the grant by the state of the exclusive privilege of slaughtering cattle in the vicinity of New Orleans was valid as an exercise of the police power (see generally § 3385, *infra*), expressly provided (art. 248) that "the police juries of the several parishes and the constituted authorities of all incorporated municipalities of the State shall alone have the power of regulating the slaughtering of cattle and other live stock within their respective limits; provided, no monopoly or exclusive privilege shall exist in this state, nor such business be restricted to the land or houses of

any individual or corporation," etc. (same provision, La. Const. 1913, art. 276), and further (Schedule, art. 258), that "the monopoly features in the charter of any corporation now existing in the State, save such as may be contained in the charters of railroad companies, are hereby abolished."

A constitutional provision abolishing the monopolistic features of corporate charters (the provision involved being the one in the Louisiana Constitution quoted *supra*, this note) cannot be given retroactive operation as to charters containing monopolistic features valid when the charters were granted (New Orleans Gas Light Co. v. Louisiana Light & Heat Producing & Manufacturing Co., 115 U. S. 650, 29 L. Ed. 516, followed in New Orleans Water Works Co. v. Rivers, 115 U. S. 674, 29 L. Ed. 525. Compare *McRee v. Wilmington & R. R. Co.*, 47 N. C. 186) unless such features are mere police regulations. *Butchers' Union Slaughter House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter House Co.* (Butchers' Union Case), 111 U. S. 746, 28 L. Ed. 585.

³⁹ *Laredo v. International Bridge & Tramway Co.*, 66 Fed. 246.

⁴⁰ 16 Wall. (U. S.) 36, 21 L. Ed. 394.

to persons and to corporations exclusive privileges—privileges denied to other citizens, privileges which come within any just definition of the word “monopoly” as much as those now under consideration—and that the power to do this has never been questioned. Nor can it be truthfully denied that some of the most useful and beneficial enterprises set on foot for the general good have been made successful by means of these exclusive rights, and could only have been conducted to success in that way.’ There are classes of exclusive privileges which certainly do not amount to ‘monopolies,’ within the meaning of the common law or of the Texas Constitution.⁴¹ Courts of last resort have generally refrained from propounding an authoritative affirmative definition of the ‘monopoly’ so odious to the common law and to the genius of a free government. It would try the power of expression of most judges, if not of human speech, to frame such a definition, outside of which a grant or contract must wholly and clearly rest to escape the stroke of nullity. It has therefore generally been deemed wise and safe to use rather the process of exclusion, and determine what is not a monopoly, so far as the case in hand required.”⁴² Under the express provision of the United States Constitution,⁴³ Congress has power to grant to authors and inventors the exclusive right, for a limited period, to their respective writings and inventions, and thus, in effect, to confer monopolies upon them in the matter thereof.⁴⁴ Moreover, as Mr. Eddy says in his work on Com-

⁴¹ For the provision of the Texas Constitution on the subject of monopolies, see note 38, *supra*.

⁴² The constitutions of a number of the states, however, either forbid absolutely the granting of exclusive or special privileges to any citizen or class of citizens or provide that no such privileges shall be granted that shall not be alterable or revocable by the legislature. See Stimson's Federal and State Constitutions, p. 129, § 16.

⁴³ Art. I, § 8.

⁴⁴ Of patents and copyrights, the Missouri Court of Appeals has said: “Patents issued to inventors are sometimes referred to as grants of exclusive privileges. But there is no grant in the case. The inventor has a natural ownership in the product of his brain. The government confers

nothing, but only protects him in the enjoyment of that which is already his. If the stranger is hindered by this protection, he is only hindered against invasion of another's right. In this case, also, he may be ‘excluded from that to which he never had any right,’ but is not, therefore, wronged. The protection of copyright stands upon the same footing of natural, positive, and impregnable right and ownership in the author or composer. Here, as elsewhere in the necessary disciplining of humanity, the civil law advances in aid of natural justice. It imposes no privation or exclusion upon any one, but holds all mankind to observance of the universal law which forbids the appropriation of another's property without his consent.” *St. Louis Gaslight Co. v. St. Louis Gas, Fuel & Power Co.*

binations,⁴⁵ "the legislatures of the several states may, within the limits of their respective constitutions,⁴⁶ grant certain privileges in the nature of a monopoly for the good of the entire public.⁴⁷ And

16 Mo. App. 52, 69. See also, in this connection, the dissenting opinion of Mr. Justice Field in the Slaughter House Cases, 16 Wall. (U. S.) 36, 21 L. Ed. 394.

That copyrights and patents do not absolve their owners from violations of anti-trust laws, see §§ 3395, 3396, *infra*.

⁴⁵ 1 Eddy, Combinations, 19, 26.

⁴⁶ In an early case, decided by the Supreme Court of Pennsylvania, such court declared that it seemed "scarcely necessary to say that monopolies are not prohibited by the Constitution; and that to abolish them would destroy many of our most useful institutions. Every grant of privilege so far as it goes, is exclusive; and every exclusive privilege is a monopoly. Not only is every railroad, turnpike, or canal such, but every bank, college, hospital, asylum, or church, is a monopoly; and the ten thousand beneficial societies incorporated by the executive on the certificates of their legality, by the attorney-general and judges of the Supreme Court, are all monopolies." *In re Philadelphia & T. R. Co.*, 6 Whart. (Pa.) 25, 36 Am. Dec. 202.

So also, in a case decided by the Supreme Court of California a number of years ago, in which it was held that the act conferring "certain special privileges, in the nature of a franchise" in connection with the construction and operation of a telegraph line was not unconstitutional, it was stated that "much is said about the odious character of monopolies, in which we entirely agree, but such arguments should properly be addressed to the Legislature, with whom the power is vested." We cannot deny the existence of the power to grant

special privileges without overturning the legislation of centuries and the whole system of jurisprudence upon the subject of franchises and vested rights of property." *California State Tel. Co. v. Alta Tel. Co.*, 22 Cal. 398.

For provisions on the subject of monopolies in various of the state constitutions, see note 38, *supra*, this section.

⁴⁷ "Monopolies are favorites neither with courts nor people. They operate in restraint of competition, and are, hence, as a rule, detrimental to the public welfare; nor are they at all allowable except where the resultant advantage is in favor of the public, as, for instance, where a water or a gas company could not exist except as a monopoly." *Seranton Elec. Light & Heat Co.'s Appeal*, 122 Pa. St. 154, 1 L. R. A. 285, 9 Am. St. Rep. 79, 15 Atl. 446.

In *State v. Milwaukee Gaslight Co.*, 29 Wis. 454, 9 Am. Rep. 598, holding valid the charter grant to the Milwaukee Gaslight Company of the exclusive right and authority to manufacture and sell gas in the city of Milwaukee, the court said: "We had supposed the law to be quite well settled that the sovereign authority might grant special privileges to corporations and individuals without violating any constitutional principle. It is frequently and constantly done by enacting various acts of incorporation of private companies for building and operating railroads, plank-roads, ferries and toll-bridges; and for many other objects upon which private skill and capital can be employed. It is important that these corporations be created, although they sometimes become great monopolies and are injurious to freedom of trade and the

municipalities within the powers granted by the legislature frequently

progress of improvement. But it is not obvious upon what principle the power of the legislature to pass such acts can be denied. The legislature retains control over such charters in this state, and has the power to take away any exclusive privilege or franchise which it may have improvidently granted."

The grant in the amended charter of the Norwich Gas Light Company of the exclusive right to lay gas pipes in the streets of the city of Norwich is invalid as the grant of a monopoly. *Norwich Gas Light Co. v. Norwich City Gas Co.*, 25 Conn. 19.

The special charter of the Memphis Water Company whereby it was given the privilege, exclusive for thirty years, of laying pipes in the streets of the city of Memphis and supplying water to the inhabitants thereof is not invalid as creating a monopoly. *Memphis v. Memphis Water Co.*, 5 Heisk. (Tenn.) 495, approving Lord Coke's definition of a monopoly (quoted in § 3380, *supra*) which it erroneously stated was adopted in the case of *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 9 L. Ed. 773, while, as a matter of fact, the definition in question was incorporated in the dissenting opinion of Mr. Justice Story in that case, where in the court said: "The question then is narrowed down to the inquiry, did the individuals composing the Memphis Water Company have the right, before their incorporation, in common with all others [see § 3380, *supra*], to erect water works in Memphis, to take up pavements, occupy the streets and do such things as were necessary and proper, in completing their water works? It is clear that none had the right to do these things except the city of Memphis, by virtue of its corporate powers; and this

right, on the part of the city, was exclusive until it was taken away by the legislature and transferred to the Memphis Water Company. It is no more a monopoly when conferred on the water company, than when it belonged to the city of Memphis. It was an exclusive privilege when exercised by the city, but it was not a monopoly. It is an exclusive privilege in the Memphis Water Company, but not a monopoly." See also *Crescent City Gaslight Co. v. New Orleans Gaslight Co.*, 27 La. Ann. 138. And compare *St. Louis Gaslight Co. v. St. Louis Gas, Fuel & Power Co.*, 16 Mo. App. 52.

In *Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. 143 (see note 48, *infra*, this section), however, the court said: "It has been said * * * that there can be no monopoly in the use of a street to lay down gas or water mains or pipes, because it is not a matter of common right to use streets for such purpose. This may be admitted without affecting the question before us. When such use, however, is but a means to the exercise of an exclusive right to sell water, and to compel a city or its inhabitants to buy it, it will be found difficult to separate the means from the end intended to be accomplished. * * * It will not do to say that an exclusive right in a municipal corporation to operate water or gas works stands upon the same ground as does such exclusive right held by a private corporation or an individual. In the one case the right is, in effect, exercised by the people, who are to be affected by it, and not for profit, but for the welfare and convenience of the public and the inhabitants of the corporation. The correction of abuses in its management, whereby oppression may be avoided, is in the hands

grant franchises and enter into contracts which confer upon indi-

of the people, while, on the other hand, such works are operated for private gain, with every incentive to oppression, without power, in those to be affected, to relieve themselves from it. In the one case the exclusive right may create a monopoly, and in the other not. The exclusive rights given by the contract [municipal ordinance] before us lead to the same results as a monopoly in any other matter; and whether a monopoly or not is best ascertained by the results which are brought about by a contract or law, and the exercise of rights the one or the other may profess to confer."

In granting the Broadway and Locust Point Ferry Company the exclusive right to hold and use the end of a certain wharf for ferry purposes, the Maryland legislature did not contravene the 41st section of the Maryland Declaration of Rights [see note 38, supra, this section] which forbids monopolies. *Broadway & L. P. Ferry Co. v. Hankey*, 31 Md. 346. "We are at a loss," said the court, "to comprehend how the privilege granted to the appellant by the charter is obnoxious to [the] * * * objection [that it violates such section]. It is not a monopoly in any sense; but a privilege conferred on the company to be exercised for the public benefit; such a grant by this legislature has never been considered as creating a monopoly, and no authority has been cited which sustains such a proposition."

Wisconsin has an "indeterminate permit" which "is a public privilege emanating direct from the state to own, operate, manage, or control any plant or equipment, or any part of a plant or equipment within the state for the production, transmission, delivery, or furnishing of heat, light, water, power, either directly or in-

directly to or for the public, and is perpetual and exclusive, subject to the conditions of the public utility law." *La Crosse v. La Crosse Gas & Electric Co.*, 145 Wis. 408, 130 N. W. 530 (headnote, citing *State v. Kenosha Elec. R. Co.*, 145 Wis. 337, 129 N. W. 600, by Judge Marshall).

Exclusive schoolbook contracts are not necessarily invalid under the law prohibiting monopolies. *Dickinson v. Cunningham*, 140 Ala. 527, 37 So. 345; *State v. Haworth*, 122 Ind. 462, 7 L. R. A. 240, 23 N. E. 946; *Leeper v. State*, 103 Tenn. 500, 48 L. R. A. 167, 53 S. W. 962; *Rand, McNally & Co. v. Hartranft*, 29 Wash. 591, 70 Pac. 77.

A special charter, granted by the Louisiana legislature, which gave to a gaslight company, as it was possible at the time validly to do, the exclusive right for a period of fifty years of making and supplying gas in the city of New Orleans constituted a contract which could not be impaired by the provision, in the subsequently-adopted Louisiana Constitution (see note 38, supra, this section), abolishing the monopoly features of corporate charters. *New Orleans Gas Co. v. Louisiana Light & Heat Producing & Manufacturing Co.*, 115 U. S. 650, 29 L. Ed. 516, followed, in the matter of the charter of a water company, in *New Orleans Water Works Co. v. Rivers*, 115 U. S. 674, 29 L. Ed. 525. See also *St. Tammany Water Works Co. v. New Orleans Water Works*, 120 U. S. 64, 30 L. Ed. 563, following *New Orleans Water Works Co. v. Rivers*, supra. Impairment of contract obligations cannot be urged, however, when the exclusive privilege was a police regulation. *Butchers' Union Slaughter House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter House Co.* (*Butchers' Union Case*), 111 U. S.

viduals and corporations certain exclusive rights. But these privileges are granted only in connection with the performance of some public or quasi-public service, and are jealously regarded by both the people and the courts. * * * There is, however, such a conflict among the authorities as to the rights of municipalities to grant exclusive privileges that no proposition of general validity can be laid down, but each case as it arises must be considered in connection with the constitutional provisions and the legislative enactments of the particular state.”⁴⁸ There is one rule connected with this subject, however,

746, 28 L. Ed. 585. See note 53, § 3385, *infra*.

For the leading case sustaining the proposition that exclusiveness in a grant by the state will not be implied, see *Charles River Bridge v. Warren Bridge*, 11 Pet. (U. S.) 420, 9 L. Ed. 773.

⁴⁸ The following cases are cited merely as illustrating the divergence of views referred to, and the respective holdings noted must be understood as going only to the broad objection that the grant recited was a violation of the law prohibiting monopolies and not as indicating any one particular line of reasoning nor as having anything to do with the question of the validity of the several grants viewed from any standpoint other than the law of monopolies.

United States. *Laredo v. International Bridge & Tramway Co.*, 66 Fed. 246 (holding valid a city ordinance whereby the city for a money consideration gave a right of entry upon certain of its streets and lands to an international bridge and agreed not to exercise its exclusive ferry franchise for a period of 25 years).

Indiana. *Indianapolis Cable St. R. Co. v. Citizens St. R. Co.*, 127 Ind. 369, 8 L. R. A. 539, 26 N. E. 893, 24 N. E. 1054 (declaring that the rule which renders monopolies illegal “applies only to such things as are of common right, and is never to be applied to such things as are in their nature a monopoly,” e. g., the right to lay

street railroad tracks on streets too narrow to be occupied by the tracks of more than one company); *Citizens Natural Gas & Mining Co. v. Town of Elwood*, 114 Ind. 332, 16 N. E. 624 (holding that “a municipal corporation cannot grant to any fuel or gas supply company a monopoly of its streets”).

Iowa. *Davenport Gas & Electric Co. v. Davenport*, 124 Iowa 22, 98 N. W. 892 (holding valid a grant by a city of an exclusive lighting franchise for 25 years); *Des Moines St. R. Co. v. Des Moines Broad-Gauge St. R. Co.*, 73 Iowa 513, 35 N. W. 602, 33 N. W. 610 (holding valid a city ordinance granting an exclusive street railroad franchise for a period of 30 years).

Kansas. *O’Neal v. Harrison*, 96 Kan. 339, 150 Pac. 551 (holding valid a grant by a city to the highest bidder of the exclusive right to remove all garbage).

Kentucky. *Truesdale v. Newport*, 28 Ky. L. Rep. 840, 90 S. W. 589 (holding valid a city ordinance providing for the sale at public bidding of the exclusive privilege of supplying the city with gas for 20 years, the franchise granted to be in force in the corporate limits as they then existed or as they might thereafter be enlarged).

Maine. *State v. Robb*, 100 Me. 180, 60 Atl. 874, 4 Ann. Cas. 275 (holding valid a city ordinance giving the exclusive privilege of collecting and removing all refuse matter constituting

which may be accepted as fairly well settled, and that one is the rule that, in any event, a municipality can grant an exclusive franchise

house offal or swill; within the city, to a person or to persons specially appointed, and prohibiting all other persons from engaging in such business).

Michigan. *Grand Rapids v. De Vries*, 123 Mich. 570, 82 N. W. 269 (holding valid a city ordinance providing for the issuance of an exclusive license to collect and remove garbage, offal, dead animals and other refuse matter).

Montana. *Davenport v. Kleinschmidt*, 6 Mont. 502, 13 Pac. 249 (holding void the grant by city ordinance of the exclusive right to supply the city with water for municipal and fire purposes for a period of 20 years).

Nebraska. *Iler v. Ross*, 64 Neb. 710, 57 L. R. A. 895, 97 Am. St. Rep. 676, 90 N. W. 869 (holding void a city ordinance which provided that any person who, without a contract from the city so to do, should collect or remove any dead animals, garbage, ashes, filth, offal, night soil or other refuse matter within the corporate limits, should be deemed guilty of a misdemeanor and, upon conviction, be fined).

New Jersey. *Conover v. Long Branch Commission*, 65 N. J. L. 167, 47 Atl. 222 (holding void a grant by a board of commissioners of an exclusive franchise for 20 years, for the collection and cremation of garbage, etc.).

New York. *Parfitt v. Ferguson*, 3 App. Div. 176, 38 N. Y. Supp. 466 (holding void the provision in a contract between a town board and a lighting company that no other gas or electric light company should have the consent of the board to extend its mains or lay its pipes or conductors within the town during the term of the agreement); *Rochester v. Gutberlett*, 73 Misc. 607, 133 N. Y. Supp. 541 (holding valid a city ordinance pre-

venting all persons excepting the city contractor from engaging in the business of collecting garbage).

North Carolina. *Thrift v. Town Com'rs Town of Elizabeth City*, 122 N. C. 31, 44 L. R. A. 427, 30 S. E. 349 (holding void a grant by a town of an exclusive waterworks franchise for a period of 30 years).

Pennsylvania. *Bailey v. Philadelphia*, 184 Pa. St. 594, 39 L. R. A. 837, 63 Am. St. Rep. 812, 39 Atl. 494 (holding valid the provision in a lease of gas works by the city owning them that during the term of the lease "it will do nothing, by ordinance or otherwise, which will in any way interfere with, or limit, restrict, or imperil, this exclusive right hereby vested" in the corporation lessee).

Texas. *Ennis Waterworks v. Ennis*, 105 Tex. 63, 144 S. W. 930 (holding void a grant by a city of an exclusive franchise to a water company); *Brenham v. Brenham Water Co.*, 67 Tex. 542, 4 S. W. 143 (holding void a city ordinance giving to a water company the exclusive right and privilege of supplying water to the city and its inhabitants for a period of 25 years. Quoted in note 47, supra, this section); *Hartford Fire Ins. Co. v. Houston* (Tex. Civ. App.), 110 S. W. 975 (holding void the contract between a city and a water company whereby the latter was given the exclusive privilege of furnishing water for fire hydrants and other public purposes for a period of 25 years and longer unless at or after the expiration of such period the city should elect to purchase the waterworks. Judgment rev'd on another ground, 102 Tex. 317, 116 S. W. 36); *Ex parte London*, 73 Tex. Cr. App. 208, 163 S. W. 968 (holding valid a city ordinance prohibiting all persons excepting the garbage superintendent

only when its charter expressly authorizes it so to do or grants powers to which the power to grant an exclusive franchise is indispensable.⁴⁹

§ 3385. Exercise of police power resulting in monopoly. Aside from any other ground upon which grants of exclusive privileges⁵⁰ may be sanctioned, a right in the nature of a monopoly acquired as a result of a proper exercise of the police power may on account of its genesis be found to be valid. In other words, the common-law denunciation of monopolies, strong and vigorous as it is, would seem not to apply to mere police regulations designed to promote the physical or moral well-being of the general public.⁵¹ So it was upon the ground of an exercise of the police power that the decision in the *Slaughter House Cases*⁵² was made to turn.⁵³ Indeed, the police power has been said "to be supreme over all rules of action, of whatsoever origin, whether mandatory or prohibitory, in civil administration," and its proper exercise may justify monopolies or exclusive

from engaging in the business of carting trash, slops, and night soil for others).

The invalidity of the exclusive feature of a contract, in the form of an ordinance, between a city and a water company will not extend to the entire contract when "the grant of the exclusive privilege can be rejected without affecting the meaning and force of the ordinance in other particulars." *Kimball v. Cedar Rapids*, 100 Fed. 802. Compare *Hartford Fire Ins. Co. v. Houston* (Tex. Civ. App.), 110 S. W. 973, rev'd 102 Tex. 317, 116 S. W. 36.

⁴⁹ *Water, Light & Gas Co. v. Hutchison*, 207 U. S. 385, 52 L. Ed. 257 (aff'g 144 Fed. 256), and *Freeport Water Co. v. Freeport City*, 180 U. S. 587, 45 L. Ed. 679 (aff'g 186 Ill. 179, 57 N. E. 862), both following *Detroit Citizens' St. R. Co. v. Detroit Ry.*, 171 U. S. 48, 43 L. Ed. 67 (aff'g 110 Mich. 384, 35 L. R. A. 859, 64 Am. St. Rep. 350, 68 N. W. 304), in which the court said: "Easements in the public streets for a limited time are different and have different consequences from those given in perpetuity. Those reserved from monopoly are different and have

different consequences from those fixed in monopoly. Consequently those given in perpetuity and in monopoly must have for their authority explicit permission, or, if inferred from other powers, it is not enough that the authority is convenient to them, but it must be indispensable to them." See also 4 *McQuillin, Municipal Corporations*, § 1633, p. 3413, and the numerous state cases therein cited.

⁵⁰ See § 3384, *supra*.

⁵¹ *Coombs v. McDonald*, 43 Neb. 632, 62 N. W. 41.

⁵² 16 Wall. (U. S.) 36, 21 L. Ed. 394.

⁵³ See note 38, § 3384, *supra*. As the exclusive privilege involved in that case was granted as a police regulation, there was no impairment of contract obligations in the subsequent disregard of the exclusiveness of the privilege by the city of New Orleans acting under the authority of arts. 248 and 258 of the Louisiana Constitution of 1879. (See note 38, § 3384, *supra*.) *Butchers' Union Slaughter House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter House Co.* (*Butchers' Union Case*), 111 U. S. 746, 28 L. Ed. 585.

privileges in the nature of monopolies which would otherwise be illegal.⁵⁴ So grants of exclusive bridge⁵⁵ and of exclusive ferry rights have been sustained as coming within the police power.⁵⁶ "As the granting of exclusive ferry franchises is the proper exercise of the police power of the state, it follows," says the Supreme Court of North Dakota,⁵⁷ "that the fact that such a grant results incidentally in the establishment of a monopoly does not bring the grant within the prohibition of our Constitution. It is not a business that any citizen has a natural right to pursue. The grantee is subject to the control of the state as to his charges.⁵⁸ The franchise is given in exchange for the engagement of the grantee to perform important public duties—⁵⁹ his promise to operate a public highway over which all

⁵⁴ *St. Louis Gaslight Co. v. St. Louis Gas, Fuel & Power Co.*, 16 Mo. App. 52. Said the court: "The state is specially charged with the preservation of the public health, morals, and safety. This great trust would be utterly barren, without a certain paramount right and authority vested in the state and known as the police power. The power thus entitled is found to be supreme over all rules of action, of whatsoever origin, whether mandatory or prohibitory, in civil administration." Referring to what was said on the subject in the *Slaughter House Cases* the court continued: "To this exposition of the transcendent efficacy of the police power nothing need be added to show that when acting within its legitimate sphere, and finding some grant or regulation of an exclusive and prohibitory character necessary to the due fulfillment of its purposes, it creates what might otherwise be denounced as an odious monopoly, the power is not to be impeded on any ground of general negation falling short of the highest public necessity. Private interest must in this, as in many other instances, give way, if need be, to that paramount concern for the public health, morals, and safety, in whose behalf civil governments are instituted. No general objections against legislation of any

sort can prevail over this natural and unquestionable public right, and no interpretation of them can reasonably include it."

See, generally, the subject "Monopolies" (§§ 656-681) in the chapter on "Special Privileges" in Freund's *Police Power*.

⁵⁵ *Binghampton Bridge*, 3 Wall. (U. S.) 51, 18 L. Ed. 137; *Bridge Proprietors v. Hoboken Land & Improvement Co.*, 1 Wall. (U. S.) 116, 17 L. Ed. 571. See also *West River Bridge v. Dix*, 6 How. (U. S.) 507, 12 L. Ed. 535.

⁵⁶ *McRoberts v. Washburne*, 10 Minn. 23; *Patterson v. Wollmann*, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040. See also *Carroll v. Campbell*, 108 Mo. 550, 17 S. W. 884, recognizing that such a grant might have been validly made by the legislature "prior to the adoption of the Constitution of 1875." This is also the ground on which grants of the exclusive privilege of removing garbage (see note 48, § 3384, *supra*) are sometimes sustained.

⁵⁷ *Patterson v. Wollmann*, 5 N. D. 608, 33 L. R. A. 536, 67 N. W. 1040.

⁵⁸ As to the effect of the control of the state over rates on the application of anti-trust statutes to combinations of public utilities, see § 3394, *infra*.

⁵⁹ Where the privilege granted by the state might have been exclusively exercised by it, it may make the exer-

may pass on the same terms." To the same point were the statements of Mr. Justice Field in his dissenting opinion in the Slaughter House Cases,⁶⁰ wherein, addressing himself to the argument that the grant of the exclusive slaughter house and kindred privileges involved stood on the same ground as exclusive grants of ferry, bridge and turn-pike privileges, he said: "Those grants are of franchises of a public character appertaining to the government. Their use usually requires the exercise of the sovereign right of eminent domain. It is for the government to determine when one of them shall be granted, and the conditions upon which it shall be enjoyed. It is the duty of the government to provide suitable roads, bridges and ferries for the convenience of the public, and if it chooses to devolve this duty to any extent, or in any locality, upon particular individuals or corporations, it may of course stipulate for such exclusive privileges connected with the franchise as it may deem proper, without encroaching upon the freedom or the just rights of others. The grant, with exclusive privileges of a right thus appertaining to the government, is a very different thing from a grant, with exclusive privileges, of a right to pursue one of the ordinary trades or callings of life, which is a right appertaining solely to the individual."⁶¹ But however valid, upon occasion, a police regulation resulting in a virtual monopoly may be, the exercise of the police power must not be a mere sham and pretense if the grant of the exclusive privilege conferred is to be saved from the illegality which would otherwise attach to it.⁶²

§ 3386. Anti-trust statutes generally. The Federal Anti-Trust Act, the provisions of which are oftenest invoked, is the one approved on July 2, 1890, entitled ⁶³ "An act to protect trade and commerce

cise of such privilege exclusive in the hands of its grantee. *State v. Haworth*, 122 Ind. 462, 7 L. R. A. 240, 23 N. E. 946.

⁶⁰ 16 Wall. (U. S.) 36, 21 L. Ed. 394.

⁶¹ See also in this connection, *Com. v. Bacon*, 13 Bush (Ky.) 210, 26 Am. Rep. 189.

⁶² See the concurring opinions of Justices Bradley and Field in *Butchers' Union Slaughter House & Live Stock Landing Co. v. Crescent City Live Stock Landing & Slaughter House Co.* (*Butchers' Union Case*), 111 U. S. 746, 28 L. Ed. 585, and the dissenting

opinions of these two Justices in the *Slaughter House Cases*, 16 Wall. (U. S.) 36, 21 L. Ed. 394.

⁶³ In *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007, the court had under consideration the question "as to what is the true construction of the statute [*Sherman Act*], assuming that it applies to common carriers by railroad. What is the meaning of the language as used in the statute [section 1], that 'every contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or

against unlawful restraints and monopolies," and popularly known

commerce among the several states or with foreign nations, is hereby declared to be illegal?" Is it confined to a contract or combination which is only in unreasonable restraint of trade or commerce, or does it include what the language of the act plainly and in terms covers,—all contracts of that nature?" Mr. Justice Peckham, delivering the opinion of the majority, said: "We are asked to regard the title of this act as indicative of its purpose to include only those contracts which were unlawful at common law, but which require the sanction of a federal statute in order to be dealt with in a federal court. It is said that when terms which are known to the common law are used in a federal statute those terms are to be given the same meaning that they received at common law, and that when the language of the title is 'to protect trade and commerce against unlawful restraints and monopolies,' it means those restraints and monopolies which the common law regarded as unlawful, and which were to be prohibited by the federal statute. We are of opinion that the language used in the title refers to and includes and was intended to include those restraints and monopolies which are made unlawful in the body of the statute. It is to the statute itself that resort must be had to learn the meaning thereof, though a resort to the title here creates no doubt about the meaning of and does not alter the plain language contained in its text." In the course of his dissenting opinion in this case, however,—in which opinion Justices Field, Gray and Shires concurred—Chief Justice (then Associate Justice) White said: "Admitting arguendo the correctness of the proposition by which it is sought to include every contract, however reasonable, within the inhibition of the law, the

statute, considered as a whole, shows, I think, the error of the construction placed upon it. Its title is 'An Act to Protect Trade and Commerce against Unlawful Restraints and Monopolies.' The word 'unlawful' clearly distinguishes between contracts in restraint of trade which are lawful and those which are not. In other words, between those which are unreasonably in restraint of trade, and consequently invalid, and those which are reasonable and hence lawful. When, therefore, in the very title of the act the well settled distinction between lawful and unlawful contracts is broadly marked, how can an interpretation be correct which holds that all contracts, whether lawful or not, are included in its provisions? Whilst it is true that the title of an act cannot be used to destroy the plain import of the language found in its body, yet when a literal interpretation will work out wrong or injury, or where the words of the statute are ambiguous, the title may be resorted to as an instrument of construction." Subsequently, in the case of *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734, Mr. Justice Harlan incorporated in his opinion, in which he concurred in the ultimate holding on the facts but dissented from the majority view that the decree affirmed should be modified in certain respects, a lengthy quotation from the majority opinion in *United States v. Trans-Missouri Freight Ass'n*, supra, including the part thereof above set out. But although, in this case, Mr. Chief Justice White, speaking for the majority of the court, construed the act, as he did in *United States v. Trans-Missouri Freight Ass'n*, supra, as prohibiting "undue" restraints only, he did not, in terms, find any persuasive force in-

as the "Sherman Act."⁶⁴ The act of October 15, 1914, entitled "An Act to supplement existing laws against unlawful restraints and monopolies, and for other purposes,"⁶⁵ and commonly called the "Clayton Act" has also been before the courts⁶⁶ but, by reason of the recentness of the date of its enactment, not as frequently as has the Sherman Act. Aside from the anti-trust acts which have been passed by Congress⁶⁷ and which apply, of course, only when interstate trade

hering in the title necessary to his conclusion.

⁶⁴ 26 U. S. Stat. L. 209, 7 Fed. St. Ann. p. 336 et seq. While the debates in Congress show that doubt as to whether there was a common law of the United States which, without legislation, governed the subject covered by the first and second sections of the Sherman Act was among the influences leading to the passage of such act, they show, and this conclusively, that the cause, mainly responsible for the statute, "was the thought that it was required by the economic condition of the times; that is, the vast accumulation of wealth in the hands of corporations and individuals, the enormous development of corporate organization, the facility for combination which such organizations afforded, the fact that the facility was being used, and that combinations known as trusts were being multiplied, and the widespread impression that their power had been and would be exerted to oppress individuals and injure the public generally." *Standard Oil Co. v. United States*, 221 U. S. 1, 34 L. R. A. (N. S.) 834, 55 L. Ed. 619, 641, Ann. Cas. 1912 D 734. Continuing, the court said: "Although debates may not be used as a means for interpreting a statute (*United States v. Trans-Missouri Freight Asso.*, 166 U. S. 318, 41 L. Ed. 1019, 17 Sup. Ct. Rep. 548, and cases cited), that rule, in the nature of things, is not violated by resorting to debates as a means of ascertaining the environment at the time of the enactment of a particular law; that is, the

history of the period when it was adopted."

⁶⁵ 38 U. S. Stat. L. 730, Fed. St. Ann. 1916 Supp. p. 266 et seq.

⁶⁶ Section 3 of the Clayton Act which is considered *infra* this chapter reads as follows: "That it shall be unlawful for any person engaged in commerce, in the course of such commerce, to lease or make a sale or contract for sale of goods, wares, merchandise, machinery, supplies or other commodities, whether patented or unpatented, for use, consumption or resale within the United States or any Territory thereof or the District of Columbia or any insular possession or other place under the jurisdiction of the United States or fix a price charged therefor, or discount from, or rebate upon, such price, on the condition, agreement or understanding that the lessee or purchaser thereof shall not use or deal in the goods, wares, merchandise, machinery, supplies or other commodities of a competitor or competitors of the lessor or seller, where the effect of lease, sale, or contract for sale or such condition, agreement or understanding may be to substantially lessen competition or tend to create a monopoly in any line of commerce."

⁶⁷ Section 1 of the Clayton Act provides that "Anti-Trust Laws" as used in the act "includes the Act entitled 'An Act to protect trade and commerce against unlawful restraints and monopolies,' approved July second, eighteen hundred and ninety [*Sherman Act*, *supra*]; sections seventy-three to

or commerce is involved, the several states, in large number if not without exception, have passed anti-trust statutes which apply to the trade and commerce within their respective boundaries. The majority of such statutes are similar in scope even though variant in phraseology. Some of them, indeed, were modeled, as far as was possible considering the difference in the trade and commerce which is under the control of the state governments and that concerning which the federal government may legislate, after the Sherman Act.⁶⁸

§ 3387. Constitutionality of anti-trust statutes—Federal statutes. Both the Sherman Act ⁶⁹ and the Clayton Act ⁷⁰ find their justification

seventy-seven, inclusive, of an Act entitled 'An Act to reduce taxation, to provide revenue for the Government, and for other purposes,' of August twenty-seventh, eighteen hundred and ninety-four [7 Fed. St. Ann. pp. 346-347]; an Act entitled 'An Act to amend sections seventy-three and seventy-six of the Act of August twenty-seventh, eighteen hundred and ninety-four, entitled "An Act to reduce taxation, to provide revenue for the Government, and for other purposes,"' approved February twelfth, nineteen hundred and thirteen [Fed. St. Ann. 1914 Supp. p. 402]; and also this Act."

The Federal Trade Commission Act, 38 U. S. Stat. L. 719, Fed. St. Ann. 1916 Supp., p. 114, especially provides in section 5, which deals with the regulation of unfair competition, that "no order of the commission or judgment of the court to enforce the same shall in anywise relieve or absolve any person, partnership, or corporation from any liability under the anti-trust acts."

⁶⁸ These various statutes manifestly cannot here be set out but many of them will be referred to and considered in the remaining pages of this chapter.

Section 580 of the New York Penal Law (Consol. Laws, c. 40) which provides, inter alia, that "if two or more persons conspire (1) to commit a crime or * * * (6) to commit an act in-

jurious * * * to trade or commerce, * * * each of them is guilty of a misdemeanor" was not repealed by implication by sections 340 and 341 of the General Business Law (Consol. Laws, c. 20) which provide that "every contract, agreement, arrangement or combination whereby a monopoly in the manufacture, production or sale in this state of any article or commodity of common use is or may be created, established or maintained, or whereby competition in this state in the supply or price of any such article or commodity is or may be restrained or prevented, or whereby for the purpose of creating, establishing or maintaining a monopoly within this state of the manufacture, production or sale of any such article or commodity, the free pursuit in this state of any lawful business, trade or occupation is or may be restricted or prevented is hereby declared to be against public policy and void." *People v. Dwyer*, 160 N. Y. App. Div. 542, 145 N. Y. Supp. 748, aff'd 215 N. Y. 46, 109 N. E. 103.

⁶⁹ See *United States v. E. C. Knight Co.*, 156 U. S. 1, 39 L. Ed. 325.

"Under its power to regulate commerce among the several states and with foreign nations, Congress had authority to enact" the Sherman Law. *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679.

⁷⁰ *Elliott Mach. Co. v. Center*, 227 Fed. 124, 126.

in the commerce clause of the Constitution.⁷¹ "The plain language of the grant to Congress of power to regulate commerce among the several states," says the Supreme Court of the United States, "includes power to legislate upon the subject of those contracts in respect to interstate or foreign commerce which directly affect and regulate that commerce, and we can find no reasonable ground for asserting that the constitutional provision as to the liberty of the individual limits the extent of that power."⁷² The wisdom of the Sherman⁷³ and the Clayton Acts⁷⁴ was a question exclusively for the determination of Congress⁷⁵ and with that question a court has no right to concern itself.⁷⁶ Even at the time when the Supreme Court of the United States was construing the Sherman Act as condemning all direct restraints upon interstate commerce irrespective of any element of unreasonableness,⁷⁷ such court sustained the statute as being a legitimate exercise of the power of Congress over interstate commerce and a valid regulation of such commerce at least as far as it was sought to be applied to the matter in hand, namely, a contract between competing railroad companies which had for its purpose the establishing and maintaining of interstate rates and fares for the transportation of freight and pas-

⁷¹ "Congress has the power to establish rules by which interstate and international commerce shall be governed, and, by the [Sherman] Anti-Trust Act, has prescribed the rule of free competition among those engaged in such commerce." *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679.

⁷² *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136. See also, as to the last-made point, *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679; *Stewart v. W. T. Rawleigh Medical Co.*, — Okla. —, 159 Pac. 1187.

⁷³ The court has nothing to do with the wisdom of the Sherman Act "if once its purpose be authoritatively declared." *United States v. Corn Products Refining Co.*, 234 Fed. 964, 1015.

⁷⁴ *United States v. United Shoe Machinery Co.*, 234 Fed. 127, 150.

⁷⁵ Agreements entered into by manufacturers, the necessary effect of which is to restrain trade within the purview of the Sherman Act "cannot

be taken out of the category of the unlawful by general reasoning as to their expediency or nonexpediency or the wisdom or want of wisdom of the statute which prohibited their being made." *United States v. Standard Sanitary Mfg. Co.*, 191 Fed. 172, 182.

⁷⁶ "When the nature and character of the contracts create a conclusive presumption bringing them within the statute, such a result is not to be disregarded by the courts by a substitution of a judicial appreciation of what the law ought to be for the plain judicial duty of enforcing the law as it is." *United States v. Standard Sanitary Mfg. Co.*, 191 Fed. 172, 182.

⁷⁷ See *E. Bement & Sons v. National Harrow Co.*, 186 U. S. 70, 46 L. Ed. 1058, and compare *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. Ed. 663; *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734, all considered in § 3391, *infra*.

sengers on the roads of the contracting companies, and as not being unconstitutional in that it unlawfully infringed upon the freedom of contract guaranteed by the Fifth Amendment.⁷⁸ After the announcement, by the Standard Oil and Tobacco decisions, of the rule of reason,⁷⁹ the objection was raised in the Cash Register Case that the Sherman Act was thereby rendered vague and uncertain, and incapable of enforcement by the criminal prosecution provided. In overruling the demurrer to the indictment in such case, however, the District Court held that the act "is a valid criminal statute, sufficiently clear in itself to inform the accused of the nature and cause of the accusation against them, and that criminal prosecutions under it in no way deprive the defendants of liberty or property without due process of law."⁸⁰ When this decision was rendered, the Supreme Court of the United States, as the District Court observed, had not directly passed upon the question presented. Subsequently, however, such question arose in a case before the Supreme Court⁸¹ and its decision then rendered was in accord with that of the District Court in the Cash Register Case.⁸² Within the proper subjects of equitable cognizance, as estab-

⁷⁸ *United States v. Joint-Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259.

⁷⁹ See § 3391, *infra*.

⁸⁰ *United States v. Patterson*, 201 Fed. 697. (For subsequent steps in this prosecution, see *United States v. Patterson*, 205 Fed. 292, and *Patterson v. United States*, 222 Fed. 599.) See also, on the question of the validity of the penal provisions of the Sherman Act, *United States v. American Naval Stores Co.*, 186 Fed. 592, decided prior to the Standard Oil and Tobacco cases.

⁸¹ *Nash v. United States*, 229 U. S. 373, 57 L. Ed. 1232, *rev'g* on another ground 186 Fed. 489.

⁸² In delivering the opinion of the court, in *Nash v. United States*, *supra*, Mr. Justice Holmes said: "The objection to the criminal operation of the statute is thought to be warranted by *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734, and *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. Ed. 663. Those cases may be taken to have established that only such con-

tracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade. 221 U. S. 179. And thereupon it is said that the crime thus defined by the statute contains in its definition an element of degree as to which estimates may differ, with the result that a man might find himself in prison because his honest judgment did not anticipate that of a jury of less competent men. The kindred proposition that 'the criminality of an act cannot depend upon whether a jury may think it reasonable or unreasonable. There must be some definiteness and certainty,' is cited from the late Mr. Justice Brewer, sitting in the circuit court. *Tozer v. United States*, 4 Inters. Com. Rep. 245, 52 Fed. 917, 919. But, apart from the common law as to the restraint of trade thus taken up by the statute, the law is full of instances where a man's fate depends on his estimating rightly, that is, as the jury

lished when the Federal Constitution was adopted, it was competent for Congress to vest the circuit courts of the United States with the jurisdiction to prevent and restrain violations of the Sherman Act which was granted by section 4 thereof, and although such jurisdiction is conferred in broad and general terms, it will be deemed to be limited so as not to extend to a case which is not of equitable cognizance and, therefore, it cannot be held to be an unwarranted invasion of the right to trial by jury.⁸³ So of the 7th section of the Sherman Act, the Supreme Court of the United States has said that "there can be no doubt that Congress had power to give an action for damages to an individual who suffers by breach of the law," and "if Congress had power to make the acts which [lead] * * * to the damage illegal, it could authorize a recovery for the damage, although the latter was suffered wholly within the boundaries of one state."⁸⁴ Concerning the Clayton Act, it has been held that Congress had the power to make section 3 thereof⁸⁵ apply to pre-existing contracts.⁸⁶ Even

subsequently estimates it, some matter of degree. If his judgment is wrong, not only may he incur a fine or a short imprisonment, as here; he may incur the penalty of death. 'An act causing death may be murder, manslaughter, or misadventure, according to the degree of danger attending it' by common experience in the circumstances known to the actor. 'The very meaning of the fiction of implied malice in such cases at common law was, that a man might have to answer with his life for consequences which he neither intended nor foresaw.' [Citing cases.] * * * 'The criterion in such cases is to examine whether common social duty would, under the circumstances, have suggested a more circumspect conduct.' [Citing case.] * * * If a man should kill another by driving an automobile furiously into a crowd, he might be convicted of murder, however little he expected the result. [Citing references.] * * * If he did no more than drive negligently through a street, he might get off with manslaughter or less. [Citing cases.] * * * And in the last case

he might be held although he himself thought that he was acting as a prudent man should. [Citing case.] * * * But without further argument, the case is very nearly disposed of by *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 109, 53 L. Ed. 417, 429, 29 Sup. Ct. Rep. 220, where Mr. Justice Brewer's decision and other similar ones were cited in vain. We are of opinion that there is no constitutional difficulty in the way of enforcing the criminal part of the act."

⁸³ *United States v. Debs*, 64 Fed. 724, petition for writ of habeas corpus denied, *Re Debs*, 158 U. S. 564, 39 L. Ed. 1092.

⁸⁴ *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 51 L. Ed. 241, citing *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. Ed. 608.

⁸⁵ See note 66, § 3386, supra.

⁸⁶ *Elliott Mach. Co. v. Center*, 227 Fed. 124. "Counsel for defendant earnestly insists," said the court, "that, even if Congress so intended, the statute cannot be construed to apply to pre-existing contracts, and to

though such statute impairs the obligation of contracts, it is not for that reason invalid since there is nothing in the Constitution of the United States which prohibits Congress from enacting a statute which has that effect, section 10 of article 1 of such Constitution applying to the several states only and not being a limitation upon the powers of the federal legislature.⁸⁷ Again it has been held that that part of section 3 of the Clayton Act ⁸⁸ which names leases as a prohibited instrumentality in lessening competition, etc., is not unconstitutional when applied to leases of machinery manufactured in one state and shipped under such leases to other states and to foreign countries, the lessor corporation, in such circumstances, being engaged in interstate commerce and subject to regulation by Congress.⁸⁹

§ 3388. — State statutes. State anti-trust statutes have time and again been assailed as violative either of the state or federal constitution or of both of such constitutions, but, in perhaps the majority of cases, they have withstood successfully the attacks made upon their validity. On one proposition, namely, the one that public policy cannot be urged to defeat them, there can be no argument, since a constitutional statute itself defines public policy.⁹⁰

prohibit their performance and enforcement, without violating fundamental and constitutional rights.

* * * Congress derives its power to enact such legislation from the commerce clause of the Constitution, and the power so conferred is broad, comprehensive and all embracing. All persons entering into contracts involving interstate commerce must do so subject to the right of Congress thereafter to control, regulate, or prohibit the performance thereof. * * * It is now too well settled to admit of controversy that a contract to do a thing, lawful when made, may be avoided by subsequent legislation making it unlawful, and that an act of Congress may lawfully affect rights which had their inception before its passage." See also *United States v. United Shoe Machinery Co.*, 227 Fed. 507, rev'd 232 Fed. 1023 (mem. dec.).

As to whether such section actually does apply to such contracts, see § 3403, *infra*.

An anti-trust statute may be applied to a continuing contract valid when made without being thereby given a retroactive effect. *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. Ed. 417; *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007.

⁸⁷ *United States v. United Shoe Machinery Co.*, 234 Fed. 127, 151.

⁸⁸ See note 66, § 3386, *supra*.

⁸⁹ *United States v. United Shoe Machinery Co.*, 234 Fed. 127, 143, pretermittting question whether section 3 of the Clayton Act would apply to intrastate leases by a corporation engaged in interstate business.

⁹⁰ *State v. Coyle*, 7 Okla. Cr. 50, 122 Pac. 243.

Even if the Iowa statute be unconstitutional (a proposition not decided), the Iowa legislature, by enacting it, declared the public policy of the state relative to its subject-matter, and fence a newspaper advertisement falsely charging a person with the do-

Generally, a statute which, within proper limits and with due regard for constitutional guaranties, denounces monopolies, trusts, combinations and conspiracies in restraint of trade is referable to the police power of the state and will be held to be a valid exercise thereof.⁹¹

The Texas statutes of 1889 and 1895 were sustained against the

ing of an act made criminal by such statute, will be libelous per se. *Dorn & McGinty v. Cooper*, 139 Iowa 742, 16 Ann. Cas. 744, 117 N. W. 1.

⁹¹ See *In re Opinion of Justices*, 193 Mass. 605, 81 N. E. 142, reaffirming *Com. v. Strauss*, — Mass. —, 78 N. E. 136, writ of error dismissed 207 U. S. 599, 52 L. Ed. 358.

"It is generally agreed that statutes directly against competition [combination?] in restraint of trade are not in violation of the constitutional provision guaranteeing liberty and property, since the regulation of monopolies, as dangerous to society, has always been a recognized part of the police power of the state; but it is not clear that such statutes will be supported if they are retrospective in their operation or discriminating in their application." *State v. American Sugar Refining Co.*, 138 La. 1005, 71 So. 137.

The Supreme Court of Mississippi has declared (*State v. Jackson Cotton Oil Co.*, 95 Miss. 6, 48 So. 300) that "the power of the legislature to prohibit 'trusts, combinations, contracts and agreements inimical to the public welfare' is not derived from or dependent on section 198 of the State Constitution of 1890, which neither confers nor limits its power, which exists by virtue of the general grant of legislative power. This section imposes on the legislature the duty to pass such laws, and the use of the expression 'inimical to the public welfare' by the legislature has no effect, except to show that what it prohibits is by it regarded as of the character. That expression might be stricken from the Constitution and

laws without affecting the validity of the law. It is for the legislature to declare what is inimical to public welfare, and it is only when it transcends the limit of legislative power that the courts may interpose to shield the fundamental law from violation." See also the earlier Mississippi case (*Yazoo & M. V. R. Co. v. Searles*, 85 Miss. 520, 68 L. R. A. 715, 37 So. 939) in which the Mississippi Supreme Court affirmed its adherence to "the doctrine which recognizes the right of the state, in the exercise of its reserved police power, to restrict the power of corporations to contract within certain prescribed limits, and which forbids that such power should ever be so abridged or so construed as to permit corporations to conduct their business in such manner as to infringe upon the rights of individuals or the general well-being of the state. That power inheres in the sovereign, and the protection from the encroachments of corporations is assured by the guaranty of section 190, Const. 1890," which provides, in part, in accordance with the last clause of the sentence immediately supra.

The Idaho Public Utilities Act held justified under section 18, article 11 of the Idaho Constitution, which prohibits combinations for the purpose of fixing prices or regulating production and requires the legislature to pass appropriate laws to enforce its provisions, since the ultimate effect of such act will be to prevent unreasonable rates and combinations by public utilities. *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, Ann. Cas. 1916 E 282, 141 Pac. 1083.

charge that they illegally infringed upon the liberty of the citizen to contract concerning his property, deprived him of his property and imposed restraints and burdens upon it without due process of law, and, in excepting from their operation (each act) agricultural products and live stock while in the hands of the producer or raiser and also (act of 1895) labor organizations, constituted class legislation, all of which was in violation of the Fourteenth Amendment to the Constitution of the United States. Such statutes, the court held, were a valid exercise of the police power of the state.⁹² In a later Texas case, it was insisted that the state statute violated the section of the Texas Bill of Rights which declared that "no citizen of this state shall be deprived of life, liberty, property, privileges or immunities, or in any manner disfranchised, except by the due course of the law of the land," and, also, that it violated the Fourteenth Amendment to the Federal Constitution. This contention was disposed of by the statement that "our Supreme Court has time and again held the act valid, * * * and we think their decisions on the question are sound."⁹³ When, subsequently, the Texas statutes of 1899 and 1903 were before the Texas Court of Civil Appeals, such court declared them valid⁹⁴ and in so doing was afterwards sustained by the Supreme Court of the United States.⁹⁵ The latter court failed to find any basis for the contention that the statutes worked a denial of due process of law, and in the course of its opinion, delivered by Mr. Justice Day, said: "That state legislatures have the right to deal with the subject-matter and to prevent unlawful combinations to prevent competition and in restraint of trade, and to prohibit and punish monopolies, is not open to question. * * * Having the power to pass laws of this character, of course the state may provide for proceedings to enforce the same. The state, keeping within constitutional limitations, may provide its

⁹² *Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 936, aff'd 177 U. S. 28, 44 L. Ed. 657. Contra, as to the Texas act of 1889 (intended to be repealed by the act of 1895 [*Waters-Pierce Oil Co. v. State*, 19 Tex. Civ. App. 1, 44 S. W. 936], but not repealed thereby [*Waters-Pierce Oil Co. v. State*, 177 U. S. 28, 44 L. Ed. 657]), *In re Grice*, 79 Fed. 627.

That the Texas statute of 1899 is not unconstitutional as imposing excessive and unreasonable penalties, see *State v. Laredo Ice Co.*, 96 Tex. 461, 73 S. W. 951, in which the court stated

that "there is a wide range for the discretion of the jury between the minimum and the maximum penalties fixed by this act, and we are not able to say that the minimum penalty inflicted upon an individual would be so excessive as to 'shock the sense of mankind.'"

⁹³ *Texas Brewing Co. v. Durrum* (Tex. Civ. App.), 46 S. W. 880.

⁹⁴ *Waters-Pierce Oil Co. v. State*, 48 Tex. Civ. App. 162, 106 S. W. 918.

⁹⁵ *Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. Ed. 417.

own method of procedure and determine the methods and means by which such laws may be made effectual." Addressing itself to the contention that the fines imposed upon the defendant were so excessive as to constitute a taking of its property without due process of law, the court said: "It is not contended in this connection that the prohibition of the 8th Amendment to the Federal Constitution against excessive fines operates to control the legislation of the states. The fixing of punishment for crime or penalties for unlawful acts against its laws is within the police power of the state. We can only interfere with such legislation and judicial action of the states enforcing it if the fines imposed are so grossly excessive as to amount to a deprivation of property without due process of law," and this, the court stated, it was not prepared, upon the case presented, to hold with regard to the penalties involved.⁹⁶

The Tennessee statute of 1897 was also upheld notwithstanding various and sundry objections to it. In attempting the defeat of this statute, it was claimed that, in excepting from its operation agricultural products and live stock while in the possession of the producer or raiser, the act contravened both the Fourteenth Amendment to the Federal Constitution and also those parts of the state constitution which prohibited class legislation, the deprivation of liberty or property except by the law of the land, and the inclusion in an act of a subject not embraced in its title; that the provision that conviction of a violation of the act should be followed by a fine of from one hundred to five thousand dollars and by imprisonment of from one year to ten years, or in the judgment of the "court" by one or the other thereof violated the provision of the Tennessee Constitution which declares that no fine in excess of fifty dollars shall be laid on any citizen of the state unless it be assessed by a jury of his peers, who shall assess the fine at the time they find the fact, etc.; that the section giving a remedy to a private person injured or damaged by any trust or combination introduces a subject not embraced in the act's title, and that as a result of the statute there is an impairment, other than by the law of the land of the right to acquire and dispose of property, certain contracts, etc., through which property might be acquired and disposed of being forbidden. Each of these contentions was disposed of adversely to the objector and the court held the statute "constitutional in all particulars."⁹⁷ Subsequently, the Tennessee

⁹⁶ *Waters-Pierce Oil Co. v. Texas*, Tenn. 715, 78 Am. St. Rep. 941, 59 212 U. S. 86, 53 L. Ed. 417. S. W. 1033.

⁹⁷ *State v. Schlitz Brewing Co.*, 104

statute of 1903 which was the same in all particulars as the statute of 1897 except that it did not contain a provision excluding from its operation contracts in relation to agricultural products and live stock while in the hands of the producer or raiser was held to be constitutional⁹⁸ and not invalid as interfering with interstate commerce.⁹⁹

As to the Ohio statute, it has been held that in so far as it forbids independent corporations from entering into combinations to restrict competition in trade with the view of exacting from consumers higher prices than would prevail under conditions of open competition, it is an exercise of legislative power which is not repugnant to any limitation prescribed by either the federal or state constitution,¹ and, further, that the statute "by a valid exercise of the police power, authorizes the punishment by fine and imprisonment of a person who is an active member of, and assists in carrying out the purposes of, an association formed to prevent competition in the sale of an article of merchandise."²

In upholding the constitutionality of the Indiana statute against various objections thereto, the Supreme Court of Indiana, in the course of its opinion, said: "It has been held, over and over, that the exercise of a police regulation or a power under the general welfare clause of the Constitution, such as restraining monopolies, is not a denial of due process of law. Regulation in reason is not a denial of due process of law, and this may be true either as to special occupations, or as to general classes of business. * * * The Fourteenth Amendment does not impair the police powers of the state or analogous powers. * * * The power of each state to regulate the relative rights and duties of all persons, individual or corporate, within its jurisdiction, for the public convenience and the public good, is well grounded. * * * Anti-trust laws are exercised as a police power, or an analogous power. * * * At common law, from its earliest history, combinations in restriction of competition or in restraint of trade have been denounced as being inimical to the public welfare, and contrary to public policy, and a statute which is simply declaratory of that law, and affixes civil and criminal penalties for its infraction, is certainly 'responsive to some public necessity, suitable to

⁹⁸ State v. Witherspoon, 115 Tenn. 138, 90 S. W. 852.

⁹⁹ Standard Oil Co. v. State, 117 Tenn. 618, 100 S. W. 705, holding that even if the statute did attempt a regulation of interstate commerce, such fact did not vitiate the statute

as an entirety and render void those of its provisions which dealt with intrastate commerce.

¹ State v. Buckeye Pipe Line Co., 61 Ohio St. 520, 56 N. E. 464.

² State v. Gage, 72 Ohio St. 210, 73 N. E. 1078 (headnote by the court).

subserve it, and reasonable in its operation upon the persons whom it affects.' ”³

A valid police regulation was the position taken by the Supreme Court of South Carolina relative to the statute of that state.⁴

The Supreme Court of Kansas has held that “the making of anti-competitive trade agreements as to products and merchandise bought or sold on the general market is contrary to public policy”; that “it is competent for the legislature to enact penal measures to prevent the making and carrying out of such agreements,” and that the Kansas statute “does not conflict with the guaranty of right to acquire property by lawful contract secured by the Federal Constitution, and is a valid exercise of legislative power.”⁵

The territorial statute of Oklahoma was upheld by the Supreme Court of the territory as being valid and not in conflict nor inconsistent with the Federal Constitution or with the laws of the United States generally or the Sherman Act, which by section 3 thereof⁶ is made to apply in the territories of the United States, in particular.⁷

³ Knight & Jillson Co. v. Miller, 172 Ind. 27, 18 Ann. Cas. 1146, 87 N. E. 823.

⁴ State v. Virginia-Carolina Chemical Co., 71 S. C. 544, 51 S. E. 455.

⁵ State v. Smiley, 65 Kan. 240, 67 L. R. A. 903, 69 Pac. 199 (headnotes by the court), aff'd 196 U. S. 447, 49 L. Ed. 546.

A proceeding, under section 10 of the Kansas Anti-Trust Law (Laws 1897, c. 265, p. 485), before a district court or district judge of the state, upon the written application of the county attorney or attorney general, to take the testimony of witnesses as to their knowledge of violations of such act, is of the nature of an investigation or preliminary proceeding and a valid exercise of judicial power, and the procedure is due process of law. State v. Jack, 69 Kan. 387, 1 L. R. A. (N. S.) 167, 2 Ann. Cas. 171, 76 Pac. 911, holding further that the immunity afforded by this section to a witness subpoenaed to testify, is, within the scope of the inquiry, co-extensive with the constitutional privilege (section 10, Kansas Bill of

Rights) that “no person shall be a witness against himself,” and hence the statute, in this respect, is sufficient, and a witness cannot claim the constitutional privilege of silence. The possibility that the answers of the witness may disclose violations of the Federal Anti-Trust Law, and the evidence given by him be used against him in a criminal prosecution for a violation of such law is not a real and probable danger of criminal prosecution which entitles him to claim such constitutional privilege.

⁶ “When Oklahoma and Indian Territories became transformed into the state of Oklahoma, * * * section 3 of the act of Congress known as the Sherman Anti-Trust Act ceased to have force within the boundaries of the state. By the provisions of the Enabling Act and the Constitution the Territorial Anti-Trust Act alone was adopted and continued in force in the state of Oklahoma.” State v. Coyle, 7 Okla. Cr. 50, 122 Pac. 243.

⁷ Territory v. Long Bell Lumber Co., 22 Okla. 890, 99 Pac. 911, followed in Wagner v. Minnie Harvester Co.,

Unconstitutionality and conflict with the law on the subject of criminal conspiracies as defined by the California Penal Code have both been urged against the California statute and each has been denied by the California Court of Appeals.⁸

The Missouri statutes have been upheld against numerous objections to their validity, among them, denial of due process of law, unlawful abridgment of the right to contract, interference with interstate commerce, and impairment of the obligation of contracts. Passing on the two objections last mentioned, the Supreme Court of Missouri in a proceeding in the nature of quo warranto to forfeit the charter of a domestic corporation and to revoke the licenses of certain foreign corporations for a violation of the statutes, said: "It was not the intention of the legislature, by the enactment of those statutes, to interfere with interstate commerce; but the clear intention was to prevent the formation and maintenance of pools, trusts, and combinations in restraint of intrastate commerce. The legislature has no power or authority to prevent respondents from carrying on interstate trade,

25 Okla. 558, 106 Pac. 969. See also *State v. Coyle*, 7 Okla. Cr. 50, 122 Pac. 243, holding that section 2 of the Oklahoma Labor Act (Laws 1907-08, c. 53, art. 2) which provides that "no agreement, combination or contract by or between two or more persons to do or procure to be done, or not to do or procure to be done, any act in contemplation or furtherance of any trade dispute between employers and employees in the state of Oklahoma, shall be deemed as criminal nor shall those engaged therein be indictable or otherwise punishable for the crime of conspiracy, if such act committed by one person would not be punishable as a crime, nor shall such agreement, combination or contract be considered as in restraint of trade or commerce, nor shall any restraining order or injunction be issued with relation thereto. Nothing in this act shall exempt from punishment otherwise than is herein excepted, any person guilty of conspiracy for which punishment is now provided by an act of the legislature, but such act of the legislature shall as to the agreement,

combination and contracts hereinbefore referred to, be construed as if this act was therein contained: Provided, that nothing in this act shall be construed to authorize force or violence," and the Oklahoma Anti-Trust Act (Laws 1907-08, c. 83, art. 1), which provides in section 1 "that every act, agreement, contract, or combination in the form of trust, or otherwise, or conspiracy in restraint of trade or commerce within this state, which is against public policy, is hereby declared to be illegal," are to be regarded as a single enactment; that such enactment "is not in violation of the Constitution of this state, nor of that of the United States, and is not in contravention of the Fourteenth Amendment, guaranteeing the equal protection of the laws, and that both [section 2 of the Labor Act and the Anti-Trust Act] are within the scope of legislative power and authority."

⁸ *People v. Sacramento Butchers' Protective Ass'n*, 12 Cal. App. 471, 107 Pac. 712.

for the reason that power is vested in and rests with Congress; but it does possess the power to authorize the courts to forfeit the charters of all corporations organized and existing under the laws of this state for the usurpation of powers not granted to them, or for misuser or nonuser of those granted, and it is wholly immaterial whether those corporations are engaged in interstate commerce or not. The legislature also possesses the undoubted authority to revoke or forfeit the license issued to any foreign corporation authorizing it to do an intrastate business in this state. The revocation of such a license in no manner interferes with interstate commerce. The authority to conduct such business is obtained under the acts of Congress, and not by virtue of the laws of the state. A license from the state can neither confer nor take away the authority or right of a foreign corporation to carry on interstate commerce; and, that being true, we are unable to see in what possible manner the forfeiture of such a license, that is, a license which only authorizes a foreign corporation to do an intrastate business, can possibly offend against section 8 of article 1 of the Federal Constitution, which only applies to interstate commerce. We are therefore of the opinion that this contention of respondents [that the statutes interfere with interstate commerce] is not well founded. * * * Nor are we able to concur with the learned counsel for respondents in their contention that [specified] sections [of the statutes] * * * are void for the reason that they violate section 10 of article 1 of the Constitution of the United States, which provides that no state shall enact any law which will impair the obligations of a contract. Clearly that section of the Constitution has no application to a license issued by the state to a foreign corporation to do business herein, for the reason that, when it accepted the license, it impliedly, at least agreed to transact such business under and in obedience to the laws of this state in the same manner as a domestic corporation should transact similar business, and that, if it violated the laws of the state, then it would thereby forfeit its rights to such license, in the same manner that the domestic corporations would forfeit their charter rights by offending against the laws. * * * The mere fact that the licenses granted to the Indiana and Republic Companies were issued prior to the enactment of some or all of those sections does not change the legal aspect of the question, because the enactment of those statutes was but the exercise of the police power of the state, which cannot be contracted away or surrendered by legislation.”⁹ Again, the Supreme Court of the United

⁹ State v. Standard Oil Co., 218 Mo. Firemen's Fund Ins. Co., 152 Mo. 1, 116 S. W. 902. See also State v. 45 L. R. A. 363, 52 S. W. 595.

States has held that the Missouri statutes are not violative of the equality and due process clauses of the Fourteenth Amendment to the Federal Constitution by reason of the fact that they apply to the vendors of commodities but neither to the purchasers thereof nor to the vendors of labor and services,¹⁰ and, in another case, that the

¹⁰ *International Harvester Co. v. State of Missouri*, 234 U. S. 199, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525, distinguishing *Connelly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679.

Plaintiff-in-error's contentions to the contrary, said the court, "may be considered together, both involving a charge of discrimination—the one because the law does not embrace vendors of labor; the other because it does not cover purchasers of commodities as well as vendors of them. Both, therefore, invoke a consideration of the power of classification which may be exerted in the legislation of the state. And * * * that power has very broad range. A classification is not invalid because of simple inequality. We said in *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U. S. 96, 106, 43 L. Ed. 909, 913, 19 Sup. Ct. Rep. 609, by Mr. Justice Brewer: 'The very idea of classification is that of inequality, so that it goes without saying that the fact of inequality in no manner determines the matter of constitutionality.' Therefore, it may be there is restraint of competition in a combination of laborers and in a combination of purchasers, but that does not demonstrate that legislation which does not include either combination is illegal. Whether it would have been better policy to have made such comprehensive classification it is not our province to decide. In other words, whether a combination of wage earners or purchasers of commodities called for repression by law under the conditions in the state was for the

legislature of the state to determine.

* * * We are helped little in determining the legality of a legislative classification by making broad generalizations, and it is for a broad generalization that plaintiff in error contends—indeed, a generalization which includes all the activities and occupations of life; and there is an enumeration of wage earners in emphasis of the discrimination in which manufacturers and sellers are singled out from all others. The contention is deceptive, and yet it is earnestly urged in various ways which it would extend this opinion too much to detail. 'In dealing with restraints of trade,' it is said, 'the proper basis of classification is obviously neither in commodities nor services; nor in persons, but in restraints.' A law, to be valid, therefore, is the inflexible deduction, cannot distinguish between 'restraints,' but must apply to all restraints, whatever their degree or effect or purpose; and that because the Missouri statute has not this universal operation it offends against the equality required by the 14th Amendment. This court has decided many times that a legislative classification does not have to possess such comprehensive extent. Classification must be accommodated to the problems of legislation; and we decided in *Ozan Lumber Co. v. Union County Nat. Bank*, 207 U. S. 251, 52 L. Ed. 195, 28 Sup. Ct. Rep. 89, that it may depend upon degrees of evil without being arbitrary or unreasonable. We repeated the ruling in *Heath & M. Mfg. Co. v. Worst*, 207 U. S. 338, 52 L. Ed. 236, 28 Sup. Ct. Rep. 114,

statutory requirement of annual affidavits by corporations of non-participation in any pool, trust, agreement, combination, etc., is not repugnant to the equal protection clause of the Federal Constitution.

in *Engel v. O'Malley*, 219 U. S. 128, 55 L. Ed. 128, 31 Sup. Ct. Rep. 190, in *Mutual Loan Co. v. Martell*, 222 U. S. 225, 56 L. Ed. 175, 32 Sup. Ct. Rep. 74, Ann. Cas. 1913 B 529, and again in *German Alliance Ins. Co. v. Lewis*, 233 U. S. 389, 418 [58 L. Ed.] * * * 1011, 34 Sup. Ct. Rep. 612. * * * If this power of classification did not exist, to what straits legislation would be brought. We may illustrate by the examples furnished by plaintiff in error. In the enumeration of those who, it is contended, by combination are able to restrain trade, are included, among others, 'persons engaged in domestic service' and 'nurses'; and because these are not embraced in the law, plaintiff in error, it is contended, although a combination of companies uniting the power of \$120,000,000, and able thereby to engross 85 per cent. or 90 per cent. of the trade in agricultural implements, is nevertheless beyond the competency of the legislature to prohibit. As great as the contrast is, a greater one may be made. Under the principle applied a combination of all the great industrial enterprises (and why not railroads as well?) could not be condemned unless the law applied as well to a combination of maidservants or to infants' nurses, whose humble functions preclude effective combination. Such contrasts and the considerations they suggest must be pushed aside by government, and a rigid and universal classification applied, is the contention of plaintiff in error; and to this the contention must come. Admit exceptions, and you admit the power of the legislature to select them. But it may be said the comparison of extremes is forensic, and, it may be, fallacious;

that there may be powerful labor combinations as well as powerful industrial combinations, and weak ones of both, and that the law, to be valid, cannot distinguish between strong and weak offenders. This may be granted * * *, but the comparisons are not without value in estimating the contentions of plaintiff in error. The foundation of our decision is, of course, the power of classification which a legislature may exercise, and the cases we have cited, as well as others which may be cited, demonstrate that some latitude must be allowed to the legislative judgment in selecting the 'basis of community.' We have said that it must be palpably arbitrary to authorize a judicial review of it, and that it cannot be disturbed by the courts 'unless they can see clearly that there is no fair reason for the law that would not require with equal force its extension to others whom it leaves untouched.' *Missouri, K. & T. R. Co. v. May*, 194 U. S. 267, 269, 48 L. Ed. 971, 972, 24 Sup. Ct. Rep. 638; *Williams v. Arkansas*, 217 U. S. 79, 90, 54 L. Ed. 673, 677, 30 Sup. Ct. Rep. 493, 18 Ann. Cas. 865; *Watson v. Maryland*, 218 U. S. 173, 179, 54 L. Ed. 987, 990, 30 Sup. Ct. Rep. 644. * * * Other cases might be cited whose instances illustrate the same principle, in which this court has refused to accept the higher generalizations urged as necessary to the fulfilment of the constitutional guaranty of the equal protection of the law, and in which we, in effect, held that it is competent for a legislature to determine upon what differences a distinction may be made for the purpose of statutory classification between objects otherwise having resemblances. Such power, of course,

because of its not applying to individuals, partnerships, and associations, although the latter are equally within other provisions of the law prohibiting pools, trusts, etc.¹¹

cannot be arbitrarily exercised. The distinction made must have reasonable basis. * * * Whether the Missouri statute should have set its condemnation on restraints generally, prohibiting combined action for any purpose and to everybody, or confined it as the statute does to manufacturers and vendors of articles, and permitting it to purchasers of such articles; prohibiting it to sellers of commodities and permitting it to sellers of services, was a matter of legislative judgment; and we cannot say that the distinctions made are palpably arbitrary, which we have seen is the condition of judicial review. It is to be remembered that the question presented is of the power of the legislature, not the policy of the exercise of the power. To be able to find fault, therefore, with such policy, is not to establish the invalidity of the law based upon it." *International Harvester Co. v. State of Missouri*, 234 U. S. 199, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525.

¹¹ *Mallinckrodt Chemical Works v. State of Missouri*, 238 U. S. 41, 59 L. Ed. 1192 (aff'g *State v. Mallinckrodt Chemical Works*, 249 Mo. 702, 156 S. W. 967). In this case wherein it was sought to compel the forfeiture of the corporate charter of plaintiff in error for its refusal to make such annual affidavit, plaintiff in error also objected that the statute as applied to it was "inconsistent with due process of law because it prescribes 'an inflexible and immutable form of affidavit,' and that the form transmitted to plaintiff in error [by the secretary of state as required by the statute] was accompanied with official instructions that it 'will not be accepted if any changes or erasures are made in

the form'; and that the statutory form includes in the jurat the year '19—,' and hence is not applicable to corporations organized, as plaintiff in error was, prior to the year 1900." Disposing of this objection, the court declared that it hardly merited serious treatment. "It might as well be said that the blanks in the affidavit could not be filled up without departing from the form prescribed by the legislature. Of course, neither the statute nor the official caution reasonably admits of any such construction." Regarding "a similar contention * * * based upon the circumstance that the prescribed form of affidavit 'has a venue and jurat, in a county,' whereas plaintiff in error is located and transacts business in the city of St. Louis, which, under the Constitution and laws of Missouri, is not part of any county," the court was of the opinion that a sufficient answer was found in what it had just said, as above set out, "but we may add that, as pointed out in the opinion of the Missouri Supreme Court (249 Mo. 702, 156 S. W. 967), § 8057, Rev. St. 1909, which prescribes rules for the construction of statutes, provides that 'whenever the word "county" is used in any law, general in its character to the whole state, the same shall be construed to include the city of St. Louis, unless such construction be inconsistent with the evident intent of such law, or of some law specially applicable to such city.'" Further, the court held that plaintiff in error, which had based its refusal to make the affidavit, which contained the statement, *inter alia*, that the affidavit "has not issued and does not own any trust certificates," on the general ground that it was not

The Supreme Court of Mississippi has stated that it does not regard the Mississippi "statute [of 1900] as unconstitutional, for it is certainly true that an agreement, the purpose and effect of which are directly to restrain trade and hinder competition in the sale or purchase of a commodity, is against public policy and void and punishable,"¹² and the Supreme Court of the United States on a writ of error to review the decree of the Supreme Court of Mississippi dissolving a voluntary association of retail lumber dealers as a combination in restraint of trade, has declared that such statute, "as construed and applied to the facts of this case by the Supreme Court of Mississippi, exhibits no such restraint upon liberty of contract as to violate the Federal Constitution."¹³

Of the New York statute, the New York Court of Appeals has said that "its object is to destroy monopolies in the manufacture, produc-

obliged to make the indicated disclosure and not on the ground that the term "trust certificates" was ambiguous, could not object that the statute requiring the affidavit, on the penalty of a forfeiture of its charter by the corporation, was repugnant to the due process clause of the Federal Constitution in that it did not explain or define such term, otherwise indicate the meaning of the requirement, nor limit it to such certificates as are declared unlawful by the statute, distinguishing, at this point, *Collins v. Commonwealth of Kentucky*, 234 U. S. 634, 58 L. Ed. 1510, and *International Harvester Co. of America v. Commonwealth of Kentucky*, 234 U. S. 216, 58 L. Ed. 1284.

Further as to the constitutionality of the Missouri statute, see note 10, *supra*, this section.

¹² *State v. Jackson Cotton Oil Co.*, 95 Miss. 6, 48 So. 300. Continuing, the court said: "If it is true that any provision of the act of 1900 is violative of the Constitution of the state or the United States, it may be disregarded and eliminated, since the various provisions are severable, and do not present the difficulty which has sometimes caused statutes to be condemned."

In *Grenada Lumber Co. v. State*, 98 Miss. 536, 54 So. 8, the Supreme Court of Mississippi declined to consider the question whether the penalties provided by the Mississippi statute of 1900 (Code 1906, § 5004) were so excessive as to be confiscatory and therefore inimical to the equal protection and due process clauses of the Fourteenth Amendment, on the ground that such question was not properly before it. And for the same reason such court in *Dukate v. Adams*, 101 Miss. 433, 58 So. 475, declined to consider the question whether "chapter 204 of the Laws of 1908 is unconstitutional, in so far as it attempts to confer jurisdiction upon the chancery court to hear and determine suits arising out of violations of the Anti-Trust Law, for the reason that this Anti-Trust Law makes the formation of a trust or combine a crime, and * * * under the Constitution the criminal laws cannot be enforced by the chancery court."

¹³ *Grenada Lumber Co. v. State*, 217 U. S. 433, 54 L. Ed. 826, *aff'g* *Retail Lumber Dealer's Ass'n v. State*, 95 Miss. 337, 35 L. R. A. (N. S.) 1054, 48 So. 1021.

tion, and sale in this state of commodities in common use, to prevent combinations in restraint of competition in the supply or price of such commodities or in restraint of the free pursuit of any lawful business, trade, or occupation;" that, in this respect, the statute "is little more than a codification of the common law upon the subject, and its validity, to this extent, is not and cannot be successfully questioned in view of a long line of authorities." Moreover, the court was of the opinion that the duties imposed by the statute upon justices of the Supreme Court of issuing an order, on the application of the attorney general for the taking of testimony, etc., "are of a judicial character, because they are incidental to a judicial proceeding; that said statute does not infringe upon personal liberty without due process of law, and does not come [in the matter of procedure] within the express or implied prohibition of the state or federal constitutions." ¹⁴

The Fourteenth Amendment, it was held by the Supreme Court of Michigan, cannot be invoked to defeat the Michigan statute which provides for the ouster of foreign corporations violating its provisions.¹⁵ Such court has also held that the object of the Michigan statute relating to foreign insurance companies which provides a penalty for the violation of the regulations made is sufficiently stated in its title which reads "An act to regulate the manner in which insurance companies not organized under the laws of this state but doing business within it, shall transact their business," and, further, that the statute is not unconstitutional as working a deprivation of valuable rights and privileges without due process of law.¹⁶

¹⁴ *In re Davies*, 168 N. Y. 89, 56 L. R. A. 855, 61 N. E. 178.

¹⁵ *Attorney-General v. A. Booth & Co.*, 143 Mich. 89, 106 N. W. 868. "It is urged," said the court, "that the statute violates the Fourteenth Amendment of the Constitution of the United States, in that the limit to which it [such amendment] will permit interference with corporations is to punish or prevent unlawful acts by it [them], and it is asserted that the exclusion of corporations from the right of doing any business in the state is beyond legislative power. The authority of a state to impose conditions upon the privilege of doing business by foreign corporations is

well established, and is not affected by the Fourteenth Amendment to the Federal Constitution."

¹⁶ *Hartford Fire Ins. Co. v. Raymond*, 70 Mich. 485, 38 N. W. 474. Regarding the title of the act, the court said: "It is not very seriously contended that, under the title of an act to prohibit or regulate a certain business, a failure to embody in such title a statement that it is also for the purpose of punishing violators of the law renders it invalid. An act to regulate a business must of necessity visit some form of punishment or penalty for violations of its provision, as the penalty is the only lever that could give practical effect to the law.

The Nebraska statute which is directed against unfair commercial discrimination or unfair competition and which was enacted to supply a defect in the state anti-trust statute has been held by the Nebraska Supreme Court to be constitutional and not invalid as class legislation or as interfering with freedom of contract.¹⁷

The Massachusetts statute prohibiting under penalty any person, firm, corporation or association of persons, doing business in the commonwealth, from making it a condition of the sale of goods, wares or merchandise that the purchaser shall not sell or deal in the goods, wares or merchandise of any other person, firm, corporation or association of persons,¹⁸ it being expressly provided, however, that such statute shall not prohibit the appointment of agents or sole agents for the sale of goods, wares or merchandise nor the making of contracts for the exclusive sale thereof, has been held, by the Supreme Court of Massachusetts, not to be in conflict with the Fourteenth Amendment nor an interference with interstate commerce and not to be in conflict with articles 1 and 10 of the Massachusetts Declaration of Rights providing, respectively, that "all men are born free and equal, and have certain natural, essential, and unalienable rights; among which may be reckoned the right of enjoying and defending their lives and liberties; that of acquiring, possessing, and protecting property; in fine, that of seeking and obtaining their safety and happiness," and that "each individual of the society has a right to be protected by it in the enjoyment of his life, liberty, and property, according to standing laws," etc., but to be a legitimate exercise of the police power of the state.¹⁹ So in the bill "to prohibit discrimination in the sale of commodities" which was before the governor of Massachusetts for revision, the justices of the Supreme Court of that state did not find "any provision not susceptible of a construction in harmony with the respective provisions of the Constitution of the commonwealth and of the United States."²⁰

* * * The object is sufficiently stated in its title."

¹⁷ *State v. Drayton*, 82 Neb. 254, 23 L. R. A. (N. S.) 1287, 130 Am. St. Rep. 671, 117 N. W. 768. In *Niagara Fire Ins. Co. v. Cornell*, 110 Fed. 816, however, the court held both the Nebraska statute of 1897 with reference to trusts generally and combinations of fire insurance companies in particular, and the Nebraska statute of the same year, dealing with combinations of fire in-

surance companies only, violative of the Fourteenth Amendment to the Federal Constitution.

¹⁸ See, for a similar federal provision, section 3 of the Clayton Act, § 3386, note 66, supra, and § 3403, infra.

¹⁹ *Com. v. Strauss*, 191 Mass. 545, 11 L. R. A. (N. S.) 968, 6 Ann. Cas. 842, 78 N. E. 136, writ of error dismissed 207 U. S. 599, 52 L. Ed. 358.

²⁰ In re Opinion of Justices, 211

As against the objections that the prohibition in the Arkansas Declaration of Rights against unreasonable searches and seizures invalidates those portions of the Arkansas statute providing for the taking of testimony of nonresidents, etc., and the production of books and papers before a commission to be appointed by the court, and for

Mass. 620, 99 N. E. 294. In their answer to the governor's request for their opinion as to the constitutionality of the bill, the justices said: "The bill relates to the subject of commerce. As no legislation of any state can have extraterritorial force, it is plain that this statute affects only sales made within the commonwealth. It does not reach to transactions where the contract of sale is made without the commonwealth, and the delivery only takes place to a purchaser within the commonwealth. Its title is 'An act to prohibit discrimination in the sale of commodities.' The first section appears to have two main purposes: First, it prohibits any person engaged in general business in the commonwealth from maliciously discriminating, in prices of commodities sold, between different parts of the commonwealth or between different purchasers; and second, it prohibits any discrimination in such prices for the purpose of destroying the business of a competitor and of creating a monopoly. The kind of discrimination which is prohibited by this section is the charging of a lower price for the sale of a commodity in one part of the commonwealth than in another, after making allowance for the difference due to quality and cost of transportation. The second section prohibits combinations, for the purpose of destroying the business of any person engaged in selling commodities and of creating a monopoly. There is no constitutional objection to a statute which prohibits an act done for the express purpose of annoying or injuring another and with actual malevolence, although the same act done with an innocent intent is lawful.

* * * A monopoly of any commodity in general use is illegal at common law. * * * It is not beyond the power of the legislature to prohibit contracts or combinations which are designed and have a tendency to create a monopoly. This is in substance the effect of the first section of the Federal Anti-Trust Statute. * * * It does not detract from the force of such a prohibition that the act tending toward monopoly must be combined with a design to destroy the business of a competitor or of some other person before constituting the conduct forbidden by the statute. Although the statute is in some respects a limitation upon freedom of contract, yet we are of opinion that it does not go beyond the police power of the legislature. * * * The statute does not seem to be aimed at interstate commerce, although it may interfere to some extent with such commerce. If however, it is a valid exercise of the police power, it is not fatal to its validity that its operation imposes some limitation upon the freedom of interstate commerce. It comes within the class of statutes which incidentally, but not primarily, affect interstate commerce, and hence are not forbidden by the commerce clause of the Constitution of the United States. * * * In all of its constitutional aspects the statute is fairly covered by *Commonwealth v. Strauss*, 191 Mass. 545, 78 N. E. 136, 11 L. R. A. (N. S.) 968, 6 Ann. Cas. 842. [See *supra*, this section.] * * * The other sections of the act are framed for the purpose of making effective and enforcing the terms of sections 1 and 2."

the rendering of a default judgment on a noncompliance with the orders made, and that the due process clause of the Fourteenth Amendment invalidates the latter of such two provisions, the Supreme Court of Arkansas has held that the statute in these particulars was valid and enforceable as to nonresident officers, etc., of foreign corporations doing business in the state.²¹

The Supreme Court of the United States, however, has held invalid, under the Fourteenth Amendment, for uncertainty in the standard of the conduct made criminal, the Kentucky law on the subject of trusts,²² which under the Kentucky decisions²³ makes any combination for the purpose of controlling prices lawful unless its purpose or effect was to fix a price that was greater or less than the real value of the article involved, "the real value" having been construed by the Kentucky Court of Appeals²⁴ as "the market value under fair competition, and under normal market conditions."²⁵

²¹ *Hammond Packing Co. v. State*, 81 Ark. 519, 126 Am. St. Rep. 1047, 100 S. W. 407, 1199.

That in requiring the attorney or attorneys of record in the cause to have the person or persons desired present to testify at the designated place and time, the similar provision in the Missouri statute is not unconstitutional, see *State v. Standard Oil Co. of Indiana*, 194 Mo. 124, 91 S. W. 1062.

²² As contained in the act of May 20, 1890 (Carroll's Stat. §§ 3915-3917), the constitution of 1891, § 198, and the act of March 21, 1906 (Session Laws 1906, c. 117, p. 429).

²³ *International Harvester Co. of America v. Com.*, 137 Ky. 668, 126 S. W. 352; *Com. v. International Harvester Co.*, 131 Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703; *Owen County Burley Tobacco Society v. Brumback*, 128 Ky. 137, 107 S. W. 710.

²⁴ *International Harvester Co. of America v. Com.*, 147 Ky. 564, 144 S. W. 1064 (one of the cases under review). See also *International Harvester Co. of America v. Com.*, 137 Ky. 668, 126 S. W. 352; *Com. v. International Harvester Co. of America*, 131

Ky. 551, 133 Am. St. Rep. 256, 115 S. W. 703.

²⁵ *International Harvester Co. of America v. Commonwealth of Kentucky*, 234 U. S. 216, 58 L. Ed. 1284, reconciling *Nash v. United States*, 229 U. S. 373, 57 L. Ed. 1232 (see note 82, § 3387, *supra*), and reversing judgments of conviction in prosecutions under the Kentucky law in *International Harvester Co. of America v. Com.*, 148 Ky. 572, 147 S. W. 1199; *International Harvester Co. of America v. Com.*, 147 Ky. 564, 144 S. W. 1064, and *International Harvester Co. of America v. Com.*, 147 Ky. 795, 146 S. W. 12. In holding the law invalid, Mr. Justice Holmes, delivering the opinion of the Supreme Court, said: "Value is the effect in exchange of the relative social desire for compared objects expressed in terms of a common denominator. It is a fact, and generally is more or less easy to ascertain. But what it would be with such increase of a never extinguished competition as it might be guessed would have existed had the combination not been made, with exclusion of the actual effect of other abnormal influences, and, it would

Such court has also held invalid the provision in the Louisiana statute that a person committing a specified act "shall be prima facie presumed to be a party to a monopoly or combination or conspiracy in restraint of trade and commerce, and upon conviction thereof shall be subject to a fine" of a designated amount, it not being "within the province of a legislature to declare an individual guilty or presumptively guilty of a crime."²⁶

seem, with exclusion also of any increased efficiency in the machines [manufactured by plaintiff in error], but with inclusion of the effect of the combination so far as it was economically beneficial to itself and the community, is a problem that no human ingenuity could solve. The reason is not the general uncertainties of a jury trial, but that the elements necessary to determine the imaginary ideal are uncertain both in nature and degree of effect to the acutest commercial mind. The very community, the intensity of whose wish relatively to its other competing desires determines the price that it would give, has to be supposed differently organized and subject to other influences than those under which it acts. It is easy to put simple cases; but the one before us is at least as complex as we have supposed, and the law must be judged by it. In our opinion it cannot stand. * * * If business is to go on, men must unite to do it and must sell their wares. To compel them to guess, on peril of indictment, what the community would have given for them if the continually changing conditions were other than they are, to an uncertain extent; to divine prophetically what the reaction of only partially determinate facts would be upon the imaginations and desires of purchasers, is to exact gifts that mankind does not possess." See also, as following the supreme court decision in *International Harvester Co. of America v. Com.*, supra, *American Seeding Mach. Co. v. Commonwealth*

of Kentucky, 236 U. S. 660, 59 L. Ed. 773, rev'g 152 Ky. 589, 153 S. W. 972; *Collins v. Commonwealth of Kentucky*, 234 U. S. 634, 58 L. Ed. 1510 (followed in *Malone v. Com.*, 234 U. S. 639, 58 L. Ed. 1512, rev'g 141 Ky. 570, 133 S. W. 235), rev'g 141 Ky. 564, 133 S. W. 233; *International Harvester Co. of America v. Commonwealth of Kentucky*, 234 U. S. 589, 58 L. Ed. 1484, rev'g 149 Ky. 41, 147 S. W. 760.

²⁶ *McFarland v. American Sugar Refining Co.*, 241 U. S. 79, 60 L. Ed. 899 (aff'g decree in 229 Fed. 284), holding that Act No. 10 of the extra session of 1915 of the Louisiana General Assembly, which contains an invalid classification and also the invalid provision above referred to, must fall as a whole since "it falls in the sections without which there is no reason to suppose that it would have been passed."

Disposing of the contention that the Louisiana Anti-Trust Acts of 1890 and 1915 are invalid under the provision of the state constitution (art. 31) which requires the object of an act to be expressed in its title "in that the titles purport to legislate with regard only to unlawful restraints of trade whereas the acts themselves embrace 'all' restraints of trade, whether lawful or unlawful," the Supreme Court of Louisiana, in *State v. American Sugar Refining Co.*, 138 La. 1005, 71 So. 137, said: "When the title provides against unlawful restraints and monopolies, and the body refers to 'every contract, combination in the form of trusts, or conspiracy, in restraint of

Again, the Federal Supreme Court has held that the discrimination in the Illinois statute of 1893 in favor of agricultural products and live stock while in the hands of the producer or raiser renders such statute invalid under the equal protection clause of the Fourteenth Amendment.²⁷

trade or commerce, or to fix or limit the amount or quantity of any article, commodity or merchandise to be manufactured, mined, produced or sold in this state,' as being illegal; it is clear that only unlawful acts in restraint of trade are declared to be illegal, and punished in the manner indicated in the act. * * * The intent of the legislature, as expressed in the title to the act under consideration, is to protect trade against unlawful restraint and monopoly; and, as these unlawful restraints and monopolies have been known to exist from time immemorial, and as this reason is that which existed for the passage of the act, the construction that only unlawful acts are referred to in the body of the act is certain." In this case, the court also held that by granting permission to a foreign corporation to do business within its boundaries, a state does not preclude itself from seeking, by proper judicial proceedings, to revoke the franchises and privileges granted if they shall be so misused as to defeat the object of the grant; and hence the ouster of a foreign corporation for a violation of the state anti-trust laws, as authorized thereby, cannot be opposed on the ground that it would constitute a taking of the corporation's property without due process of law or would deny to it the equal protection of the law.

²⁷ *Gonnolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679 (McKenna, J., dissenting), *aff'g* 99 Fed. 354. Mr. Justice Harlan delivered the opinion of the Supreme Court in this case and in so doing said: "What may be regarded as a denial of the equal protec-

tion of the laws is a question not always easily determined, as the decisions of this court and of the highest courts of the states will show. It is sometimes difficult to show that a state enactment, having its source in a power not controverted, infringes rights protected by the national Constitution. No rule can be formulated that will cover every case. But upon this general question we have said that the guaranty of the equal protection of the laws means 'that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or other classes in the same place and under like circumstances.' * * * We have also said: 'The 14th Amendment, in declaring that no state "shall deprive any person of life, liberty, or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws," undoubtedly intended, not only that there should be no arbitrary deprivation of life or liberty, or arbitrary spoliation of property, but that equal protection and security should be given to all under like circumstances in the enjoyment of their personal and civil rights; that all persons should be equally entitled to pursue their happiness and acquire and enjoy property; that they should have like access to the courts of the country for the protection of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts; that no impediment should be interposed to the pursuits of anyone except as applied to the same pursuits by others under like circumstances; that no greater

Following the decision of the Supreme Court of the United States

burdens should be laid upon one than are laid upon others in the same calling and condition, and that in the administration of criminal justice no different or higher punishment should be imposed upon one than such as is prescribed to all for like offenses.' * * *

The difficulty is not met by saying that, generally speaking, the state when enacting laws may, in its discretion, make a classification of persons, firms, corporations, and associations, in order to subserve public objects. For this court has held that classification 'must always rest upon some difference which bears a reasonable and just relation to the act in respect to which the classification is proposed, and can never be made arbitrarily and without any such basis. * * * But arbitrary selection can never be justified by calling it classification. The equal protection demanded by the 14th Amendment forbids this. * * * No duty rests more imperatively upon the courts than the enforcement of those constitutional provisions intended to secure that equality of rights which is the foundation of free government. * * *

It is apparent that the mere fact of classification is not sufficient, to relieve a statute from the reach of the equality clause of the 14th Amendment, and that in all cases it must appear, not only that a classification has been made, but also that it is one based upon some reasonable ground—some difference which bears a just and proper relation to the attempted classification—and is not a mere arbitrary selection.' * * * It may be observed that if combinations of capital, skill, or acts, in respect of the sale or purchase of goods, merchandise, or commodities, whereby such combinations may, for their benefit exclusively, control or establish prices, are hurtful to the public interests and should be

suppressed, it is impossible to perceive why like combinations in respect of agricultural products and live stock are not also hurtful. Two or more engaged in selling dry goods, or groceries, or meats, or fuel, or clothing, or medicines, are, under the statute, criminals, and subject to a fine, if they combine their capital, skill, or acts for the purpose of establishing, controlling, increasing, or reducing prices, or of preventing free and unrestrained competition amongst themselves or others in the sale of their goods or merchandise; but their neighbors, who happen to be agriculturists and live-stock raisers, may make combinations of that character in reference to their grain or live stock without incurring the prescribed penalty: Under what rule of permissible classification can such legislation be sustained as consistent with the equal protection of the laws? It cannot be said that the exemption made by the 9th section of the statute was of slight consequence, as affecting the general public interested in domestic trade and entitled to be protected against combinations formed to control prices for their own benefit; for it cannot be disputed that agricultural products and live stock in Illinois constitute a very large part of the wealth and property of that state. We conclude this part of the discussion by saying that to declare that some of the class engaged in domestic trade or commerce shall be deemed criminals if they violate the regulations prescribed by the state for the purpose of protecting the public against illegal combinations formed to destroy competition and to control prices, and that others of the same class shall not be bound to regard those regulations, but may combine their capital, skill, or acts to destroy competition and to control prices for their special benefit,

in the matter of the Illinois statute, the Supreme Court of Georgia²⁸ and the Supreme Court of Montana²⁹ have held their respective state statutes, each of which contained a provision similar to the one in the Illinois statute which worked the latter's avoidance, to be violative of the constitutional guaranty of equal protection of the laws.³⁰

§ 3389. Interstate trade and commerce considered. It was under the commerce clause of the Federal Constitution that the Sherman Act was passed.³¹

Such statute "does not apply where the trade or commerce affected is purely intrastate,"³² but to come within its provisions the trade or commerce involved must be among the several states or with foreign nations.³³ That a negligible amount of intrastate business is affected

is so manifestly a denial of the equal protection of the laws that further or extended argument to establish that position would seem to be unnecessary." Further, the court held that the statute must be regarded as an entirety and that it fell as a whole as a result of the invalidity of its 9th section.

²⁸ *Brown v. Jacobs' Pharmacy Co.*, 115 Ga. 429, 57 L. R. A. 547, 90 Am. St. Rep. 126, 41 S. E. 553.

²⁹ *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. Rep. 804, 8 Ann. Cas. 717, 82 Pac. 833. The Montana statute exempted from its operation "persons engaged in horticulture or agriculture."

³⁰ "The Constitution of the United States is, within the scope of its provisions, the supreme law of the land, and state courts and legislatures are bound by it as well as by the interpretation put upon its provisions by the federal court of last resort." *State v. Cudahy Packing Co.*, 33 Mont. 179, 114 Am. St. Rep. 804, 8 Ann. Cas. 717, 82 Pac. 833.

³¹ See § 3387, *supra*.

³² *United States v. Patten*, 226 U. S. 525, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325.

Indictment, under the Sherman Act, for entering into a combination in re-

straint of trade and commerce in the territory of Utah held required to be dismissed on the admission of Utah into the Union as a state. *Moore v. United States*, 85 Fed. 465.

³³ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007. See also *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290.

Although a contract on its face carries an apparent tendency to stifle competition, and is, in that sense, in restraint of trade, it is not illegal under the Sherman Act unless it affects interstate or foreign commerce. *Slaughter v. Thacker Coal & Coke Co.*, 55 W. Va. 642, 65 L. R. A. 342, 104 Am. St. Rep. 1013, 2 Ann. Cas. 335, 47 S. E. 247. See also *Pocahontas Coke Co. v. Powhatan Coal & Coke Co.*, 60 W. Va. 508, 10 L. R. A. (N. S.) 268, 116 Am. St. Rep. 901, 9 Ann. Cas. 667, 56 S. E. 264.

"When the act prohibits contracts in restraint of trade or commerce, the plain meaning of the language used includes contracts which relate to either or both subjects. Both trade and commerce are included so long as each relates to that which is interstate or foreign." *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007.

A combination put into operation in, and affecting the foreign commerce of,

is, however, immaterial, it being as a whole that the scheme is to be judged,³⁴ and that a combination is concerned in great part with internal matters does not preclude its coming within the operation of the statute.³⁵ Moreover, persons who are not themselves engaged in interstate commerce may accomplish a violation of the Sherman Act.³⁶ Thus persons conspiring to restrain the trade of others engaged in interstate commerce may be guilty of the crime of conspiracy denounced by section 1 of such statute even though the trade in which they themselves are engaged is wholly intrastate.³⁷ The extent of the interstate trade or commerce conspired against is immaterial.³⁸ It is the interstate character of its trade and not the extent of its interstate trade that gives to a corporation the status of an interstate trader,³⁹ and no act of interstate trade or commerce is so insignificant

this country is none the less within the purview of the Sherman Act because of the fact that it was formed in a foreign country. *Thomsen v. Cayser*, 243 U. S. 66, 61 L. Ed. 597, Ann. Cas. 1917 D 322.

³⁴*Loewe v. Lawlor*, 208 U. S. 274, 52 L. Ed. 488, 13 Ann. Cas. 815.

It has been held that where the parties to a sale of goods, resident in different states, deal with such goods, under the contract of sale but after the goods have become part of the common mass of property in the state of the purchaser's residence, in violation of the anti-trust law of such state, such law applies notwithstanding the original interstate character of the transaction (*Fuqua v. Pabst Brewing Co.*, 90 Tex. 298, 35 L. R. A. 241, 38 S. W. 29, 750; *W. T. Rawleigh Medical Co. v. Fitzpatrick*, — Tex. Civ. App. —, 184 S. W. 549; *Armstrong v. W. T. Rawleigh Medical Co.*, — Tex. Civ. App. —, 178 S. W. 582; *J. R. Watkins Medical Co. v. Johnson*, — Tex. Civ. App. —, 162 S. W. 394. *Contra*, *McCall Co. v. J. D. Stiff Dry Goods Co.*, — Tex. Civ. App. —, 142 S. W. 659), and further that where the state anti-trust statute applies to render illegal a part of an indivisible contract, not even the portion of such contract which involves

interstate commerce and which is, therefore, outside of the operation of such statute can be enforced in the state courts. *W. T. Rawleigh Medical Co. v. Fitzpatrick*, — Tex. Civ. App. —, 184 S. W. 549.

³⁵“How far the effects upon interstate commerce of the combination must preponderate to bring it within [the Sherman Act] * * * is not a question of the extent of federal powers, but of the extent to which Congress intended to exert such powers. That it intended to reach every conceivable restraint of such commerce may not be true, and the degree to which it reaches is not measured by the power of the states in the regulation of their internal affairs until Congress intervenes. It is no objection that the combination declared illegal shall be concerned in great part with internal matters.” *H. B. Marienelli, Ltd. v. United Booking Offices of America*, 227 Fed. 165, 170.

³⁶*H. B. Marienelli, Ltd. v. United Booking Offices of America*, 227 Fed. 165, 169.

³⁷*Knauer v. United States*, 237 Fed. 8, 12.

³⁸*Patterson v. United States*, 222 Fed. 599, 619.

³⁹*Standard Sanitary Mfg. Co. v.*

as not to come within the protection of the anti-trust statute.⁴⁰ So a conspiracy need not affect more than a single interstate shipment in order to come within the condemnation of section 1 of such statute.⁴¹

Moreover, such section does not concern itself with whether the interstate trade or commerce conspired against is rightful or wrongful, but condemns conspiracies against, not merely legal interstate trade and commerce, but interstate trade and commerce generally, without regard to its legality.⁴²

Nor is an express charge upon interstate trade or commerce required. The anti-trust statute does not contemplate "that the combination therein made unlawful must be one which shall by its terms refer to interstate commerce. It is enough if its purpose and effect are necessarily to restrict interstate trade. If it were otherwise, all combinations in restraint of interstate trade might be so expressed in words as to avoid the statute. The true test would seem to be, not what the agreement professes, but what it accomplishes."⁴³

As to what constitutes "commerce" in general and "interstate trade and commerce" in particular, a brief discussion must suffice.⁴⁴ In dis-

United States, 226 U. S. 20, 57 L. Ed. 107.

⁴⁰ *Patterson v. United States*, 222 Fed. 599, 619.

⁴¹ *Steers v. United States*, 192 Fed. 1, 5, wherein the court distinguished *Cincinnati, P., B. S. & P. Packet Co. v. Bay*, 200 U. S. 179, 50 L. Ed. 428, and declared that it did "not find in the *Standard Oil and Tobacco Cases* any holding that a direct restraint of trade must affect an unreasonably great amount of commerce in order to be within the prohibition. As we read these opinions, the matter under consideration, from the standpoint of reason, was not the amount of merchandise or traffic affected by the restriction, but the character and extent of the restriction itself; and it was thought that, if such restriction reasonably pertained to lawful results, it was not of itself necessarily forbidden. These opinions contain no justification for the idea that a direct and absolute restraint, bearing no reasonable relation to lawful means of accomplishing lawful ends, can be per-

mitted only because the volume of traffic affected is not very great."

While the theory of injury to the public lies at the bottom of the *Sherman Act* and while such act is directed against things which tend "to deprive the public of the advantages which flow from free competition" (*Northern Securities Case*, 193 U. S. 197, 48 L. Ed. 679, 24 Sup. Ct. 436), "a single, private injury may well tend to this public result." *Steers v. United States*, *supra*.

⁴² "The terms of the section are of a most sweeping character. It includes every conspiracy in restraint of interstate trade or commerce. It is not a question whether it is rightful or wrongful interstate trade or commerce that is covered by the conspiracy. It is sufficient that it is interstate trade or commerce." *Patterson v. United States*, 222 Fed. 599, 646.

⁴³ *Gibbs v. McNeeley*, 118 Fed. 120, 126, 60 L. R. A. 152.

⁴⁴ As to who are common carriers within the meaning of the *Interstate*

posing of the contention that the meaning of the word "commerce" as used in the clause of the Federal Constitution which gives Congress the power to regulate commerce with foreign nations and among the several states, etc., was limited "to traffic, to buying and selling, or the interchange of commodities," and did not extend to navigation, Chief Justice Marshall, in the celebrated case of *Gibbons v. Ogden*,⁴⁵ declared that "commerce, undoubtedly, is traffic, but it is something more; it is intercourse. It describes the commercial intercourse between nations, and parts of nations, in all its branches." When it comes to interstate commerce, the Supreme Court of the United States has declared that "commerce among the states is not a technical legal conception, but a practical one, drawn from the course of business."⁴⁶

Commerce Act, see 36 U. S. Stat. L. 544, section 7, Fed. St. Ann. 1912 Supp. p. 112.

⁴⁵ 9 Wheat. (U. S.) 1, 6 L. Ed. 23, 68.

⁴⁶ *United States v. Union Pac. R. Co.*, 226 U. S. 61, 57 L. Ed. 124; *Swift & Co. v. United States*, 196 U. S. 375, 49 L. Ed. 518. See also *Loewe v. Lawlor*, 208 U. S. 274, 13 Ann. Cas. 815, 52 L. Ed. 488.

"Commerce among the states, within the exclusive regulating power of Congress, 'consists of intercourse and traffic between their citizens, and includes the transportation of persons and property, as well as the purchase, sale, and exchange of commodities.' *County of Mobile v. Kimball*, 102 U. S. 691-702; *Gloucester Ferry Co. v. Pennsylvania*, 114 U. S. 203, 5 Sup. Ct. Rep. 826. In the application of this comprehensive definition, it is settled by the decisions of the court that such commerce includes, not only the actual transportation of commodities and persons between the states, but also the instrumentalities and processes of such transportation. That it includes all the negotiations and contracts which have for their object, or involve as an element thereof, such transmission or passage from one state to another. That such commerce begins, and the regulating power of Con-

gress attaches, when the commodity or thing traded in commences its transportation from the state of its production or situs to some other state or foreign country, and terminates when the transportation is completed, and the property has become a part of the general mass of the property in the state of its destination. When the commerce begins is determined, not by the character of the commodity, nor by the intention of the owner to transfer it to another state for sale, nor by his preparation of it for transportation, but by its actual delivery to a common carrier for transportation, or the actual commencement of its transfer to another state. At that time the power and regulating authority of the state ceases, and that of Congress attaches and continues, until it has reached another state, and become mingled with the general mass of property in the latter state. That neither the production or manufacture of commodities or articles which constitute subjects of commerce, and which are intended for trade and traffic with citizens of other states, nor the preparation for their transportation from the state where produced or manufactured, prior to the commencement of the actual transfer, or transmission thereof to another state, constitutes

While on the one hand it has been suggested that what constitutes trade within the meaning of the Sherman Act is not necessarily to be determined by what constitutes such trade within the rules relative to a state's right of taxation,⁴⁷ on the other, it has been declared that "such commerce as the states are excluded from burdening or regulating in any way by tax or otherwise, because of the power of Congress to regulate interstate commerce, must, of necessity, be the commerce which Congress may regulate, and which, by the terms of the anti-trust law, it has regulated."⁴⁸ The transportation of commodities is commerce,⁴⁹ "and if from one state to or through another it is interstate commerce."⁵⁰ Accordingly, interstate railroads come within

that interstate commerce which comes within the regulating power of Congress; and, further, that after the termination of the transportation of commodities or articles of traffic from one state to another, and the mingling or merging thereof in the general mass of property in the state of destination, the sale, distribution, and consumption thereof in the latter state forms no part of interstate commerce." In *re Greene*, 52 Fed. 104, 114, citing *Kidd v. Pearson*, 128 U. S. 1, 32 L. Ed. 346; *Robbins v. Shelby Co. Taxing Dist.*, 120 U. S. 497, 30 L. Ed. 694; *Coe v. Errol*, 116 U. S. 517, 29 L. Ed. 715; *Brown v. Houston*, 114 U. S. 622, 29 L. Ed. 257; *Pensacola Tel. Co. v. Western U. Tel. Co.*, 96 U. S. 1, 24 L. Ed. 708. See also *United States v. Hopkins*, 82 Fed. 529, *rev'd Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290; *United States v. E. C. Knight Co.*, 60 Fed. 306, *aff'd* 60 Fed. 934, 24 L. R. A. 428, in turn *aff'd* by 156 U. S. 1, 39 L. Ed. 325.

⁴⁷ *Steers v. United States*, 192 Fed. 1, 5.

"'Trade,' as referring to a business which must have a fixed continuance and established character in order to be in existence so as to be subject to a tax or so as to be carried on within a state, cannot be synonymous with 'trade' in the sense of commerce or traffic or transportation from one place to another." *Steers v.*

United States, *supra*. See also *H. B. Marienelli, Ltd. v. United Booking Offices of America*, 227 Fed. 165, 169.

⁴⁸ *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 296, 46 L. R. A. 122.

⁴⁹ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007.

"Transportation for others, as an independent business, is commerce, irrespective of the purpose to sell or retain the goods which the owner may entertain with regard to them after they shall have been delivered." *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617, 47 L. Ed. 333 (involving fixing of railroad rates by state).

⁵⁰ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007. See also *Steers v. United States*, 192 Fed. 1, 5.

It seems that a contract involving Ohio river commerce between two points in the state of Ohio will not involve interstate commerce within the meaning of the Sherman Acts merely because the boats engaged therein may, in passing between such two points, pass over soil belonging to the state of Kentucky. *Cincinnati, P., B. S. & P. Packet Co. v. Bay*, 200 U. S. 179, 50 L. Ed. 428. Compare, however, with this last-cited case, *Hanley v. Kansas City Southern R. Co.*, 187 U. S. 617, 47 L. Ed. 333.

the meaning of the Sherman Act.⁵¹ Manufacture, however, is not commerce but is precedent thereto.⁵² Generally speaking, interstate commerce "comprehends * * * intercourse for the purposes of trade in any and all its forms, including transportation, purchase, sale, and exchange of commodities between the citizens of different states, and the power to regulate it embraces all the instruments by which such commerce may be conducted."⁵³

⁵¹ *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007.

The distinct allegation in the bill of complaint, brought to vacate and set aside an order of the Michigan Railroad Commission authorizing a merger of certain telephone companies, that such companies were doing an intrastate business, and the absence of even an intimation in such bill that any of the companies are doing or contemplate doing an interstate business preclude consideration of the complainant's contention that the commission's order violates the Sherman Act. *Home Tel. Co. v. Michigan Railroad Commission*, 174 Mich. 219, 140 N. W. 496.

"Tugs employed in the business of towing, into and out of harbors and between ports, of vessels engaged in interstate commerce, and in the lightering and wrecking of vessels so engaged, are themselves instrumentalities of interstate commerce. * * * It inevitably follows that any undue restraint upon such business of towing and wrecking offends against the Sherman Act." *United States v. Great Lakes Towing Co.*, 208 Fed. 733, 742.

⁵² *United States v. E. C. Knight Co.*, 156 U. S. 1, 39 L. Ed. 325.

⁵³ *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290.

Although the Sherman Act "has no reference to the mere manufacture or production of articles or commodities within the limits of the several states, it does embrace and declare to be il-

legal every contract, combination or conspiracy, in whatever form, of whatever nature, and whoever may be parties to it, which directly or necessarily operates in restraint of trade or commerce among the several states or with foreign nations." *Northern Securities Co. v. United States*, 193 U. S. 197, 48 L. Ed. 679.

"As has frequently been said, interstate commerce consists of intercourse and traffic between the citizens or inhabitants of different states, and includes not only the transportation of persons and property and the navigation of public waters for that purpose, but also the purchase, sale, and exchange of commodities. * * * If, therefore, an agreement or combination directly restrains not alone the manufacture, but the purchase, sale, or exchange of the manufactured commodity among the several states, it is brought within the provisions of the statute." *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 211, 44 L. Ed. 136. See also *W. W. Montague & Co. v. Lowry*, 193 U. S. 38, 48 L. Ed. 608.

A contract to supply to a paper manufacturer in Wisconsin pulp wood obtained in Wisconsin, Michigan, Minnesota and Canada involves interstate commerce and whether it is invalid as creating a monopoly or being in restraint of trade must be determined by the federal rather than by the state statutes. *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N. W. 1058.

Of the word "trade," as used in the Sherman Act, it has been said that it "means the buying as well as the selling of property, and the statute extends its protection to those who buy as well as to those who sell. A practice that is helpful to the seller, but is hurtful to the buyer, is as fully within the inhibition of the statute as a practice pursued by one seller which unlawfully restrains the trade of another seller. Therefore it may be assumed without discussion, that the statute intends to protect the purchasing public from the consequences of combinations, which, either in their purpose or effect, so raise and maintain prices that trade, in the sense of buying, cannot exist except upon terms fixed by combinations of sellers."⁵⁴

An actual physical transportation of merchandise is not necessary in order for a person to be engaged in interstate trade or commerce.⁵⁵ A corporation engages in interstate commerce when it sends its salesmen into foreign states, and accepts and fills the orders obtained by them,⁵⁶ and, in this connection, it is not important where the title to the goods sold technically passes.⁵⁷ Nor can a manufacturing corporation claim that it is not engaged in interstate trade when it ap-

⁵⁴ *United States v. United States Steel Corporation*, 223 Fed. 55, 177 (per Wooley, Circuit Judge).

⁵⁵ *United States v. American Tobacco Co.*, 164 Fed. 700, 708 (per Cox, Circuit Judge, concurring).

⁵⁶ *United States v. American Tobacco Co.*, 164 Fed. 700, 713 (per Noyes, Circuit Judge, concurring).

"Neither a sale nor the place of sale and delivery is alone the test of interstate commerce, nor does transportation, although an adjunct essential to commerce, constitute a transaction in interstate commerce. A sale, the parties to which are from different states, when such sale necessarily involves the transportation of goods, is a transaction of interstate commerce, whether the contract be made in the one state or in the other, or made before or after shipment. Every negotiation, initiatory and intervening act, contract, trade, and dealing between citizens of any state, and territory, or the District of Columbia, with those of another political division of the United States, which contemplates and causes

such importation, whether it be of goods, persons or information, is a transaction of interstate commerce." *United States v. Tucker*, 188 Fed. 741, 743 (prosecution for violation of Pure Food and Drugs Act).

A sale of goods made in Wisconsin by one Wisconsin corporation to another is not a transaction in interstate commerce and hence is not within the Sherman Act. *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352, 39 Am. St. Rep. 902, 56 N. W. 864.

⁵⁷ *United States v. American Tobacco Co.*, 164 Fed. 700, 714 (per Noyes, Circuit Judge, concurring).

The validity of an exclusive-agency contract, made by a manufacturer of one state with a citizen of another, under which the title to the goods shipped is to remain in the manufacturer until such goods are sold, must be determined by the federal anti-trust laws and not by the anti-trust laws of the state of the agent's residence. *Cole Motor Car Co. v. Hurst*, 228 Fed. 280.

pears that it manufactures its product in one state, ships such product to warehouses in other states, and there sells it, its trade extending over several states.⁵⁸

§ 3390. Monopolization under anti-trust statutes. Monopolization and attempts to monopolize are the subjects with which section 2 of the Sherman Act is concerned.⁵⁹ In this section, the word "monopolize" is used "in a legal and accurate sense. Its root idea is to exclude. To monopolize trade or commerce, or a part thereof, is to exclude persons therefrom. It is not, however, to exclude all persons. In the case of a perfect monopoly, which in experience has arisen only from a sovereign grant, the exclusion is of all persons but one, or, perhaps, a group of persons. By reason of such exclusion such person or group of persons secure^a the entire field covered by the grant to themselves. But it is not such monopolizing that the section has in mind. It is monopolizing by the acts of individuals."⁶⁰

⁵⁸ *United States v. Standard Sanitary Mfg. Co.*, 191 Fed. 172, 193, aff'd 226 U. S. 20, 57 L. Ed. 107.

A corporation alleged to have been engaged since its organization "in the business of cutting and harvesting ice, principally in the state of New Hampshire, transporting the said ice to the city of Boston in the state of Massachusetts, and there selling the same; the larger part of said ice being delivered in said Boston, but some being shipped to places outside the state," is not thereby shown to have been engaged in interstate commerce in ice. *Corey v. Independent Ice Co.*, 207 Fed. 459, 461.

⁵⁹ *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734.

In penalizing, monopolizing and attempting to monopolize, section 2 of the Sherman Act creates two separate and distinct offenses, and a count in an indictment which charges both of such offenses is bad for duplicity. *United States v. American Naval Stores Co.*, 186 Fed. 592. (The convictions, had on the other counts of the indictment here involved, which

charged conspiracy and which the court held not subject to demurrer, were reversed by the Supreme Court, in *Nash v. United States*, 229 U. S. 373, 57 L. Ed. 1232, for error in the charge to the jury.) In connection, however, with the ruling of Judge Sheppard, in the Circuit Court, whereby he upheld the other counts of the indictment as sufficient to put the defendants on notice of the nature of the accusation, Justice Holmes, delivering the opinion of the court in *Nash v. United States*, supra, said: "We cannot pronounce the counts before us bad for uncertainty. On demand of the defendants a bill of particulars was furnished, and there is no reason to fear that injustice was done in that respect. * * * The first count, at least, was well enough."

⁶⁰ *Patterson v. United States*, 222 Fed. 599, 619. Continuing, the court said: "In the case of such a monopoly it would seem that it is not essential that all but the insiders be wholly excluded, so that they have the whole field to themselves. It is sufficient that outsiders are substantially excluded, so that the insiders have to themselves

The prohibitions of this section extend only to such monopolies as are unjust and unreasonable restraints of trade.⁶¹ It is not "to be

approximately, or 'a largely preponderating part of,' the whole field."

"There can be no monopolizing in the legal and accurate sense of the word where there can be no common occupation. Where in the very nature of things there must be exclusion of all others but one, there can be no monopolizing. Hence it would seem that there can be no monopolizing in making a single interstate sale, or in making a great number of such sales, even though wrongful means are used in making them. A wrong has been done the competitors, but the wrong is not that of monopolizing. In the very nature of things but one competitor can make the sale. The idea that such conduct constitutes monopolizing is not according to the legal and accurate meaning of the word. It can only be such according to a popular conception thereof. But, though but one competitor can make a sale, all competitors can enjoy the free opportunity of approaching each and every prospective purchaser on equal terms, with the chance of making a sale if he can persuade him to buy. For one competitor to exclude all or substantially all other competitors from such opportunity—i. e., drive them from the field of freely offering their goods, so as to have that field to himself—is to monopolize according to the legal and accurate sense of the word." *Patterson v. United States*, 222 Fed. 599, 620.

In the *Standard Oil Case*, Chief Justice White declared that "the commerce referred to by the words 'any part' [in the second section of the *Sherman Act*] construed in the light of the manifest purpose of the statute has both a geographical and a distributive significance, that is it includes any portion of the United States and any one of the classes of things forming a

part of interstate or foreign commerce." *Standard Oil Co. v. United States*, 221 U. S. 1, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734, 55 L. Ed. 619.

This construction of such words, according to Judge Cochran, who wrote the opinion in the *Cash Register Case*, excludes from their meaning "the interstate trade or commerce of a particular prospective purchaser of a particular commodity, and confines it to the interstate trade or commerce of all prospective purchasers of a particular commodity in the United States or in some particular portion thereof." *Patterson v. United States*, 222 Fed. 599, 622. See also *United States v. Standard Oil Co. of New Jersey*, 173 Fed. 177 (aff'd with directions 221 U. S. 1, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734, 55 L. Ed. 619); *United States v. American Tobacco Co.*, 164 Fed. 700 (rev'd and remanded with directions 221 U. S. 106, 55 L. Ed. 663); *Whitwell v. Continental Tobacco Co.*, 125 Fed. 454, 64 L. R. A. 689, and, in connection therewith, the comments of Judge Cochran, in *Patterson v. United States*, *supra*, thereupon. (Quaere, whether there must not be attached to the exclusion the proviso that the "particular prospective purchaser of a particular commodity" be not the only prospective purchaser in a "particular portion" of the United States?)

⁶¹ *United States v. Eastman Kodak Co.*, 226 Fed. 62, 65.

In the *Standard Oil Case*, Chief Justice White, delivering the opinion of the court, said: "A consideration of the text of the 2d section serves to establish that it was intended to supplement the 1st, and to make sure that by no possible guise could the public policy embodied in the 1st sec-

lost sight of," declares one of the federal courts, "that actually doing

tion be frustrated or evaded. * * * Undoubtedly, the words 'to monopolize' and 'monopolize,' as used in the section, reach every act bringing about the prohibited results. The ambiguity, if any, is involved in determining what is intended by monopolize. But this ambiguity is readily dispelled in the light of the previous history of the law of restraint of trade to which we have referred and the indication which it gives of the practical evolution by which monopoly and the acts which produce the same result as monopoly, that is, an undue restraint of the course of trade, all came to be spoken of as, and to be indeed synonymous with, restraint of trade. In other words, having by the 1st section forbidden all means of monopolizing trade, that is, unduly restraining it by means of every contract, combination, etc., the 2d section seeks, if possible, to make the prohibitions of the act all the more complete and perfect by embracing all attempts to reach the end prohibited by the 1st section, that is, restraints of trade, by an attempt to monopolize, or monopolization thereof, even although the acts by which such results are attempted to be brought about or are brought about be not embraced within the general enumeration of the 1st section. And, of course, when the 2d section is thus harmonized with and made, as it was intended to be, the complement of the 1st, it becomes obvious that the criteria to be resorted to in any given case for the purpose of ascertaining whether violations of the section have been committed is the rule of reason guided by the established law and by the plain duty to enforce the prohibitions of the act, and thus the public policy which its restrictions were obviously enacted to subserve. And it is

worthy of observation, as we have previously remarked concerning the common law, that although the statute by the comprehensiveness of the enumerations embodied in both the 1st and 2d sections, makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete, it indicates a consciousness that the freedom of the individual right to contract, when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract." *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734. See also *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. Ed. 663.

Under the provisions of the Idaho Public Utilities Act, unregulated competition is not needed to protect the public against unreasonable rates or unsatisfactory service, and unregulated competition or a duplication of utility plants under the pretense of preventing monopoly cannot be justified. *Idaho Power & Light Co. v. Blomquist*, 26 Idaho 222, Ann. Cas. 1916 E 282, 141 Pac. 1083, declaring that cutthroat competition can only result in monopoly; "unregulated competition is a tool of unregulated monopoly, as the word 'monopoly' is usually understood."

business, no matter how large, is not monopolizing. It is excluding from the opportunity of doing business that is."⁶² It is true that

⁶² Patterson v. United States, 222 Fed. 599, 625.

In the American Tobacco Case (United States v. American Tobacco Co., 221 U. S. 106, 55 L. Ed. 663), the Supreme Court, by Chief Justice White, said: "Considering * * * the undisputed facts which we have previously stated, it remains only to determine whether they establish that the acts, contracts, agreements, combinations, etc., which were assailed, were of such an unusual and wrongful character as to bring them within the prohibitions of the law. That they were, in our opinion, so overwhelmingly results from the undisputed facts that it seems only necessary to refer to the facts as we have stated them to demonstrate the correctness of this conclusion. Indeed, the history of the combination is so replete with the doing of acts which it was the obvious purpose of the statute to forbid, so demonstrative of the existence from the beginning of a purpose to acquire dominion and control of the tobacco trade, not by the mere exertion of the ordinary right to contract and to trade, but by methods devised in order to monopolize the trade by driving competitors out of business, which were ruthlessly carried out upon the assumption that to work upon the fears or play upon the cupidity of competitors would make success possible. We say these conclusions are inevitable, not because of the vast amount of property aggregated by the combination, not because, alone, of the many corporations which the proof shows were united by resort to one device or another. Again, not alone because of the dominion and control over the tobacco trade which actually exists, but because we think the conclusion of wrongful purpose and ille-

gal combination is overwhelmingly established by the following considerations: (a) By the fact that the very first organization or combination was impelled by a previously existing fierce trade war, evidently inspired by one or more of the minds which brought about and became parties to that combination. (b) Because, immediately after that combination and the increase of capital which followed, the acts which ensued justify the inference that the intention existed to use the power of the combination as a vantage ground to further monopolize the trade in tobacco by means of trade conflicts designed to injure others, either by driving competitors out of the business or compelling them to become parties to a combination—a purpose whose execution was illustrated by the plug [tobacco] war which ensued and its results, by the snuff war which followed and its results, and by the conflict which immediately followed the entry of the combination in England, and the division of the world's business by the two foreign contracts which ensued. (c) By the ever-present manifestation which is exhibited of a conscious wrongdoing by the form in which the various transactions were embodied from the beginning, ever changing, but ever in substance the same. Now the organization of a new company, now the control exerted by the taking of stock in one or another or in several, so as to obscure the result actually attained, nevertheless uniform, in their manifestations of the purpose to restrain others and to monopolize and retain power in the hands of the few who, it would seem, from the beginning, contemplated the mastery of the trade which practically followed. (d) By the gradual absorption of control

vast size, influence on and control of trade incident thereto, power to crush competition and ability through systematized organization to absorb business are factors associated with monopoly,⁶³ but the size and varied character of an enterprise do not of themselves constitute a violation of the Sherman Act.⁶⁴ The amount and extent of the business is relevant only as throwing light upon the effect of the proprietor's conduct on interstate and foreign trade.⁶⁵ There is no limit to the extent to which a business may legally grow, but when additions to a business are accompanied by an intent to monopolize and restrain trade by an arbitrary use of the power resulting from increased size to eliminate weaker competitors, such additions are inimical to the Sherman Act.⁶⁶ "The vital question is, how was the business, whether big or little, done?"⁶⁷ Whether a corporation which

over all the elements essential to the successful manufacture of tobacco products, and placing such control in the hands of seemingly independent corporations serving as perpetual barriers to the entry of others into the tobacco trade. (e) By persistent expenditure of millions upon millions of dollars in buying out plants, not for the purpose of utilizing them, but in order to close them up and render them useless for the purposes of trade. (f) By the constantly recurring stipulations, whose legality, isolatedly viewed, we are not considering, by which numbers of persons, whether manufacturers, stockholders, or employees, were required to bind themselves, generally for long periods, not to compete in the future. Indeed, when the results of the undisputed proof which we have stated are fully apprehended, and the wrongful acts which they exhibit are considered, there comes inevitably to the mind the conviction that it was the danger which it was deemed would arise to individual liberty and the public well-being from acts like those which this record exhibits, which led the legislative mind to conceive and to enact the Anti-Trust Act—considerations which also serve so clearly to demonstrate that the combination here assailed is within the law as to leave

no doubt that it is our plain duty to apply its prohibitions."

⁶³ United States v. United States Steel Corporation, 223 Fed. 55, 121 (per Buffington, Circuit Judge).

Section 2 of the Sherman Act, "does not cover every monopolizing by the acts of individuals. A monopolizing by efficiency in producing and marketing a better and cheaper article than any one else is not within it. However, possibly, efficiency is so abundant that in experience there never will be, as there never has been, such a monopolizing." Patterson v. United States, 222 Fed. 599, 619.

⁶⁴ United States v. Eastman Kodak Co., 226 Fed. 62, 80.

⁶⁵ United States v. Reading Co., 226 Fed. 229, 233.

⁶⁶ United States v. Eastman Kodak Co., 226 Fed. 62, 80.

"The normal and necessary expansion of business to any size is not forbidden by the Sherman Law, unless such expansion is accompanied or accomplished by an undue restraint or obstruction of trade." United States v. United States Steel Corporation, 223 Fed. 55, 104 (per Buffington, Circuit Judge).

⁶⁷ United States v. United States Steel Corporation, 223 Fed. 55, 103 (per Buffington, Circuit Judge).

is, beyond question, a combination "is a combination in restraint of trade, or has monopolized, or has attempted to monopolize, commerce among the states in violation of the Anti-Trust Law, depends upon the inherent nature or effect of the combination, the evident purpose of its acts, or the intent to be inferred from the extent of the control over the industry, the method by which such control has been brought about, and the manner in which it has been exerted, resulting in prejudice to the public interests by unduly restricting competition or unduly obstructing the course of trade."⁶⁸ A monopoly having been obtained, those who have secured it have the burden of proving that they acquired it by lawful methods, i. e., that it resulted from normal processes of growth, etc.⁶⁹

§ 3391. Restraint of trade. The sole subject with which section 1 of the Sherman Act deals is restraint of trade as therein contemplated,⁷⁰ and it was the decisions of the Supreme Court of the United States in the Standard Oil and American Tobacco cases, wherein the subject was approached directly and considered carefully, that settled with finality the question as to whether all restraints were by that

⁶⁸ United States v. United States Steel Corporation, 223 Fed. 55, 162 (per Woolley, Circuit Judge).

"Monopoly and unreasonable restraint of trade are, after all, not questions of law, but questions of hard-headed business rivalry, and whether there is monopoly of an industry, whether trade is subjected to unreasonable restraint, whether there is unfair competition, are facts about which business competitors best know and are best qualified to speak. And it may be accepted as a fact that where no competitor complains, and much more so, where they unite in testifying * * * that the business conduct of [the combination alleged to be illegal] * * * has been fair, we can rest assured there has been neither monopoly nor restraint." United States v. United States Steel Corporation, 223 Fed. 55, 78 (per Buffington, Circuit Judge).

⁶⁹ United States v. Eastman Kodak Co., 226 Fed. 62, 79.

The vast size of the United States Steel Corporation, the influence on and control of the trade incident to such size, the seeming power of such corporation to crush competition, and its ability to absorb business through its systematized organization held to give an impression of monopoly which, in a suit to dissolve such corporation, devolves upon the latter and its creators the burden of satisfying the court "by affirmative proof that monopoly was not the purpose for which it was formed, but that it was the normal, regular, and natural outcome of the improvement in steel making, and its concentrated powers were only such as were deemed to be necessary to successful producing and marketing its product." United States v. United States Steel Corporation, 223 Fed. 55, 121 (per Buffington, Circuit Judge).

⁷⁰ Standard Oil Co. v. United States, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734.

token condemned by such section. In the Standard Oil Case⁷¹ the government contended "that the language of the statute embraces every contract, combination, etc., in restraint of trade, and hence its text leaves no room for the exercise of judgment, but simply imposes the plain duty of applying its prohibition to every case within its literal language." To this contention the court replied that "the error involved lies in assuming the matter to be decided. This is true, because, as the acts which may come under the classes stated in the 1st section and the restraint of trade to which that section applies are not specifically enumerated or defined, it is obvious that judgment must in every case be called into play in order to determine whether a particular act is embraced within the statutory classes, and whether, if the act is within such classes, its nature or effect causes it to be a restraint of trade within the intendment of the act. To hold to the contrary would require the conclusion either that every contract, act, or combination of any kind or nature, whether it operated a restraint of trade or not, was within the statute, and thus the statute would be destructive of all right to contract or agree or combine in any respect whatever as to subjects embraced in interstate trade or commerce, or, if this conclusion were not reached, then the contention would require it to be held that, as the statute did not define the things to which it related, and excluded resort to the only means by which the acts to which it relates could be ascertained,—the light of reason,—the enforcement of the statute was impossible because of its uncertainty. The merely generic enumeration which the statute makes of the acts to which it refers, and the absence of any definition of restraint of trade as used in the statute, leaves room but for one conclusion, which is, that it was expressly designed not to unduly limit the application of the act by precise definition, but while clearly fixing a standard, that is, by defining the ulterior boundaries which could not be transgressed with impunity, to leave it to be determined by the light of reason, guided by the principles of law and the duty to apply and enforce the public policy embodied in the statute, in every given case whether any particular act or contract was within the contemplation of the statute." ⁷²

⁷¹ Standard Oil Co. v. United States, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734.

⁷² Continuing, the court found it altogether possible to reconcile the cases of United States v. Joint Traffic Ass'n, 171 U. S. 505, 43 L. Ed. 259, and

United States v. Trans-Missouri Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007, with the view then taken by it, as set out above in the text, notwithstanding the fact that "it is undoubted that, in the opinion in each case, general language was made use

Subsequently, in deciding the American Tobacco Company Case,⁷³ the Supreme Court, by Chief Justice White who had delivered the opinion of the court in the Standard Oil Case, declared ⁷⁴that "applying the rule of reason to the construction of the statute, it was held in the Standard Oil Case that, as the words 'restraint of trade' at common law and the law of this country at the time of the adoption of the Anti-Trust Act only embraced acts or contracts or agreements or combinations which operated to the prejudice of the public interests by unduly restricting competition, or unduly obstructing the due course of trade, or which, either because of their inherent nature or effect, or

of, which, when separated from its context, would justify the conclusion that it was decided that reason could not be resorted to for the purpose of determining whether the acts complained of were within the statute."

In *E. Bement & Sons v. National Harrow Co.*, 186 U. S. 70, 46 L. Ed. 1058, the Supreme Court, citing *United States v. Trans-Missouri Freight Ass'n*; *United States v. Joint Traffic Ass'n*; *Addyston Pipe & Steel Co. v. United States*, recognized the fact "that it has been held by this court that the [Sherman] act included any restraint of commerce, whether reasonable or unreasonable."

⁷³ *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. Ed. 663.

⁷⁴ First, however, stating that in the Standard Oil Case "it was held, without departing from any previous decision of the court, that as the statute had not defined the words 'restraint of trade,' it became necessary to construe those words,—a duty which could only be discharged by a resort to reason. We say the doctrine thus stated was in accord with all the previous decisions of this court, despite the fact that the contrary view was sometimes erroneously attributed to some of the expressions used in two prior decisions (the *Trans-Missouri Freight Assn.* and *Joint Traffic Cases*, 166 U. S. 290, 41 L. Ed. 1007, 17 Sup. Ct. Rep. 540, and 171 U. S. 505, 43

L. Ed. 259, 19 Sup. Ct. Rep. 25). That such view was a mistaken one was fully pointed out in the Standard Oil Case, and is additionally shown by a passage in the opinion in the *Joint Traffic Case*, as follows (171 U. S. 568): 'The act of Congress must have a reasonable construction, or else there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it.' "

"Whatever understanding or misunderstanding may have arisen out of the decisions in the *Trans-Missouri Case*, 166 U. S. 290, 17 Sup. Ct. 540, 41 L. Ed. 1007, and the *Joint Traffic Association Case*, 171 U. S. 505, 19 Sup. Ct. 25, 43 L. Ed. 259, it is now definitely decided that the words 'restraint of trade' at common law and in the law of this country at the time of the adoption of the Anti-Trust Act [Sherman Law] embraced only acts, contracts, agreements, or combinations which operated to the prejudice of the public interests by unduly restricting competition or by unduly obstructing due course of trade, and that Congress intended that those words used in the act should have a like significance." *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N. W. 1058, citing *Standard Oil* and *Tobacco cases*.

because of the evident purpose of the acts, etc., injuriously restrained trade,⁷⁵ that the words as used in the statute were designed to have and did have but a like significance. It was therefore pointed out that the statute did not forbid or restrain the power to make normal and usual contracts to further trade by resorting to all normal methods, whether by agreement or otherwise, to accomplish such purpose. In other words, it was held not that acts which the statute prohibited could be removed from the control of its prohibitions by a finding that they were reasonable, but that the duty to interpret, which inevitably arose from the general character of the term 'restraint of trade,' required that the words 'restraint of trade' should be given a meaning which would not destroy the individual right to contract, and render difficult, if not impossible, any movement of trade in the channels of interstate commerce,—the free movement of which it was the purpose of the statute to protect. The soundness of the rule that the statute should receive a reasonable construction, after further mature deliberation, we see no reason to doubt."⁷⁶ In a still later case,⁷⁷ the same court, by Mr. Justice Holmes, stated that the Standard Oil and American Tobacco Cases "may be taken to have established that only such contracts and combinations are within the act as, by reason of intent or the inherent nature of the contemplated acts, prejudice the public interests by unduly restricting competition or unduly obstructing the course of trade."⁷⁸ But not only must the restraint be undue or

⁷⁵ "It is certain that at a very remote period the words 'contract in restraint of trade' in England came to refer to some voluntary restraint put by contract by an individual on his right to carry on his trade or calling. Originally all such contracts were considered to be illegal, because it was deemed they were injurious to the public as well as to the individuals who made them. In the interest of the freedom of individuals to contract, this doctrine was modified so that it was only when a restraint by contract was so general as to be coterminous with the Kingdom that it was treated as void. That is to say, if the restraint was partial in its operation, and was otherwise reasonable, the contract was held to be valid." *Standard Oil Co. v. United States*, 221

U. S. 1, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734, 55 L. Ed. 619.

The right of combination under the Sherman Act cannot be greater than it was at common law. *United States v. King*, 229 Fed. 275, 279.

⁷⁶ The rule of "reasonable restraint" has no application in a case not of mere restraint but of total exclusion. *United States v. Associated Bill Posters*, 235 Fed. 540, 542.

⁷⁷ *Nash v. United States*, 229 U. S. 373, 57 L. Ed. 1232.

⁷⁸ Quoted in *United States v. United States Steel Corporation*, 223 Fed. 55, 61 (per Buffington, Circuit Judge). See also *Stewart v. W. T. Rawleigh Medical Co.*, — Okla. —, 159 Pac. 1187.

The Standard Oil and Tobacco "cases must be understood to decide

unreasonable in order to come within the terms of the Sherman Act; ⁷⁹ it must be direct and not merely incidental.⁸⁰ "A contract may, in a

that the effect upon the industry is a factor in determining the illegality of the combination." *United States v. Corn Products Refining Co.*, 234 Fed. 964, 1011.

In considering whether the United States Steel Corporation was "prejudicing the public interests by unduly restricting or unduly obstructing the steel and iron business of the United States" when the bill asking its dissolution was filed in 1911, said Circuit Judge Buffington in *United States v. United States Steel Corporation*, 223 Fed. 55, 64, "a number of fields of inquiry naturally suggest themselves. Had this company in 1911 a monopoly of the steel and iron trade of the country? What had been and was then its business conduct towards its competitors? Was it fair or unfair? Had it forced or was it forcing others out of the steel trade by unfair conduct? Had it prevented others from entering it? Was it then exacting or had it exacted from the public undue prices for its products? Had it lowered the character of its product? Had it cut down or was it cutting down, its output so as to restrict proper supply? Had it taken advantage of its power to unduly reduce wages? All these, as [appears] * * * from the *Standard Oil*, the *Tobacco*, the *Powder*, and *Keystone Watch Cases*, were inquiries by which the question could be determined whether the Steel Corporation was acting, as the Supreme Court said in the *Standard Oil Case*, * * * with 'the legitimate purpose of reasonably forwarding personal interest and developing trade,' or, on the other hand, 'with the intent to do wrong to the general public and to limit the right of individuals.'"

⁷⁹ *United States v. Eastman Kodak*

Co., 226 Fed. 62, 66; *Patterson v. United States*, 222 Fed. 599, 618; *United States v. Keystone Watch Case Co.*, 218 Fed. 502, 507.

Under the California statute (Civil Code, § 1673), contracts even in partial restraint of trade are illegal. *Chamberlain v. Augustine*, 172 Cal. 285, 156 Pac. 479.

⁸⁰ *United States v. Patten*, 226 U. S. 525, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325; *Cincinnati, P., B. S. & P. Packet Co. v. Bay*, 200 U. S. 179, 50 L. Ed. 428, construed in *Steers v. United States*, 192 Fed. 1, 5; *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259; *United States v. E. C. Knight Co.*, 156 U. S. 1, 39 L. Ed. 325; *United States v. Eastman Kodak Co.*, 226 Fed. 62, 66; *United States v. Motion Picture Patents Co.*, 225 Fed. 800, 806; *United States v. Keystone Watch Case Co.*, 218 Fed. 502, 507.

In *United States v. Patten*, 226 U. S. 525, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325, the Supreme Court, reversing the holding of the Circuit Court (187 Fed. 664) that a conspiracy to corner the cotton market is not indictable under section 1 of the Sherman Act for the reason, inter alia, "that the obstruction of interstate trade and commerce resulting from the operation of the conspiracy, even although a necessary result, would be so indirect as not to be a restraint in the sense of the statute," said: "It was a conspiracy to run a corner in the market. The commodity to be cornered was cotton,—a product of the Southern states, largely used and consumed in the Northern states. It was a subject of interstate trade and commerce, and through that channel it was obtained from time to time by

variety of ways, affect interstate commerce, and yet be entirely valid, because the interference produced by the contract is not direct. The

the many manufacturers of cotton fabrics in the Northern states. The corner was to be conducted on the Cotton Exchange in New York city, but by means which would enable the conspirators to obtain control of the available supply and to enhance the price to all buyers in every market of the country. This control and the enhancement of the price were features of the conspiracy upon the attainment of which it is conceded its success depended. Upon the corner becoming effective, there could be no trading in the commodity save at the will of the conspirators and at such price as their interests might prompt them to exact. And so, the conspiracy was to reach and to bring within its dominating influence the entire cotton trade of the country. Bearing in mind that such was the nature, object, and scope of the conspiracy, we regard it as altogether plain that, by its necessary operation, it would directly and materially impede, and burden the due course of trade and commerce among the states, and therefore inflict upon the public the injuries which the Anti-Trust Act is designed to prevent. * * * And that there is no allegation of a specific intent to restrain such trade or commerce does not make against this conclusion, for, as is shown by prior decisions of this court, the conspirators must be held to have intended the necessary and direct consequences of their acts, and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result. * * * The defendants place some reliance upon

Ware v. Mobile County, 209 U. S. 405, 52 L. Ed. 855, 14 Ann. Cas. 1031, as showing that the operation of the conspiracy did not involve interstate trade or commerce; but we think the case does not go so far and is not in point. It presented only the question of the effect upon interstate trade or commerce of the taxing by a state of the business of a broker who was dealing in contracts for the future delivery of cotton, where there was no obligation to ship from one state to another; while here we are concerned with a conspiracy which was to reach and bring within its dominating influence the entire cotton trade of the country, and which was to be executed, in part only, through contracts for future delivery. It hardly needs statement that the character and effect of a conspiracy are not to be judged by dismembering it and viewing its separate parts, but only by looking at it as a whole."

An association composed of retail lumber dealers, which periodically and systematically circulates among its members a confidential report of the names, which such members are called upon to furnish, of wholesalers who sell directly to or solicit from consumers, which report, although no agreement had been entered into and no penalty was provided, had, as it was intended to have, the effect of causing the members to withhold their patronage from the wholesalers listed, offends against the Sherman Act in so doing, the wholesalers involved being engaged in interstate trade, and subjects itself to an injunction at the suit of the government. *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U. S. 600, 58 L. Ed. 1490, L. R. A. 1915 A 788, aff'g 201 Fed. 581, and distinguishing *Anderson*

fact that trade and commerce might be indirectly affected is not sufficient. The effect must be direct and proximate.”⁸¹ Involuntary

v. United States, 171 U. S. 604, 43 L. Ed. 300.

A contract which is the mere accompaniment of the sale of property, which is entered into for the purpose of enhancing the price at which the vendor sells, and which is collateral to the sale, the latter being the main purpose of the contract, does not come within the inhibition of section 3 of the Sherman Act relative to trusts in territories, etc., even though it restrains trade to some extent. Gallup Elec. Light Co. v. Pacific Improvement Co., 16 N. M. 86, 113 Pac. 848 (sale by the sole owner thereof of all of the capital stock of an electric light and power company).

⁸¹ Camors-McConnell Co. v. McConnell, 140 Fed. 412, 414, aff'd 140 Fed. 987.

In *H. B. Marienelli v. United Booking Offices of America*, 227 Fed. 165, the court said: “No doubt the proposition still stands that [to come within the condemnation of the Sherman Act] the restraint of interstate commerce must be direct (*United States v. Patten*, 226 U. S. 543, 33 Sup. Ct. 141, 57 L. Ed. 333, 44 L. R. A. [N. S.] 325), just as it did when *E. C. Knight v. United States* [*United States v. E. C. Knight Co.*], 156 U. S. 1, 15 Sup. Ct. 249, 39 L. Ed. 325, was decided; but nobody can intelligently read the decisions without becoming aware that the actual meaning of the words has greatly changed. All the cases, of course, presuppose that the contract has an effect upon the transit of some goods or persons across state lines, but just what that effect must be is the point of divergence. From some expressions of the earlier cases it might be supposed that the agreement must in its terms concern the transit, or in other words that the conscious

purpose of the parties must be to change movement, which would otherwise occur; but that rule is not now the law. Since perhaps *Addyston Pipe Co. v. United States*, 175 U. S. 211, 20 Sup. Ct. 96, 44 L. Ed. 136, and certainly since *United States v. Patten*, supra, a case which had an unusual degree of consideration by the Supreme Court, it must be understood that the combination must be judged by the usual rule of legal responsibility; that is to say, whether the effect upon the movement of goods or persons is within those consequences which would reasonably be supposed to result from the parties' acts. The words ‘direct’ and ‘indirect’ permit of some latitude, as the cases show. In nature all results are equally inevitable, and the category has no useful application; it would be arbitrary and meaningless. Only when we speak of conscious persons, necessarily ignorant of all the causes which actually operate, can the distinction become useful; and it is, of course, only in relation to persons that it is used juristically. As I have said, the rule no longer is that only those results are direct which fall within the immediate purpose, or high light of intention, a rule which would eliminate consequences, certain enough to follow, but neither desired nor intended. When once that test is abandoned, there remains only the common test of legal responsibility, which I have mentioned, or else the test of more or less. It may be that some effects of a combination, certain enough to follow, bear so small a proportion to the sum total that the Sherman Act will not reach the combination as a whole. Although the statute may seem intended to exercise the federal power to its fullest capacity, and although

restraints of the character described as well as voluntary ones are prohibited.⁸² But no restraint can exist without control,⁸³ and "regulation of trade is not restraint of trade" so as to make an indictment charging "regulation" and nothing more sufficient as charging a criminal restraint.⁸⁴

While it may be true, as has been said by one of the lower federal courts, that unlawful restraint of trade is not always the same thing as the mere restraint of competition,⁸⁵ "it is now well settled," in the language of another of such courts, "that the words 'restraint of trade' in [the Sherman] * * * Act are to be construed as including 'restraint of competition.' Full, free, and untrammelled competi-

Congress no doubt might make illegal any combination which to the parties' knowledge affected interstate commerce in any degree whatever, the decisions of the Supreme Court certainly prove that it has not been so interpreted, and that results insignificant in proportion to the total effect will be disregarded. This, in any case, is the present meaning of the test of 'direct' and 'indirect' as I understand it in the development of the decisions."

⁸² "Section 1 of the [Sherman] Act * * * is not confined to voluntary restraints, as where persons engaged in interstate trade or commerce agree to suppress competition among themselves, but includes as well involuntary restraints; as where persons not so engaged conspire to compel action by others, or to create artificial conditions, which necessarily impede or burden the due course of such trade or commerce, or restrict the common liberty to engage therein." *United States v. Patten*, 226 U. S. 525, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325, citing *Loewe v. Lawlor*, 208 U. S. 274, 52 L. Ed. 488, 13 Ann. Cas. 815 (*Danbury Hatters' Case*), and rev'g the holding of the Circuit Court (*United States v. Patten*, 187 Fed. 664) that a conspiracy to corner the cotton market is not indictable

under section 1 of the Sherman Act. See also *Eastern States Retail Lumber Dealers' Ass'n v. United States*, 234 U. S. 600, 58 L. Ed. 1490, aff'g decree 201 Fed. 581.

⁸³ *United States v. Lehigh Valley Coal Co.*, 225 Fed. 399, 406.

⁸⁴ *United States v. John Beardon & Sons Co.*, 191 Fed. 454.

⁸⁵ *United States v. Eastman Kodak Co.*, 226 Fed. 62, 66.

"Not every contract which destroys a competition, theretofore existing, is within the [Sherman] Act; but those are which put a market into one hand. *Standard Oil Co. v. United States*, 221 U. S. 1, 31 Sup. Ct. 502, 55 L. Ed. 619, 34 L. R. A. (N. S.) 843, Ann. Cas. 1912 D 734. It is the effort to secure control over prices by a control over supply which counts. No doubt 'market' is a vague word; a combination may control within such narrow limits that new supplies are available at trivial advances; perhaps such combinations do not 'prejudice the public interests.' *Nash v. United States*, 229 U. S. 373, 376, 33 Sup. Ct. 780, 57 L. Ed. 1232. If the combination does not control enough of the supply to fix prices at all, it cannot be an unreasonable restraint of trade prejudicial to the public." *H. B. Marienelli v. United Booking Offices of America*, 227 Fed. 165, 170.

tion in all branches of interstate commerce is the desideratum to be secured.”⁸⁶

§ 3392. Conspiracy. Without regard to whether conspiracies in restraint of trade were, as there is authority for declaring,⁸⁷ criminal at common law,⁸⁸ it is sufficient⁸⁹ that the Sherman Act, by sections 1, 2 and 3 thereof, and the state statutes generally, make criminal such conspiracies in restraint of trade and to create monopolies as come within their operation.

The term “conspiracy” has been said to be one of art,⁹⁰ and has

⁸⁶ *United States v. Eastern States Retail Lumber Dealers’ Ass’n*, 201 Fed. 581, 584, decree aff’d 234 U. S. 600, 58 L. Ed. 1490, L. R. A. 1915 A 788.

“An agreement or combination for the elimination of competition, from an economic point of view, may not operate in restraint of trade. It may actually develop and increase trade. Such an agreement, however, from a legal viewpoint, is necessarily in restraint of trade. The law regards competition as the life of trade, and so that which restricts competition restrains trade.” *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed. 254, 256.

⁸⁷ “That an attempted monopoly, an agreement to restrain the freedom of trade, was a criminal conspiracy at common law, is undoubtedly true. * * *. When the ingredients constituting the criminal conspiracy at common law and the ingredients constituting the ‘conspiracy to defraud’ under anti-trust acts are examined, it is apparent that the offenses are not identical. The latter is doing business while a member of an illegal combination, while the former is a conspiracy to do an unlawful act, or a conspiracy to do a lawful act in an unlawful manner.” *Hammond Packing Co. v. State*, 81 Ark. 519, 126 Am. St. Rep. 1047, 100 S. W. 407, 1199, distinguishing between “the remedies against the common-law conspiracy

[which] were indictment for the criminal conspiracy and an action on the case for damages by an aggrieved party, or quo warranto by the state against an offending corporation” (citing *Eddy on Combinations*, §§ 338, 371), and “this action [under the Arkansas statute which] * * * is purely a statutory action to recover the penalties of the statute for doing business in the state contrary to its terms. These penalties are twofold—one a money judgment for each day the offense continues, and the other (as to corporations) a forfeiture of charter if a domestic corporation, and forfeiture of right in the state if a foreign corporation.”

⁸⁸ Since the creation of a monopoly by private persons was, at least originally, unknown to the common law (see section 3380, *supra*), it would seem to follow as of necessity that the early common law did not take cognizance, as does the statute law of today, of any such offense as a conspiracy among private persons to create a monopoly.

⁸⁹ See *United States v. Patterson*, 201 Fed. 697, 717.

⁹⁰ *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823, 831.

In *United States v. Debs*, 64 Fed. 724, 747, the court said: “What constitutes an unlawful restraint is not defined [by the Sherman Act]; and, under the familiar rule that such federal enactments will be interpreted by

been defined as "a combination of two or more persons to accomplish an unlawful end by lawful means or a lawful end by unlawful

the light of the common law, I have no doubt but that this statute, in so far as it is directed against contracts or combinations in the form of trusts, or in any form of a 'contractual character,' should be limited to contracts and combinations such, in their general characteristics, as the courts have declared unlawful. But to put any such limitation upon the word 'conspiracy' is neither necessary, nor, as I think, permissible. To do so would deprive the word of all significance. It is a word whose meaning is quite as well established in the law as the meaning of the phrase 'in restraint of trade,' when used—as commonly, if not universally, that phrase has been used—in reference to contracts. A conspiracy, to be sure, consists in an agreement to do something; but in the sense of the law, and therefore in the sense of this statute, it must be an agreement between two or more to do, by concerted action, something criminal or unlawful, or, it may be, to do something lawful by criminal or unlawful means. A conspiracy, therefore, is in itself unlawful, and, in so far as this statute is directed against conspiracies in restraint of trade among the several states, it is not necessary to look for the illegality of the offense in the kind of restraint proposed; and, since it would be unnecessary, it would be illogical, to conclude that only conspiracies which are founded upon, or are intended to be accomplished by means of, contracts or combinations in restraint of trade, are within the purview of the act. It would be to make tautologous words which have distinctly different meanings, and to deprive the statute, in a large measure, of its just and needful scope. Any proposed restraint of trade, though it be in itself inno-

cent, if it is to be accomplished by conspiracy, is unlawful. A distinction has been suggested between the phrase 'in restraint of trade' and the phrases 'to injure trade' and 'to restrain trade.' Though perceptible, the distinction does not seem to one so significant that the use of one expression rather than the other should vary the interpretation of this statute. Any contract, combination, or conspiracy, to be 'in restraint of trade,' must involve the use of means of which the effect is 'to injure' or 'to restrain' trade. A contract, combination, or conspiracy in restraint of trade is therefore a contract, combination, or conspiracy to restrain or injure trade. It would not, I suppose, be enough, in an indictment, to charge conspiracy in restraint of trade in the language of the statute, but it would be necessary, unless the proposed restraint be shown to be in itself unlawful, to allege the illegal means intended to be used in order to effect the restraint; and whether the means should be averred to have been used 'in restraint of' or 'to restrain' trade could hardly be important. There are many cases, doubtless, in which the rule that every word of a statute should be given effect is inapplicable, because when synonymous words are used, the court is powerless to give them different meanings; but when words of different significance are employed, the rule forbids that the scope of the statute be compressed within the limits of the narrower word," and it is not "legitimate here to reject the word 'conspiracy,' or, what is practically the same thing, strip it of its well-settled criminal significance, by confining it within forms of contract, or of combinations in the form of trusts."

See section 6 of the Clayton Act

means.”⁹¹ While an unlawful agreement initiates the conspiracy⁹² and satisfies the definition of the crime, “it does not,” said Mr. Justice Holmes in determining a question of limitations, “exhaust it. * * * A conspiracy in restraint of trade is different from and more than a contract in restraint of trade. A conspiracy is constituted by an agreement, it is true, but it is the result of the agreement, rather than the agreement itself, just as a partnership, although constituted by a contract, is not the contract, but is a result of it. The contract is instantaneous, the partnership may endure as one and the same partnership for years. A conspiracy is a partnership in criminal purposes. That as such it may have continuation in time is shown by the rule that an overt act of one partner may be the act of all without any new agreement specifically directed to that act.”⁹³ In other words, a conspiracy can have continuance in point of time⁹⁴ and actually does have continuance as long as there continues the partnership in the criminal purpose.⁹⁵ On the theory that a reasonable conspiracy or a conspiracy to do a reasonable thing is impossible—a contradiction in terms, it has been said that every conspiracy in restraint of interstate trade or commerce is unreasonably in restraint thereof within the meaning of the Sherman Act.⁹⁶

in connection with the proposition, for which *United States v. Debs*, supra, is authority, that an injunction may issue to restrain officers of labor unions from obstructing interstate commerce by physical interference with the movement of trains.

⁹¹ *United States v. Addyston Pipe & Steel Co.*, 85 Fed. 271, 293, 46 L. R. A. 122.

The Texas statute (Vernon's Sayles' Tex. Civ. St. 1914, vol. 4, art. 7798) declares that “either or any of the following acts shall constitute a conspiracy in restraint of trade: 1. Where any two or more persons, firms, corporations or associations of persons, who are engaged in buying or selling any article of merchandise, produce or any commodity, enter into an agreement or understanding to refuse to buy from or to sell to any other person, firm, corporation or association of persons, any article of merchandise, produce or commodity. 2. Where any two or more persons, firms, corpora-

tions or association of persons shall agree to boycott or threaten to refuse to buy from or sell to any person, firm, corporation or association of persons for buying from or selling to any other person, firm, corporation or association of persons.”

⁹² *Patterson v. United States*, 222 Fed. 599, 630.

⁹³ *United States v. Kissel*, 218 U. S. 601, 54 L. Ed. 1168 (rev'g 173 Fed. 823), quoted in part in *Patterson v. United States*, 222 Fed. 599, in connection with the question of limitations therein involved.

⁹⁴ *United States v. Kissel*, 218 U. S. 601, 54 L. Ed. 1168, rev'g 173 Fed. 823; *Patterson v. United States*, 222 Fed. 599, 630.

See further, on this point, § 3397, *infra*.

⁹⁵ *Patterson v. United States*, 222 Fed. 599, 631.

⁹⁶ *Patterson v. United States*, 222 Fed. 599, 618.

The argument that a conspiracy to

That some of the means employed or to be employed in carrying out the conspiracy in violation of section 1 of the Sherman Act, for which conspiracy the defendants were indicted are sanctioned by the Clayton Act "does not help the defendants, as a combination to effect an unlawful object through lawful means may constitute a conspiracy, nevertheless."⁹⁷

corner the market in a staple commodity such as cotton is not a criminal conspiracy in restraint of trade or commerce etc., under § 1 of the Sherman Act because of the fact that the running of a corner "instead of restraining competition, tends, temporarily at least, to stimulate it" cannot be sustained. "It well may be that running a corner tends for a time to stimulate competition; but this does not prevent it from being a forbidden restraint, for it also operates to thwart the usual operation of the laws of supply and demand, to withdraw the commodity from the normal current of trade, to enhance the price artificially, to hamper users and consumers in satisfying their needs, and to produce practically the same evils as does the suppression of competition." *United States v. Patten*, 226 U. S. 525, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325, rev'g 187 Fed. 664.

⁹⁷ *United States v. Rintelen*, 233 Fed. 793, 798.

Defendants, in *Nash v. United States*, 229 U. S. 373, 57 L. Ed. 1232, were indicted, in one count, for a conspiracy in restraint of trade and, in a second count, for a conspiracy to monopolize trade, the allegations of fact in the two counts being the same. The intended restraint charged in the first count, and the intended monopoly charged in the second, it was alleged, were to be of commerce in naval stores and were "to be effected in the following ways, among others: (1) by bidding down turpentine and rosin so that competitors could sell them only at ruinous prices; (2) by causing naval stores receipts that naturally would go

to one port, to go to another; (3) by purchasing thereafter a large part of 'its' supplies at ports known as closed ports, and, with intent to depress the market, refraining from purchasing any appreciable part at Savannah, the primary market in the United States for naval stores, where purchasers would tend to strengthen prices, the defendants taking the receipts at the closed ports named on a basis of the market at Savannah; (4) by coercing factors and brokers into contracts with the defendants for the storage and purchase of their receipts, and refusing to purchase from such factors and brokers unless such contracts were entered into; (5) [withdrawn from the jury] by circulating false statements as to naval stores production and stocks on hand; (6) [withdrawn from the jury] by issuing fraudulent warehouse receipts; (7) by fraudulently grading, regrading, and raising grades of rosins, and falsely gauging spirits of turpentine; (8) [withdrawn from the jury] by attempting to bribe employees of competitors so as to obtain information concerning their business and stocks; (9) by inducing consumers, by payments and threats of boycotts, to postpone dates of delivery of contract supplies, and thus enabling defendants to postpone purchasing when to purchase would tend to strengthen the market; (10) by making tentative offers of large amounts of naval stores to depress the market, accepting contracts only for small amounts, and purchasing when the market had been depressed by the offers; (11) by selling far below cost in order to compel competitors to meet prices ruinous to

Section 1 of the Sherman Act "includes conspiracies between competitors, or between the officers and agents of a competitor on its behalf against a competitor. But it is not limited to such conspiracies. It includes also conspiracies between any persons, whoever they may be, against any other person."⁹⁸

The question of the extent of the interstate trade or commerce conspired against is immaterial, there being no act of interstate trade or commerce so insignificant as not to be protected by the statute, and "a conspiracy between the officers and agents of one competitor on

everybody; (12) by fixing the price of turpentine below the cost of production,—all the foregoing being for the purpose of driving competitors out of business" and (first count) restraining foreign trade, or (second count) monopolizing the trade. In reversing, for error in the charge to the jury (*United States v. American Naval Stores Co.*, 172 Fed. 455), the judgment of the Circuit Court of Appeals (*Nash v. United States*, 186 Fed. 489) which had affirmed the trial court's judgment on a verdict of guilty, the Supreme Court, by Mr. Justice Holmes, said: "As to the suggestion that the matters alleged to have been contemplated would not have constituted an offense if they had been done, it is enough to say that some of them conceivably might have been adequate to accomplish the result, and that the intent alleged would convert what on their face might be no more than ordinary acts of competition or the small dishonesties of trade into a conspiracy of wider scope, as has been explained more than once. *Swift & Co. v. United States*, 196 U. S. 375, 396, 49 L. Ed. 518, 524, 25 Sup. Ct. Rep. 276; *Loewe v. Lawler*, 208 U. S. 274, 299, 52 L. Ed. 488, 500, 28 Sup. Ct. Rep. 301, 13 Ann. Cas. 815. * * * But we cannot say, as was the case in *United States v. Winslow*, 227 U. S. 202, 218, [57 L. Ed.] * * * 481, 485, 33 Sup. Ct. Rep. 253, that no intent could convert the pro-

posed conduct into such a crime." In that part of his opinion in which he dealt with the fatal error in the charge, Justice Holmes further said: "One of the means alleged was the false raising of grades and false gauging. Taken with other evidence, if it was shown to be systematic, it would have had a tendency to show the scheme alleged. But taken by itself, * * * it showed only cheating, and could not warrant a finding of the conspiracy with which the defendants were charged. It is unnecessary to consider whether there was any evidence sufficient to warrant a conviction upon some of the other means alleged, for instance, the first, as the absence of such evidence only would add another reason for holding the instructions wrong upon a vital point."

⁹⁸*Patterson v. United States*, 222 Fed. 599, 618.

"The statute declares, in effect, that if the purpose of the concerted action is to restrain trade between the states, such purpose is unlawful, and the concert of action is a conspiracy. It is wide enough to cover, not only a destruction of the trade of competitors by wrongful means, as in *United States v. Patterson* (C. C.), 55 Fed. 605, but any restraint of interstate trade if the same be accomplished by a predetermined and concerted action of two or more individuals." *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823, 831.

its behalf in restraint of a single interstate sale or shipment of another competitor is covered by it.”⁹⁹

A formal agreement is not necessary to a conspiracy but it is sufficient that the conspirators acted in concert, understandingly and with the design to consummate the unlawful purpose.¹ It is not sufficient, however, to connect an officer or agent of a corporation with a conspiracy in its behalf that he knew of or acquiesced in it, but he must by word or deed have become a party to it.² Moreover, a conspiracy between two corporations cannot be formed by the thoughts and acts of a single person acting as the agent of each company.³ It is not necessary to a conspiracy that each party thereto know of all the means employed to carry out the joint purpose.⁴ Indeed, so far from such knowledge being essential, an overt act is not even necessary to the conspiracy denounced by the Sherman Act.⁵ “The Sherman Act,” says the Supreme Court of the United States, “punishes the conspiracies at which it is aimed on the common-law footing,—that is to say, it does not make the doing of any act other than the act of conspiring a condition of liability.”⁶

⁹⁹ *Patterson v. United States*, 222 Fed. 599, 619, citing *Steers v. United States*, 192 Fed. 1.

¹ *Lawlor v. Loewe*, 209 Fed. 721, 725, judgment affirmed 235 U. S. 522, 59 L. Ed. 341.

² *Patterson v. United States*, 222 Fed. 599, 631.

³ *United States v. Santa Rita Store Co.*, 16 N. M. 3, 113 Pac. 620, quoting *Union Pac. Coal Co. v. United States*, 173 Fed. 737, 745, to the effect that “the union of two or more persons, the conscious participation in the scheme of two or more minds, is indispensable to an unlawful combination and it cannot be created by the action of one man alone.”

⁴ *Lawlor v. Loewe*, 209 Fed. 721, 725, judgment aff’d 235 U. S. 522, 59 L. Ed. 341.

Where by reason of its underlying purpose being to restrain trade, an association became illegal upon the going into effect of the Sherman Act, persons who were members thereof at such time or who became members subsequently thereto, and, although

knowing of its purpose, did not withdraw from it nor repudiate its illegal procedure, are guilty of conspiracy under section 1 of such statute. *Knauer v. United States*, 237 Fed. 8, 14.

⁵ *United States v. Bopp*, 237 Fed. 283, 285; *Knauer v. United States*, 237 Fed. 8, 12.

⁶ *Nash v. United States*, 229 U. S. 373, 57 L. Ed. 1232, 1236, rev’g on another ground 186 Fed. 489.

Notwithstanding the provision of the South Dakota statutes (Penal Code, § 231) that “no agreement except to commit a felony upon the person of another, or to commit arson or burglary amounts to a conspiracy, unless some act beside such agreement be done to effect the object thereof, by one or more of the parties to such agreement,” an overt act is not essential to the illegality of a combination or agreement prohibited by the South Dakota Anti-Trust Act (Laws 1909, c. 224), which was modeled after the Sherman Act and was enacted independently of, and without reference

The success of a conspiracy formed in violation of section 1 of the Sherman Act is not necessary in order for the conspirators to be liable to prosecution,⁷ nor is it necessary that they derive any benefit from the execution of the conspiracy.⁸

§ 3393. Motive, intent and result. Neither good motives⁹ nor good results justify a combination illegal under the Sherman Act;¹⁰

to, existing laws on the subject of conspiracies, and therefore an indictment for entering into a combination or agreement, violative of such act, which fails to allege an overt act, will not on that account be defective. *State v. Fullerton Lumber Co.*, 35 S. D. 410, 152 N. W. 708, following the construction placed upon the Sherman Act in *Nash v. United States*, supra.

⁷ *Knauer v. United States*, 237 Fed. 8, 12.

⁸ *Patterson v. United States*, 222 Fed. 599, 619. The court's further statement that "it is sufficient that it [the conspiracy] will be in restraint of another's interstate trade or commerce" might be construed as carrying the implication that actual restraint is necessary, but, in view of the fact that an overt act is not required (see supra, this section), it must be that the possibility of such a construction is due to mere inadvertence on the court's part.

⁹ *Thomsen v. Cayser*, 243 U. S. 66, 61 L. Ed. 597, Ann. Cas. 1917 D 322; *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 57 L. Ed. 107.

¹⁰ Good motives such as a desire to end litigation which interfered with the development of the moving-picture business, to maintain in the case of such business a high moral standard for the product offered to the public, to promote the progress of the business by advancing the artistic and mechanical perfection of its product and to supply regulation which the state omitted to furnish will not justify a combination illegal under the

Sherman Act. *United States v. Motion Picture Patents Co.*, 225 Fed. 800, 811, declaring that "if, in the judgment of the law, a contract or co-operating agreement is such as to work an undue and unreasonable restraint of trade, and through such restraint to monopolize trade or any part of it, the judgment is one of condemnation, no matter how innocent or otherwise praiseworthy the motives of those who had part in it."

An association, the members of which control 75 per cent. of the interstate trade in a given commodity, is guilty of a criminal restraint of such trade within the meaning of the Sherman Act when it threatens to blacklist dealers in the commodity, who are outside of the association if they transact business with any person listed by the association as "undesirable," and this is true regardless of its purpose or motive in so doing. *United States v. King*, 229 Fed. 275.

Malice is not essential to a violation of the Minnesota Anti-Trust Act (Rev. Laws 1905, §§ 5168, 5169). *State v. Minneapolis Milk Co.*, 124 Minn. 34, 51 L. R. A. (N. S.) 244, 144 N. W. 417.

¹⁰ *Thomsen v. Cayser*, 243 U. S. 66, 61 L. Ed. 597, Ann. Cas. 1917 D 322.

"When a monopoly has been found * * * to be the result of an unlawful restraint of trade, the argument that the combination through which it has been accomplished is a good trust, or was formed from good motives, or that good results from the monopoly, is for legislative, and not

"the law is its own measure of right and wrong, of what it permits or forbids, and the judgment of the courts cannot be set up against it in a supposed accommodation of its policy with the good intention of parties, and, it may be, of some good results."¹¹ Whether the agreement actually has an effect prohibited by the statute is the vital question,¹² and intent, even if alleged, need not be proved.¹³ More-

judicial consideration. * * * It is the legal intendment of the whole scheme, which determines its character, what is its end, and what the means to be employed, to be found from the natural and to be expected results. * * * If the end is monopoly, and the means the restraint of trade, the inquiry is directed to the character of the restraint. If that is undue and unreasonable, and was directly intended, and the monopolistic result flows as a direct, and not a merely incidental consequence, the combination through which it is brought about is illegal. The same conclusion follows a finding that the end is illegal, because reached through the same means. Indeed, the two things come to be, nearly, if not quite, the same, although there is room for a difference." *United States v. Motion Picture Patents Co.*, 225 Fed. 800, 809.

"It is no justification of an illegal monopoly to assert that it has reduced the price of an article produced by it, as this may have been done simply to injure a rival." *United States v. Eastman Kodak Co.*, 226 Fed. 62, 79.

¹¹ *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 57 L. Ed. 107, quoted in *Thomsen v. Cayser*, 243 U. S. 66, 85, 61 L. Ed. 597, Ann. Cas. 1917 D 322. See also *United States v. Motion Picture Patents Co.*, 225 Fed. 800, 808.

¹² *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007.

The same is true under the Minnesota Anti-Trust Act (Rev. Laws 1905, §§ 5168, 5169). *State v. Minneapolis*

Milk Co., 124 Minn. 34, 51 L. R. A. (N. S.) 244, 144 N. W. 417.

"It is now settled by repeated decisions of the Supreme Court that the test of the validity of a contract, combination, or conspiracy challenged under the Anti-Trust Law is the direct effect of such a contract or combination upon competition in commerce among the states. If its necessary effect is to stifle competition, or to directly and substantially restrict it, it is void. But if it promotes, or only incidentally or indirectly restricts, competition in commerce among the states, while its main purpose and chief effect are to foster the trade and enhance the business of those who make it, it does not constitute a restraint of interstate commerce within the meaning of that law, and is not obnoxious to its provisions." *Phillips v. Iola Portland Cement Co.*, 125 Fed. 593, 594.

"At last the test, and only test, is, not what the intent of the parties may be, not what form the combination has taken, but what will its probable effect be? If unlawful or oppressive, if obnoxious to public policy, if inimical to public welfare, they will be denounced, and punishment meted out to every participant; otherwise courts will not limit or restrict the inalienable right of contract, and will not interfere unless the violation of law be apparent, or the apprehended evil effect assume some tangible form." *Yazoo & M. V. R. Co. v. Searles*, 85 Miss. 520, 68 L. R. A. 715, 37 So. 939 (under Mississippi statute).

¹³ *United States v. Trans-Missouri*

over, an agreement otherwise invalid under the Sherman Act is not saved from invalidity by a general improvement in, and development of, the business which forms its subject-matter as a result thereof.¹⁴

Freight Ass'n, 166 U. S. 290, 41 L. Ed. 1007.

Intent is immaterial on the question of the violation of the Minnesota Anti-Trust Act (Rev. Laws 1905, §§ 5168, 5169). *State v. Minneapolis Milk Co.*, 124 Minn. 34, 51 L. R. A. (N. S.) 244, 144 N. W. 417.

"In the case at bar we are to take the acts of the parties and judge their purpose by the consequence that would naturally result. When men deliberately and intelligently go to work and acquire power that will enable them to control the market, if they choose to exercise it, there is no use for them to say that they did not intend to control the trade or limit competition; nor, when the legality of their act of acquisition is in question, is it any use for them to say, 'We have not used the power to oppress any one.'"*State v. International Harvester Co. of America*, 237 Mo. 369, 141 S. W. 672 (involving Missouri statutes), quoted in *United States v. Eastman Kodak Co.*, 226 Fed. 62, 78; *United States v. International Harvester Co.*, 214 Fed. 987, 999.

There are cases wherein the court in stating, even if not in forming, its opinion has confused intent and effect, and, while declaring the former necessary, has actually made the latter controlling. See *Yazoo & M. V. R. Co. v. Searles*, 85 Miss. 520, 68 L. R. A. 715, 37 So. 939; *MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 428, 75 Pac. 89.

Intent is an essential element of the crime of unfair discrimination defined by the Montana statute (Laws 1913, c. 8, § 1), which declares guilty of such crime any person, firm or corporation engaged in buying, selling, producing, manufacturing or distribut-

ing any commodity in general use, who intentionally, for the purpose of destroying or preventing competition, discriminates between different persons or communities, or parts of the state, by purchasing such commodity at a higher price in one part of the state than he or it pays for such commodity in another part thereof "after equalizing the distance from the point of production, manufacture, or distribution and freight rates therefrom." *State v. Rocky Mountain Elevator Co.*, 52 Mont. 487, 158 Pac. 818.

¹⁴ *United States v. Associated Bill Posters*, 235 Fed. 540, 541.

Disposing of the contention of the plaintiff in error, a foreign corporation which had sustained an adverse judgment in proceedings on an information in the nature of quo warranto filed against it in the Supreme Court of Missouri (237 Mo. 369, 141 S. W. 672) by reason of its alleged violation of the Missouri anti-trust statutes (Rev. St. 1909, § 10301, and Rev. St. 1899, § 8966), that such statutes, construed as confined in their scope and operation to persons and corporations dealing in commodities and as not including combinations of persons engaged in labor pursuits (*State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902), unreasonably and arbitrarily limit the right of contract, the Supreme Court of the United States in *International Harvester Co. of America v. State of Missouri*, 234 U. S. 199, 58 L. Ed. 1276, 52 L. R. A. (N. S.) 525, said: "The specification under this head is that the Supreme Court found, it is contended, benefit—not injury—to the public had resulted from the alleged combination. Granting that this is not an overstatement of the

When a majority of the widely-separated plants acquired by a corporation, sought to be dissolved as being violative of the Sherman Act, were dismantled and the several businesses were concentrated at the place where the defendant was located and it thus appears that such plants were not actually required by the defendant in carrying on its business, but were acquired with the idea of monopolizing the trade, the details of the transactions by which they were acquired, such as, for example, that the defendant paid for them full value and more, giving money, together with stock in a larger and more progressive enterprise, are immaterial.¹⁵

But the intent and purpose with which corporations and natural persons that are claimed to have acquired a monopoly of a certain business in violation of the Sherman Act participated in various transactions, which, standing alone, might be innocent enough but which, correlated, assume a different aspect, are proper subjects of inquiry.¹⁶ Where, however, the attempt of the organizers of a combination to violate the Sherman Act was unsuccessful, the fact that they intended

opinion, the answer is immediate. It is too late in the day to assert against statutes which forbid combinations of competing companies that a particular combination was induced by good intentions and has had some good effect. *Armour Packing Co. v. United States*, 209 U. S. 56, 62, 52 L. Ed. 681, 684, 28 Sup. Ct. Rep. 428; *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 49, 57 L. Ed. 107, 117, 33 Sup. Ct. Rep. 9. The purpose of such statutes is to secure competition and preclude combinations which tend to defeat it. And such is explicitly the purpose and policy of the Missouri statutes; and they have been sustained by the Supreme Court. There is nothing in the Constitution of the United States which precludes a state from adopting and enforcing such policy. To so decide would be stepping backwards. *Carroll v. Greenwich Ins. Co.*, 199 U. S. 401, 50 L. Ed. 246, 26 Sup. Ct. Rep. 66; *Central Lumber Co. v. South Dakota*, 226 U. S. 157, 57 L. Ed. 164, 33 Sup. Ct. Rep. 66. It is true that the Supreme Court

did not find a definite abuse of its powers by plaintiff in error, but it did find that there was an offending against the statute, a union of able competitors, and a cessation of their competition, and the court said: 'Some of the smaller concerns that were competitors in the market have ceased their struggle for existence and have retired from the field.' This is one of the results which the statute was intended to prevent,—the unequal struggle of individual effort against the power of combination. The preventing of the engrossment of trade is as definitely the object of the law as is price regulation of commodities, its prohibition being against combinations 'made with a view to lessen, or which tend to lessen, lawful trade or full and free competition in the importation, transportation, manufacture, or sale of any commodity, or article, or thing bought or sold.' "

¹⁵ *United States v. Eastman Kodak Co.*, 226 Fed. 62, 76.

¹⁶ *United States v. Eastman Kodak Co.*, 226 Fed. 62, 77.

to violate such statute is not sufficient as a basis for a decree of dissolution.¹⁷

§ 3394. Means of accomplishing violation of anti-trust statutes. It has been upon the theory that competition in-trade is to the interest of the public and that monopoly and restraint of trade are opposed thereto that anti-trust statutes have been passed. Whether this theory is sound economically and to what extent it will, in the future, be renounced by legislative bodies are questions outside of the case. It is to be noted, however, that there is a tendency, even at the present time, not to demand unrestricted competition among corporations of one class, at least, namely, those which are classed as public utilities and which are, very generally, to some extent or other under governmental regulation and control.¹⁸

¹⁷United States v. United States Steel Corporation, 223 Fed. 55, 178 (per Woolley, Circuit Judge).

¹⁸The general prohibition of the New York law against one corporation's combining with another corporation or person for the creation of a monopoly, the unlawful restraint of trade or the prevention of competition in any necessary of life would seem not to apply to corporations which are subject to the supervision of public service commissions. See *Continental Securities Co. v. Interborough Rapid Transit Co.*, 221 Fed. 44.

The Consolidated Gas Company of New York which was created, through the consolidation of six domestic gas-light companies, engaged, at the time, in manufacturing and selling gas in the city of New York, for the purpose of carrying on such business, and which, subsequently to its organization, purchased either the whole or a majority of the capital stock of a number of electric lighting and gas-lighting companies and thus came into control of such companies did not, either by its organization or by its stock purchases, create an unlawful monopoly within the meaning of section 7 of the New York Stock Corporation Law (Laws 1890, c. 564, § 7,

as amended by Laws 1892, c. 688, § 7, and Laws 1897, c. 384, § 1) or within the meaning of the New York Anti-Monopoly Act of 1899 (Laws 1899, c. 690), so as to justify an action by the attorney general to procure judgment, vacating its charter and annulling its corporate existence, for "what is prohibited is the creation of a monopoly, and establishing such a competition [condition?] as will result in limiting the supply and enhancing the cost of the commodity dealt in," and this the company could not do in view of the fact that both production and price are matters under the control of the legislature. *Attorney General v. Consolidated Gas Co.*, 124 N. Y. App. Div. 401, 108 N. Y. Supp. 823 (aff'g 56 N. Y. Misc. 49, 106 N. Y. Supp. 407). That the several companies involved herein occupied different "fields of operation" in the city of New York would seem to appear from the court's statements that "that a single company thus regulated by law as to price and production does not offend against the anti-monopoly laws, even although its field of operation extends over a whole city, seems to be quite clear. Competition between two or more companies, each occupying exclusively a separate field of operation

In the *Standard Oil Case*, Chief Justice White declared that "it is worthy of observation, as we have previously remarked concerning the common law, that although the statute [Sherman Act], by the comprehensiveness of the enumerations embodied in both the 1st and 2d sections, makes it certain that its purpose was to prevent undue restraints of every kind or nature, nevertheless by the omission of any direct prohibition against monopoly in the concrete, it indicates a consciousness that the freedom of the individual right to contract,

could benefit no one. A competition which would operate to reduce prices must be between companies occupying the same field, and, while the consolidation of control effected by the purchases of stock in other companies by the Consolidated Company does not necessarily prevent such competition, it is the settled policy of the state to discourage competition of this character."

In view of section 80 of the New York Railroad Law (Laws 1890, c. 565, as amended by Laws 1892, c. 676), which "authorizes railroads in cities, although not surface street railways, to control parallel and competing lines, provided they have the consent of the Public Service Commission," the merger of the elevated, surface and subway systems of New York city by the purchase of a majority of their stock, permitted under section 52 of the Stock Corporation Law (Laws 1890, c. 564, § 40, as amended by Laws 1892, c. 688, § 40, and Laws 1902, c. 601, § 1), does not violate section 14 of the Stock Corporation Law (Laws 1890, c. 564, § 7, as amended by Laws 1892, c. 688, § 7, and Laws 1897, c. 384, § 1), which provides that "no domestic stock corporation and no foreign corporation doing business in this state shall combine with any other corporation or person for the creation of a monopoly or the unlawful restraint of trade or for the prevention of competition in any necessary of life." *Continental Securities*

Co. v. Interborough Rapid Transit Co., 221 Fed. 44, aff'g 207 Fed. 467. See also *Attorney-General v. Interborough Metropolitan Co.*, 125 N. Y. App. Div. 804, 110 N. Y. Supp. 186, aff'g 56 N. Y. Misc. 128, 106 N. Y. Supp. 416.

The New York policy is to discourage unrestricted competition between public utility companies. *People v. Willcox*, 207 N. Y. 86, 45 L. R. A. (N. S.) 629, 100 N. E. 705; *Attorney General v. Consolidated Gas Co.*, 124 N. Y. App. Div. 401, 108 N. Y. Supp. 823. See also *Continental Securities Co. v. Interborough Rapid Transit Co.*, 221 Fed. 44 (aff'g 207 Fed. 467) holding "entirely sound" the statement of Justice Collin in *People v. Willcox*, supra, "it is the settled policy of the state [of New York], arising through an extended and instructive experience, to withdraw the unrestricted right of competition between corporations occupying, through special consents or franchises, the public streets and places, and supplying the public with their products or utilities which are well-nigh necessities. * * * This policy is instigated and embodied in the Public Service Commissions Law, which was adopted in the interests and for the good of the people, and should receive from the courts an activity and effect in aid of that policy within the fair and reasonable meaning of its provisions. The legislature will not be deemed to have departed in that law

when not unduly or improperly exercised, was the most efficient means for the prevention of monopoly, since the operation of the centrifugal and centripetal forces resulting from the right to freely contract was the means by which monopoly would be inevitably prevented if no extraneous or sovereign power imposed it and no right to make unlawful contracts having a monopolistic tendency were permitted. In other words, that freedom to contract was the essence of freedom from undue restraint on the right to contract."¹⁹ It was not the purpose

from that policy, unless there is clear and certain language to that effect."

The provision of clause "e" of section 27 of the Illinois Public Utilities Act (Callaghan's 1916 St. Supp. ¶8686 [42]) that "with the consent and approval of the [Public Utilities] Commission, a public utility may purchase, acquire, take, or hold stock, stock certificates, bonds, notes or other evidences of indebtedness of another public utility" applies to competing as well as noncompeting public utilities, but even in so far as it purports to confer on one public utility the right to obtain control of a competing public utility through the purchase of stock, bonds, and other evidences of indebtedness, does not violate the public policy of the state as declared by section 22, article 4 of the Illinois Constitution which provides that "the General Assembly shall not pass local or special laws * * * granting to any corporation * * * any special or exclusive privilege, immunity or franchise whatever," the public policy thereby declared not being opposed to the elimination of competition in all cases, but condemning only the creation of a monopoly which would have been such at common law, "viz., where competition is eliminated by conferring upon a specified person or corporation the right to exclude all others from engaging in the same business, in the same field of operation, or by upholding the validity of

contracts and agreements which place it within the power of certain individuals or corporations to control production and fix prices, thereby resulting in injury to the public," and the control exercised by the state through the Public Utilities Commission precluding the existence of such a monopoly. *State Public Utilities Commission v. Romberg*, 275 Ill. 432, 114 N. E. 191.

See also Chap. 30, *supra*.

The public policy of Wisconsin, embodied in the legislative regulations of public utilities, is that the public welfare as regards such utilities is best promoted through such means as afford the highest practical efficiency at the lowest cost, and that this may best be accomplished by uniting existing facilities, under proper control and regulation, to meet the public convenience and necessity, regard being had for existing property interests and the rights and privileges appertaining thereto. *McKinley Tel. Co. v. Cumberland Tel. Co.*, 152 Wis. 359, 140 N. W. 38.

¹⁹*Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734.

The Sherman Act was not "intended to create competition [between railroads] by destroying a proprietary relation formed long before its passage and by the very means of which a railroad system has been brought into existence." *United States v. Southern Pac. Co.*, 239 Fed. 998, 1002.

of the Sherman Act, it has been said, "to prohibit or render illegal the ordinary contracts or combinations of manufacturers, merchants or traders, or the usual devices to which they resort to promote the success of their business, to enhance their trade, or to make their occupations gainful, so long as those combinations and devices do not necessarily have a direct and substantial effect to restrict competition in commerce among the states."²⁰

Although a legally effective and enforceable contract in restraint of trade is not necessary to a violation of such statute,²¹ "the rules of public policy which make a given contract void are not to be extended arbitrarily,"²² and a contract claimed to offend against the Federal Anti-Trust Law must be given a construction which will render it valid provided it is reasonably susceptible thereof.²³ One of the fundamental purposes of the Sherman Act was to protect, not to destroy, rights of property,²⁴ and such statute must be given a construction which must be strict, owing to its penal character,²⁵ and must also be

²⁰ *Phillips v. Iola Portland Cement Co.*, 125 Fed. 593, 594.

Persons have a right to associate for the purpose of advancing their own interests by discrimination against other persons, provided such discrimination be based upon proper and legal grounds and be not merely coercive and arbitrary or for the purpose of restraining interstate trade. *United States v. King*, 229 Fed. 275, 278.

A contract (*Rafferty v. Buffalo City Gas Co.*, 37 N. Y. App. Div. 618, 56 N. Y. Supp. 288) or purchase of stock (*Attorney General v. Consolidated Gas Co.*, 124 N. Y. App. Div. 401, 108 N. Y. Supp. 823, which involved, as did the case immediately preceding, section 7 of the New York Stock Corporation Law which prohibits the creation of monopolies, etc.) is not necessarily illegal because made to prevent or avoid destructive competition.

²¹ *United States v. Kellogg Toasted Corn Flake Co.*, 222 Fed. 725, 730, Ann. Cas. 1916 A 78.

²² *United States v. United Shoe Ma-*

chinery Co., 222 Fed. 349, 407 (per Brown, District Judge).

²³ *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N. W. 1058.

²⁴ *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734. See also *United States v. United States Steel Corporation*, 223 Fed. 55, 59 (per Buffington, Circuit Judge).

"It is no part of the policy of the Sherman Act to relieve men of full age from the obligation of their contracts, nor to interfere with contracts, except so far as they may restrain trade of contracting parties, or be aimed at the trade of third parties with a design to effect their exclusion from trade otherwise than by supplying a demand in fair and lawful competition." *United States v. United Shoe Machinery Co.*, 222 Fed. 349, 400 (per Brown, District Judge).

²⁵ In *Greer, Mills & Co. v. Stoller*, 77 Fed. 1, 3, it was held that "the statute, being highly penal in its character, must be strictly construed."

The Mississippi statute of 1900

reasonable.²⁶ But, notwithstanding all of this, escape from its provisions cannot be accomplished by indirection.²⁷ If the restraint "be both direct and undue,²⁸ no disguise will save it; courts will search for the substance and the actual effect of the transaction, and, if trade

(Laws 1900, c. 88, § 11) expressly provides that it "shall be liberally construed in all courts, to the end that trusts and combines may be suppressed, and the benefits arising from competition in business preserved to the people of this state." See *Kosciusko Oil Mill & Fertilizer Co. v. Wilson Cotton Oil Co.*, 90 Miss. 551, 8 L. R. A. (N. S.) 1053, 43 So. 435.

²⁶ Were it not accorded such a construction "there would scarcely be an agreement or contract among business men that could not be said to have, indirectly or remotely, some bearing upon interstate commerce, and possibly to restrain it." *Hopkins v. United States*, 171 U. S. 578, 43 L. Ed. 290; *United States v. Joint Traffic Ass'n*, 171 U. S. 505, 43 L. Ed. 259. See also § 3389, *supra*.

In *State v. Standard Oil Co. of Indiana*, 194 Mo. 124, 91 S. W. 1062, which involved the Missouri Anti-Trust Statute, Judge Lamm, in delivering the opinion of the court said: "If we may not be allowed to adopt the quaint conceit, once indulged in that the idea of monopoly may have originated in Joseph's corn and land dealings in Egypt (Gen. cc. xli, xlvii, q. v.), or the no less playful conceit of a certain ecclesiastical scholar to the general effect that illegal trusts were hinted at in Rev. c. xiii, 16, 17 (q. v.), yet we feel at least on solid ground on the proposition that statutes leveled against monopolies are buttressed upon the wisdom of the common law and this court, constrained and enlightened by events of current history, is not required and does not deem itself invited to approach the interpretation of such statutes with a hostile or sour predisposi-

tion to drive a coach and six through them, but, on the other hand, while sedulously protecting the rights and liberties of the individual from insidious approaches under whatever artful guise, we should at the same time not lose sight of the rights of the community and should endeavor to advance the beneficent purpose underlying such laws * * * where it can be done without doing violence to constitutional provisions."

Section 1747e of the Wisconsin statutes which provides that "every contract or combination in the nature of a trust or conspiracy in restraint of trade or commerce is hereby declared illegal. Every person who shall combine or conspire with any other person to monopolize or attempt to monopolize any part of the trade or commerce in this state shall forfeit for each such offense not less than fifty dollars nor more than three thousand dollars. Any such person shall also be liable to any person transacting or doing business in this state for all damages he may sustain by reason of the doing of anything forbidden by this section," is copied from the Sherman Act—"except that it applies to attempts to monopolize trade and commerce within the state and prescribes a lesser penalty for its violation than is provided for in the act of Congress"—and should receive the same construction as has been placed upon the federal statute by the Supreme Court of the United States. *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N. W. 1058.

²⁷ *United States v. Kellogg Toasted Corn Flake Co.*, 222 Fed. 725, 731, Ann. Cas. 1916 A 78.

²⁸ See § 3391, *supra*.

be unlawfully restrained thereby, will grant the needful relief.”²⁹ In the American Tobacco Case, Chief Justice White observed that “coming * * * to apply to the case before us the [Sherman] Act as interpreted in the Standard Oil and previous cases, all the difficulties suggested by the mere form in which the assailed transactions are clothed become of no moment,” and, continuing, said: “This follows because, although it was held in the Standard Oil Case that, giving to the statute a reasonable construction, the words ‘restraint of trade’ did not embrace all those normal and usual contracts essential to individual freedom, and the right to make which was necessary in order that the course of trade might be free, yet, as a result of the reasonable construction which was affixed to the statute, it was pointed out that the generic designation of the 1st and 2d sections of the law, when taken together, embraced every conceivable act which could possibly come within the spirit or purpose of the prohibitions of the law, without regard to the garb in which such acts were clothed. That is to say, it was held that, in view of the general language of the statute and the public policy which it manifested, there was no possibility of frustrating that policy by resorting to any disguise or subterfuge of form, since resort to reason rendered it impossible to escape, by any indirection, the prohibitions of the statute.”³⁰ Trust,³¹ combina-

²⁹ United States v. Keystone Watch Case Co., 218 Fed. 502, 507. See also United States v. Eastman Kodak Co., 226 Fed. 62, 66.

³⁰ United States v. American Tobacco Co., 221 U. S. 106, 55 L. Ed. 663. See also Thomsen v. Cayser, 243 U. S. 66, 85, 61 L. Ed. 597, Ann. Cas. 1917 D 322; Standard Sanitary Mfg. Co. v. United States, 226 U. S. 20, 57 L. Ed. 107.

³¹ Originally the term “trust” referred to “an organization formed by a combination of several corporations under one direction, by the device of a transfer by the stockholders in such corporation of a majority of the stock to a central committee, who issued to the stockholders in return certificates showing, in effect, that, though they had parted with their stock, they were still entitled to share in the profits, the purpose being to control competition in production and transportation,

and thus the price to the consumer.” At the present time, the word “trust,” as commonly used, “includes any form of combination between corporations, or corporations and natural persons, for the purpose of regulating production and repressing competition by means of the power thus centralized.” MacGinniss v. Boston & M. Consol. Copper & Silver Mining Co., 29 Mont. 428, 75 Pac. 89.

“A trust is a contract, combination, confederation, or understanding, express or implied, between two or more persons, to control the price of a commodity or service for the benefit of the parties thereto, and to the injury of the public, and which tends to create a monopoly.” State v. Firemen’s Fund Ins. Co., 152 Mo. 1, 45 L. R. A. 363, 52 S. W. 595.

For trust transactions, simple and unembellished but refulgent, see Standard Oil Co. v. United States, 221

tion,³² contract,³³ pool,³⁴ merger, stock purchase, license,³⁵ lease, or "gentlemen's agreement"³⁶—it matters not in the eyes of the law, if a prohibited result be accomplished thereby,³⁷ and where there is no

U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734.

³² The fact that one of the parties to a combination in restraint of trade, subject to injunction under the Sherman Act, was restricted in the conduct of its business in less degree than others of such parties, being given a certain freedom of competition to meet local conditions, does not relieve it from culpability but, at the most, merely diminishes the degree thereof. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 57 L. Ed. 107.

³³ Contract between railroad company, owning coal mines, and coal company, caused to be organized by it, which was intended to surmount the legal obstacle imposed by the commodity clause of the Hepburn Act upon its hauling its own coal held not only inimical to that act but violative of the Sherman Act as well. *United States v. Delaware, L. & W. R. Co.*, 238 U. S. 516, 59 L. Ed. 1438, rev'g *United States v. Delaware, L. & W. R. Co.*, 213 Fed. 240.

³⁴ "The commonest type of combination has been that of pool of some sort, in which the participants agreed to suppress the competition between themselves to some extent without surrendering altogether all their rights and conduct of their own business." *State v. American Sugar Refining Co.*, 138 La. 1005, 71 So. 137.

³⁵ Validity of patent licenses, see § 3395, *infra*.

³⁶ A "gentlemen's agreement" to act in violation of the Sherman Law is within the condemnation of that statute equally with an agreement which provides a penalty for its violation. *United States v. United States*

Steel Corporation, 223 Fed. 55, 155 (per Buffington, Circuit Judge).

³⁷ When there is no question that the corporation, the dissolution of which is sought, is a combination, and therefore the question to be determined "is, whether it is a 'combination' * * * in restraint of trade," and whether the corporation, its subsidiaries, and the individual defendants who actively engaged in its organization, monopolized, or attempted to monopolize, or combined with others to monopolize or restrain, trade within the meaning of the [Sherman] Act," four lines of inquiry present themselves, namely, did the organization of the corporation have the direct and necessary effect of unduly restraining trade or creating a monopoly; do the circumstances which led up to and surrounded the corporation's organization show an intent to monopolize or to unduly restrain trade; did the after conduct of the corporation show such an intent, and was the corporation monopolizing or restraining, or threatening to monopolize or restrain, trade at the time of the institution of the suit? *United States v. United States Steel Corporation*, 223 Fed. 55, 162 (per Woolley, Circuit Judge).

"Sometimes the essential facts may be so clearly shown by the contract involved, if one is involved, that further evidence is unnecessary to show that the restraint is unlawful. There is another class of cases where the contract in itself may present an innocent appearance; but, when considered in the light of other facts and circumstances, including the purpose for which it was made, the objects sought to be accomplished, and the results actually brought about, the

conflict in the evidence the court may properly determine the question of the existence of a combination, and, finding one, whether or not it is illegal under the Sherman Act.³⁸

§ 3395. Patents. Conceding the fact that "the sole value of patent property resides in monopoly,"³⁹ that the Sherman Act did not repeal the patent laws,⁴⁰ that the monopoly conferred by a patent cannot be infringed by state anti-trust laws,⁴¹ and that patents are not vitiated by the illegal combination of those owning them,⁴² it yet

contract may be positively vicious. In such cases the contract constitutes a link in the chain of evidence. There is a third class of cases where the contract involved shows some restriction of competition or some obstruction of trade, but does not show whether such restriction or obstruction is undue and unreasonable or otherwise. In such cases it is necessary to resort to evidence dehors the contract to ascertain whether it is void or valid." *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N. W. 1058.

³⁸ *Thomsen v. Cayser*, 243 U. S. 66, 61 L. Ed. 597, Ann. Cas. 1917 D 322.

³⁹ *United States Fire Escape Counterbalance Co. v. Joseph Halsted Co.*, 195 Fed. 295, 299.

If a contract or combination "is asked to be condemned, not because of the illegality of the means employed to accomplish its end, but because monopoly results as a consequence, the monopoly must be shown to be an unlawful monopoly, not the monopoly granted by the patent laws." *United States v. Motion Picture Patents Co.*, 225 Fed. 800, 806.

⁴⁰ *United States v. Motion Picture Patents Co.*, 225 Fed. 800, 804.

"A patent is merely a privilege granted to inventors by Congress, and whenever that privilege is abused or is found to be exercised in a manner contrary to the public policy of the government, Congress certainly has the power to enact laws which will prevent such an abuse. Whether it

can deprive a patentee of all the privileges granted by the patent before its expiration is a question which cannot arise under" the Clayton Act, and it would seem that the restrictions actually placed by such act upon the use of patents previously granted are not unconstitutional. *United States v. United Shoe Machinery Co.*, 234 Fed. 127, 151.

⁴¹ *Rubber Tire Wheel Co. v. Milwaukee Rubber Works Co.*, 154 Fed. 358, 361.

"The right secured by letters patent of the United States is the right of a monopoly of the invention described therein. With this right a state has no power to interfere by its legislation; nor has it the power to interfere with the exercise of any right which is necessarily incident to the exercise of that principal right." But the monopoly granted to the patentee "is simply the right to prevent others from using the products of his labors except with his consent. His own right of using is not enlarged or affected. In other words, the patentee's right is a monopoly in the invention; but it does not protect from state legislation any monopoly in other commercial ventures which the owner of the patent may attempt to establish or maintain." *In re Opinion of Justices*, 193 Mass. 605, 81 N. E. 142.

⁴² *Edison Elec. Light Co. v. Sawyer-Man Elec. Co.*, 53 Fed. 592.

Patent rights cannot be protected

remains true that the patent laws do not confer upon a patentee or his assignee or licensee any general immunity from the operation of anti-trust laws as to acts not within the limited scope of the monopoly granted.⁴³ "A patentee," declares the Supreme Court of the United States, "is as much subject to the laws of the land as is any other man. From one special application of one class of laws he is exempt. At common law and by statute monopolies are unlawful. At common law and by statute a man who invented a new and useful thing might be given a right which would enable him for a limited time effectually to monopolize it. The courts have said that this right to monopolize what he invented cannot be taken away from a patentee by state laws. They say it has not been taken away by Congress. All men know that Congress never intended when it passed the Sherman Act to change the patent law. It did not do so. The patentee may, in spite of that law, monopolize for the term of his patent the thing which he or his assignor invented. Neither at common law nor in this country by statute has he ever had a right to monopolize anything else. As to everything not validly claimed in his patent he is as other men. If by the common law or the statutes of the state or by the enactments of Congress men are forbidden to restrain trade or to monopolize it, a patentee may not restrain trade or attempt to monopolize it in anything except that which is covered by his patent. A patent is a grant of a right to exclude all others from making, using, or selling the invention covered by it. It does not give a right to the patentee to sell indulgences to violate the law of the land, be it the Sherman Act or another. * * * A patentee who monopolizes his invention breaks no law. He who uses his property right to exclude others from the making, selling, or using his invention, for the purpose and with the effect of making a combination to restrain trade in something from which his patent gives him no right to exclude others, does break the law."⁴⁴

by conspiring to restrain the patent-infringer's interstate trade or commerce in the patented articles, a conspiracy by the patentee and others so to do offending against the Sherman Act to the same extent as a conspiracy to restrain interstate trade and commerce which was not illegal. *Patterson v. United States*, 222 Fed. 599, 646.

⁴³ "Rights conferred by patents are indeed very definite and extensive, but

they do not give any more than other rights a universal license against positive prohibitions." *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 57 L. Ed. 107 (aff'g decree 191 Fed. 172), quoted in *United States v. Eastman Kodak Co.*, 226 Fed. 62, 78.

⁴⁴ *United States v. Standard Sanitary Mfg. Co.*, 191 Fed. 172, 190 (decree aff'd 226 U. S. 20, 57 L. Ed. 107); explaining statement in *Rubber Tire Wheel Co. v. Milwaukee Rubber*

The owner of a patent may license its use on such terms as he will provided he does not choose to require the violation of law.⁴⁵ While the Sherman Act "clearly does not refer to that kind of a restraint of interstate commerce which may arise from reasonable and legal conditions imposed upon the assignee or licensee of a patent by the owner thereof, restricting the terms upon which the article may be used and the price to be demanded therefor,"⁴⁶ it has been decided,

Works Co., 154 Fed. 358, 362, that "whatever the terms [of a license to use a patent], courts will enforce them, provided only that the licensee is not thereby required to violate some law outside of the patent law, like the doing of murder or arson."

"If the combination [involved] had been limited, and the agreements and the scheme in its entirety had possessed, or could be found to have, any normal real relation to the assertion and protection of these patented rights, and this had been the end proposed, the defendants would be upheld in the maintenance of such rights." United States v. Motion Picture Patents Co., 225 Fed. 800, 810.

⁴⁵ Conceding certain exceptions "the general rule is absolute freedom in the use or sale of rights under the patent laws of the United States. The very object of these laws is monopoly, and the rule is, with few exceptions, that any conditions which are not in their very nature illegal with regard to this kind of property, imposed by the patentee and agreed to by the licensee for the right to manufacture or use or sell the article, will be upheld by the courts. The fact that the conditions in the contracts keep up the monopoly or fix prices does not render them illegal." *E. Bement & Sons v. National Harrow Co.*, 186 U. S. 70, 46 L. Ed. 1058.

⁴⁶ *E. Bement & Sons v. National Harrow Co.*, 186 U. S. 70, 46 L. Ed. 1058, quoted in *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 57 L. Ed. 107.

In *E. Bement & Sons v. National Harrow Co.*, supra, plaintiff sued in a New York state court for liquidated damages for a violation of certain patent licenses (of different dates) and to restrain the future violation and compel the specific performance thereof. "To this complaint the defendant made answer, denying many of its allegations, and setting up certain other agreements which it alleged had been made by the plaintiff and other parties, including defendant, and which, as averred, amounted to a combination of all the manufacturers and dealers in patent harrows [the implements involved], to regulate their manufacture and to provide for their sale and the prices thereof throughout the United States. It was also in the answer averred that such contracts had been pronounced to be void by the Supreme Court of New York, and the contracts [licenses] now before the court were, as contended by defendant, but a continuation and a part of the other contracts already declared void, and that these contracts between the parties to this action were also void. It is also alleged that all of the various contracts were in violation of the Sherman Act. The referee to whom the case was referred found in favor of the plaintiff and from a judgment in accordance with his report defendant appealed to the Appellate Division of the New York Supreme Court. Some difficulties regarding the form in which the case was presented to that court arose upon the argument, and

says one of the lower federal courts, that patent rights and restric-

it was therefore suspended and the case sent back to the referee for a resettlement, which was subsequently agreed upon by counsel for the respective parties, who entered into a stipulation in regard to what was to be reviewed by the courts above, and, among other things, it was agreed between counsel 'that the foregoing record, as amended and corrected in this stipulation, contains all of the evidence given and proceedings had before the referee material to the questions to be raised on this appeal by the appellant,' 'one of which was whether the licenses alleged to have been violated were valid under the Sherman Act. Following argument, the Appellate Division reversed the judgment and ordered a new trial but "did not state in its order of reversal that the judgment was reversed on questions of fact as well as of law." Plaintiff then appealed to the Court of Appeals which court held "that it had no jurisdiction to review the facts, and that upon the findings of the referee there had been no error of law committed, and consequently the Supreme Court was wrong in reversing the judgment. The Court [of Appeals] therefore reversed the judgment of the Supreme Court, and affirmed the judgment entered upon the report of the referee." Defendant thereupon sued out a writ of error from the Supreme Court of the United States to the Supreme Court of New York to which court the record had been remitted. The federal court stated that the only federal question raised in the record was as to the validity of the licenses under the Sherman Act; that this was a question of law which it was not precluded from considering by any action of the state courts; that the referee made no finding of any fact connecting the

licenses with the earlier contracts which had been declared void and subsequently canceled; that it could not supply the facts necessary so to connect them, it being concluded by findings of fact made in a state court in a suit in equity, as well as in an action at law, and that the licenses were to be judged solely by their own contents and construed accordingly. Briefly, and in their essential features, the licenses, in substance, provided that the defendant (the licensee) should pay a stipulated royalty and make verified reports of its business to the plaintiff (the licensor) each month; put into the plaintiff's hands the fixing of the prices at which defendant's product, manufactured under the licenses, should be sold; bound the defendant, during the continuance of the licenses, not to directly or indirectly engage "in the manufacture or sale of any other float spring tooth harrows, etc., than those which it was licensed to manufacture and make under the terms of the license, except such as it might manufacture and furnish another licensee of the [plaintiff] * * * and then only such constructions thereof as such other licensee should be licensed by the plaintiff to manufacture and sell, except such other style and construction as it might be licensed to manufacture and sell by the plaintiff"; provided for the payment of a certain sum as liquidated damages for sales contrary to the strict terms and provisions of the license; bound the defendant not to contest the validity of any patent applicable to and embracing the construction which it was licensed to manufacture, etc.; bound the plaintiff not to "grant licenses, or let to any other person the right to manufacture the articles named, of the peculiar style and con-

tions on the sale price of a patented article cannot be used as a

struction or embodying the peculiar features thereof used by the defendant, as illustrated and embodied in the sample harrow then placed in the possession of the treasurer of the plaintiff," etc.; provided that "nothing contained in the license was to authorize the defendant to manufacture or vend, directly or indirectly, any other or different style of harrow than duplicates of such samples as had been deposited by it with the plaintiff, and such as were embraced in the license"; stipulated that any departure from the terms of the license might be treated by plaintiff as a breach thereof and the licensee might be treated as an infringer or the plaintiff might enjoin the breach, etc., such remedy to be additional to the right to recover the liquidated damages provided for, and declared that the license should continue during the term of the patent or patents applicable thereto and during the term of any reissues of such patent or patents. In holding that the licenses contained no conditions which rendered them void as in violation of the Sherman Act, the court said: "There had been, as the referee finds, a large amount of litigation between the many parties claiming to own various patents covering these implements. Suits for infringements and for injunction had been frequent, and it was desirable to prevent them in the future. The execution of these contracts did in fact settle a large amount of litigation regarding the validity of many patents, as found by the referee. This was a legitimate and desirable result in itself. The provision in regard to the price at which the licensee would sell the article manufactured under the license was also an appropriate and reasonable condition. It tended to keep up the

price of the implements manufactured and sold, but that was only recognizing the nature of the property dealt in and providing for its value so far as possible. This the parties were legally entitled to do. The owner of a patented article can, of course, charge such price as he may choose, and the owner of a patent may assign it, or sell the right to manufacture and sell the article patented, upon the condition that the assignee shall charge a certain amount for such article. It is also objected that the agreement of the defendant not to manufacture or sell any other float spring tooth harrow, etc., than those which it had made under its patents before assigning them to the plaintiff, or which it was licensed to manufacture, make, under the terms of the license, except such other style and construction as it may be licensed to manufacture and sell by the plaintiff, is void under the act of Congress. The plain purpose of the provision was to prevent the defendant from infringing upon the rights of others under other patents, and it had no purpose to stifle competition in the harrow business more than the patent provided for, nor was its purpose to prevent the licensee from attempting to make any improvement in harrows. It was a reasonable prohibition for the defendant, who would thus be excluded from making such harrows as were made by others who were engaged in manufacturing and selling other machines under other patents. It would be unreasonable to so construe the provision as to prevent defendant from using any letters patent legally obtained by it and not infringing patents owned by others. This was neither its purpose nor its meaning. There is nothing which violates the act in the agreement that

shield to nullify such statute.⁴⁷ Thus in a leading case, decided by

plaintiff would not license any other person than the defendant to manufacture or sell any harrow of the peculiar style and construction then used or sold by the defendant. It is a proper provision for the protection of the individual who is the licensee, and is nothing more in effect than an assignment or sale of the exclusive right to manufacture and vend the article. In brief, after a careful examination of these contracts, we are unable to find any provision in them, either taken separately or in connection with all the others therein contained, which would render the contracts between these parties void as in violation of the Act of Congress." There was involved in the case a certain "escrow agreement" which the court recognized as looking "to the signing, by the parties mentioned therein [which included defendant], of contracts similar to those [actually existing] between the parties to this suit * * * and containing like conditions relating to the patents respectively owned by such parties." But, although the referee inferentially found such "escrow agreement" to be valid, there was, said the court, no finding that such contracts were in fact entered into by such other parties "nor that they constituted a combination of most, if not all, of the persons or corporations engaged in the business concerning which the agreements between the parties to this suit were made. If such similar agreements had been made, and if, when executed, they would have formed an illegal combination within the Act of Congress, we cannot presume for the purpose of reversing this judgment, in the absence of any finding to that effect, that they were made and became effective as an illegal combination." Finding nothing

in the license agreements between the plaintiff and the defendant which violated the Sherman Act and not being "called upon to express an opinion upon a state of facts not found," the court affirmed the judgment of the New York Court of Appeals.

⁴⁷ *United States v. Eastman Kodak Co.*, 226 Fed. 62, 78.

The monopoly of a patent does not continue beyond an absolute sale of the invention covered so as to permit the patentee, without offending against the Sherman Act, to fix the resale price either of such invention or, in a case where the invention is a carton, of the patentee's manufactured product contained therein. *United States v. Kellogg Toasted Corn Flake Co.*, 222 Fed. 725, Ann. Cas. 1916 A 78.

"A contract or agreement among business men, which had as its end to preserve to the owners of a patent the exclusive sale of the patented article, and as its means the exercise of due, reasonable, and fairly proper control over sales to be made, would not be condemned as void in itself, or justify any inference of guilt under the Act of 1890. Where, however, by what was agreed to be done, the end indicated, in the sense of the result to be expected, was a monopolistic control of what was not the exclusive property of any one, or such a monopoly was the direct result of undue and unreasonable restraints of trade, to be employed as the means of carrying out what was to be done, the fact that any one or more of the persons concerned owned patents would not prevent a finding of conspiracy." *United States v. Motion Picture Patents Co.*, 225 Fed. 800, 806.

Restrictions as to films which might be used in complainant's patented mov-

the Supreme Court of the United States, wherein the government sued corporations manufacturing 85 per cent. of the country's enameled-ironware output, their officers, and a third person, to enjoin their violation of the Sherman Act, such court held that the license agreements entered into by the corporate defendants with the third person for the use of an automatic enamel-dredger, the control of the patent on which he had secured from one of such defendants, "transcended what was necessary to protect the use of the patent or the monopoly which the law conferred upon it," and "passed to the purpose and accomplished a restraint of trade condemned by the Sherman law." Referring to the outstanding facts in evidence, the court said: "Before the agreements the manufacturers of enameled ware were independent and competitive. By the agreements they were combined, subjected themselves to certain rules and regulations, among others, not to sell their product to the jobbers except at a price fixed not by trade and competitive conditions, but by the decision of the committee of six of their number, and zones of sales were created. And the jobbers were brought into the combination and made its subjection complete and its purpose successful. Unless they entered the combination they could obtain no enameled ware from any manufacturer who was in the combination, and the condition of entry was not to resell to plumbers except at the prices determined by the manufacturers. The trade was, therefore, practically controlled from producer to consumer, and the potency of the scheme was established by the co-operation of 85 per cent of the manufacturers, and their fidelity to it was secured not only by trade advantages, but by what was practically a pecuniary penalty, not inaptly termed in the argument, 'cash bail.' The royalty for each furnace was \$5, 80 per cent of which was to be returned if the agreement was faithfully observed; it was to be 'forfeited as a penalty' if the agreement was violated. And for faithful observance of their engagements the jobbers, too, were entitled to rebates from their purchases. It is testified that 90 per cent of the jobbers in number and more than 90 per cent in purchasing power joined the combination." On these facts and notwithstanding defendants' argument that to make the use of the automatic dredger universal was the prompting of the third person's energies "to unite

ing-picture machines held void under Clayton Act. *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 235 Fed. 398 (decree affirmed on grounds other than the violation of the Clayton Act, 243 U. S. 502, 61 L. Ed. 871,

Ann. Cas. 1917 E 1187), distinguishing *Victor Talking Mach. Co. v. Strauss*, 230 Fed. 449, rev'd *Straus v. Victor Talking Mach. Co.*, 243 U. S. 490, 61 L. Ed. 866, Ann. Cas. 1917 E 1196.

the manufacturers and to remove the evils which beset the trade [by reason of deception in the sale of "seconds" which resulted from the use of hand dredgers, a stipulation against the sale of which was contained in the license agreement] and which were 'discrediting the ware and demoralizing the market and business,' " the court affirmed the decree granting the government 'injunctive relief.'⁴⁸

The right granted to a patentee to exclude third persons from the use of his patented invention is confined to the subject-matter of such invention, and does not include the right to exclude such persons from the use of other inventions, patented or unpatented. "When, however, a patentee has installed in a factory several distinct machines, each upon a restricted lease, he has as to each a full right of exclusion from other than the licensed use and thus may legally exclude all machines that compose the group."⁴⁹

⁴⁸ *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 57 L. Ed. 107, aff'g 191 Fed. 172.

⁴⁹ *United States v. United Shoe Machinery Co. of New Jersey*, 222 Fed. 349, 398 (per Brown, District Judge). In this case, a suit in equity by the United States under the Sherman Act, the government contended that the patent laws conferred "upon the owner of a group of machines, each protected by a distinct patent, no right to handle the entire group as a unit, thus making one patented machine aid another. But," said Judge Brown, "the proposition that patented machines cannot be handled as a group is stated too broadly. If what was before in separate hands is grouped in a single hand, and handled only as a unit, this might result in a refusal of what before was obtainable. But if the patented machines are handled both as individual machines and as a group, so that there is a free choice between the taking of individual machines and a group, we can see no ground for objection. One patented machine may be made to aid another in two ways: By using a refusal to deal with them separately as a means of compelling the taking of both; or

by offering both at a lower price than the sum of the separate prices for each. The first is the way charged in the petition, but disproved as matter of fact; the second is the common device of wholesaling instead of retailing. * * * It is conceivable, if a single person should assemble in his hands a large number of distinct patented articles previously upon the market, and refuse to sell any unless all were taken, that this in special circumstances might constitute such obstruction to a former freedom of trade as to fall within the Sherman Act. Where the patented machines were originated and first put upon the market by the defendants, it is difficult to find any reason why they should not be grouped; but where there is no obstruction to a former freedom of trade, where there is no refusal of any article upon the former terms, it cannot be illegal to offer a group for a price which is lower than the sum of the separate prices—or, what is the same thing, to offer each article at a lower price if other articles also are taken at a lower price."

"The owner of a patented device, process, or product may undoubtedly acquire from another any issued pat-

Again it has been held that where the patented shoe machines severally manufactured by certain noncompeting corporations are not used in making the same part of a shoe, the merger of such corporations will not constitute a criminal combination under the Sherman Act, notwithstanding such merger results in bringing under the control of the new corporation the great bulk of the shoe machinery business.⁵⁰

ents for improvements, and we see no reason to deny the right of the owners of the original patent, and of the patented improvements, to pool their ownerships for their joint or common protection. This we understand to have been expressly ruled." *United States v. Motion Picture Patents Co.*, 225 Fed. 800, 810, citing *United States v. United Shoe Machinery Co.*, *supra*. Continuing, the court said: "Indeed, this [cited] case may well be claimed as authority for the proposition (within its facts) that there might be a combination of the owners of different patented machines all entering into a manufacturing trade. However this may be, the distinction sought to be pointed out is that while the owner of a patent on a plow, covering the handles or beam, might acquire or join with the owners of patents covering the moldboard, or share, or other parts of the plow, for the protection of the patented rights of all, and thereby incidentally secure an enlarged part of the trade in plows, the judgment would refuse to sanction a combination between the owners of patented plows, patented harrows, patented reapers and binders, and other implements of husbandry, and large dealers in these implements, who were not owners of patents, for the purpose of monopolizing the whole trade in the products of agriculture, if the direct end first proposed was to unduly and unreasonably restrain trade, as a means to the final purpose of monopolizing. The ownership of the patents, in such a case, surely

could not be accepted as a defense to the charge of unlawful combination. If a reason to support the distinction between these supposititious cases is asked for, it may be found in the fact that, in the first case, it could not be concluded that the scheme of the combination had no normal and real relation to the protection of the patent rights; in the second case, no such relation could be even plausibly said to exist, and its assertion would be characterized as a pretense."

⁵⁰ *United States v. Winslow*, 227 U. S. 202, 57 L. Ed. 481, aff'g 195 Fed. 578. The indictment in this case which was held bad on demurrer contained two counts based on substantially the same facts, the first of which charged a combination in restraint of the trade of the defendants themselves and the second, a conspiracy in restraint of the trade of others, namely, shoe manufacturers. Although it was alleged that the defendants no longer sold their machines to shoe manufacturers but merely let them and on the condition which they had constantly enforced that unless the manufacturer, in using machines of the types manufactured by the defendants, used only such as were furnished by them, all machines let by them should be taken away, such condition was not averred to have been contemporaneous with the combination or merger nor to have been contemplated when it was made, and the district court interpreted the indictment as confined to the combination or merger without regard to the leases subsequently executed. The

§ 3396. Copyrights and trade-marks. The copyright laws confer upon the owner of a copyright a monopoly similar to that conferred by the patent laws upon the owner of a patent.⁵¹

This monopoly cannot be interfered with by state anti-trust laws.⁵² But "no more than the Patent Statute was the Copyright Act intended to authorize agreements in unlawful restraint of trade and tending to monopoly, in violation of the specific terms of the Sherman Law, which is broadly designed to reach all combinations in unlawful restraint of trade, and tending, because of the agreements or combinations entered into, to build up and perpetuate monopolies," and

Supreme Court held that it had no jurisdiction to review the District Court's interpretation of the indictment; that neither the validity of the leases nor of a combination contemplating them could then be passed upon, and that the only question before it was whether the combination or merger, taken by itself, was criminal. Addressing itself to this question the court affirmed the judgment sustaining the demurrer which had been interposed to the indictment and, in so doing, said: "On the face of it the combination was simply an effort after greater efficiency. The business of the several groups that combined, as it existed before the combination, is assumed to have been legal. The machines are patented, making them is a monopoly in any case, the exclusion of competitors from the use of them is of the very essence of the right conferred by the patents, Paper Bag Patent Case (*Continental Paper Bag Co. v. Eastern Paper Bag Co.*), 210 U. S. 405, 429, 52 L. Ed. 1122, 1132, 28 Sup. Ct. Rep. 748, and it may be assumed that the success of the several groups was due to their patents having been the best. As, by the interpretation of the indictment below (195 Fed. 591) and by the admission in argument before us, they did not compete with one another, it is hard to see why the collective business should be any worse than its component parts. It is said that from

70 to 80 per cent of all the shoe machinery business was put into a single hand. This is inaccurate, since the machines in question are not alleged to be types of all the machines used in making shoes, and since the defendant's share in commerce among the states does not appear. But taking it as true, we can see no greater objection to one corporation manufacturing 70 per cent of three noncompeting groups of patented machines collectively used for making a single product than to three corporations making the same proportion of one group each. The disintegration aimed at by the statute does not extend to reducing all manufacture to isolated units of the lowest degree. It is as lawful for one corporation to make every part of a steam engine, and to put the machine together, as it would be for one to make the boilers and another to make the wheels. Until the one intent is nearer accomplishment than it is by such a juxtaposition alone, no intent could raise the conduct to the dignity of an attempt. See *Virtue v. Creamery Package Mfg. Co.* [227 U. S. 8, 57 L. Ed. 393, 33 Sup. Ct. Rep. 202] * * *; *Swift & Co. v. United States*, 196 U. S. 375, 396, 49 L. Ed. 518, 524, 25 Sup. Ct. Rep. 276."

⁵¹ See the next preceding section.

⁵² *B. F. Johnson Pub. Co. v. Mills*, 79 Miss. 543, 31 So. 101.

publishers' and booksellers' associations, members of which are engaged in interstate trade, cannot, without running counter to such statute, act upon resolutions and agreements under which books should be sold only to such booksellers as would maintain the retail price upon copyrighted books, agreed by them to be published at net prices, for one year and as would not sell books to any one who should cut such price.⁵³

⁵³ *Straus v. American Publishers' Ass'n*, 231 U. S. 222, 58 L. Ed. 192, L. R. A. 1915 A 1099, Ann. Cas. 1915 A 369, rev'g 199 N. Y. 548, 93 N. E. 1133. From the finding of facts made in the course of this litigation, "it appears," said the Supreme Court, "that the Publishers' Association was composed of probably 75 per cent. of the publishers of copyrighted and uncopyrighted books in the United States, and that the Booksellers' Association included a majority of the booksellers throughout the United States; that the Associations adopted resolutions and made agreements obligating their members to sell copyrighted books only, to those who would maintain the retail price of such net copyrighted books, and, to that end, that the Associations combined and co-operated with the effect that competition in such books at retail was almost completely destroyed. The findings further show that the Associations employed various methods of ascertaining whether prices of net copyrighted books were cut and whether there was competition in the sale thereof at retail, and issued cut-off lists, so-called, directing the discontinuance of the sale of such books to offenders, and that the plaintiffs in error, who had failed to maintain net prices upon copyrighted books, had been put upon the cut-off lists, and were unable to secure a supply of such books in the ordinary course of business. It further appears that in some instances dealers who had supplied the plaintiffs in error were wholly ruined and

driven out of business; that the Booksellers' Association widely circulated the names of such dealers, and warned others to avoid their fate, and that various circulars were issued to the trade at large by both Associations, warning all persons against dealing with the plaintiffs in error or other so-called price-cutters; that after the reformation of the resolutions and agreements [whereby uncopyrighted books were excluded from their operation] * * *, the Associations and their members continued the same methods as to ascertaining the supply of copyrighted books of the plaintiffs in error, as to cut-off lists and circulars to the trade, and that, although [later] * * * the resolution of the Publishers' Association was modified so that the 'agreement' became a 'recommendation,' the cut-off lists were still issued, with plaintiff's name thereon, and that the dealers still refused to supply plaintiffs in error with books of any kind. And it also appears from the finding of facts that the members of the Associations resided in and carried on the business of selling books in many different states, and purchased books from persons in many states other than the one in which they resided and did business; and that the rules, regulations, and agreements of the Associations were enforced against all publishers and dealers in books throughout the United States, whether they were members of either Association or not, and whether they purchased books in one state for transportation and de-

On the other hand, it has been held that a corporation marketing, under a trade name protected by a copyright covering its carton, a small percentage of a staple commodity—it not having a monopoly or even a quasi monopoly on the trade in such commodity—may, without offending against either the Sherman Act or the Clayton Act, adhere to a rule of its business to sell only to wholesalers; and although for a time it makes an exception to this rule in favor of a certain retailer, it may, without regard to its reason for so doing, subsequently enforce the rule against such retailer without rendering itself liable to an injunction in a suit by the retailer under the Clayton Act.⁵⁴

livery in another, or for delivery in the state where purchased.” Continuing, the Supreme Court said: “We agree with the Court of Appeals in its characterization of the agreement involved in this case, about which there seems to have been no difference of opinion, except as to the supposed protection of the Copyright Act. It manifestly went beyond any fair and legal agreement to protect prices and trade as among the parties thereto, and prevented, as the Court of Appeals said, when dealing with uncopyrighted books, the sale of books of any kind, at any price, to those who were condemned by the terms of the agreement, and with whom dealings were practically prohibited. We conclude, therefore, that the Court of Appeals erred in holding that the agreement was justified by the Copyright Act, and was not within the denunciation of the Sherman Act, and in denying, for that reason alone, the right of the plaintiffs in error to recover under the state [anti-trust] act as to copyrighted books.” (For this case in the New York Court of Appeals, see 199 N. Y. 548, 93 N. E. 1133, 193 N. Y. 496, 86 N. E. 525, 177 N. Y. 473, 64 L. R. A. 701, 101 Am. St. Rep. 819, 69 N. E. 1107.)

⁵⁴ Great Atlantic & Pac. Tea Co. v. Cream of Wheat Co., 227 Fed. 46, aff’g 224 Fed. 566. Thus holding, the court

said: “Defendant, * * * in the conduct of its business, decided and made announcement to the trade that for reasons sufficient to itself it would sell only to wholesalers. Why, if it chose to do so, it could not make such a rule and adhere to it, we are at a loss to understand. It named the prices at which it would sell to wholesalers, so much in carload lots, so much in less than carload lots. That certainly it had a right to do; the Clayton Act itself expressly recognizes the existence of this right. Under the rule which defendant had legitimately established for the conduct of its own business, complainant could not buy from it, because complainant was a retailer. Nevertheless, for a time, defendant made an exception to its rule, and sold to complainant, under some arrangement, which, as defendant thought, would not make the wholesalers with whom it dealt critical of the exception. On a certain day defendant decided that it would no longer sell to this retailer at all, and since then it has not sold to complainant. There was no contract between the two which bound defendant to sell to complainant for any specified period of time. This suit is really brought to force defendant to continue to sell to this single retailer, as it sells to the wholesalers, also trade with it. * * *

The business of defendant is not a

So in the case of trade-marks. "The trade-mark laws, like the patent laws, give the owner a monopoly which neither the Sherman Act nor any other act of Congress forbids. It would be a paradox to say that the exercise of a right, expressly granted by law, is unlawful."⁵⁵ Accordingly, it has been held that the company manufacturing the syrup from which a beverage, sold both at soda fountains and in bottles, is made—the company's trade-mark covering both the syrup and the beverage—may, in the interest of the high standard of quality sought to be maintained by it, permit certain persons only to bottle the beverage and sell the latter under the company's trade-mark, and refuse such privilege to others notwithstanding such others have purchased the fountain syrup, which, although it is of necessity of slightly different composition from the bottling syrup, they use in bottling the beverage, on the open market, without offending against either the Sherman Act or section 3 of the Clayton Act.⁵⁶

§ 3397. Criminal prosecutions. In view of the fact that a conspiracy to restrain and monopolize interstate and foreign trade can have a continuance, subsequent to the making of the agreement which is, of itself, sufficient to constitute the crime,⁵⁷ it does not follow

monopoly, or even a quasi monopoly.

* * * Before the Sherman Act it was the law that a trader might reject the offer of a proposing buyer, for any reason that appealed to him; it might be because he did not like the other's business methods, or because he had some personal difference with him, political, racial, or social. That was purely his own affair, with which nobody else had any concern. Neither the Sherman Act, nor any decision of the Supreme Court construing the same, nor the Clayton Act, has changed the law in this particular. We have not yet reached the stage where the selection of a trader's customers is made for him by the government."

⁵⁵ *Coca-Cola Co. v. J. G. Butler & Sons*, 229 Fed. 224, 232.

⁵⁶ *Coca-Cola Co. v. J. G. Butler & Sons*, 229 Fed. 224, distinguishing *Dr. Miles Medical Co. v. Park & Sons Co.*, 220 U. S. 373, 55 L. Ed. 502, and *Coca-Cola Co. v. Bennett*, 225 Fed. 429 (rev'd 238 Fed. 513).

⁵⁷ See § 3392, supra.

In *United States v. Kissel*, 218 U. S. 601, 54 L. Ed. 1168 (rev'g 173 Fed. 823), the court, addressing itself to the question of whether a conspiracy can have continuance in time, said: "The defendants argue that a conspiracy is a completed crime as soon as formed, that it is simply a case of unlawful agreement, and that therefore the *continuando* may be disregarded, and a plea is proper to show that the statute of limitations has run. Subsequent acts in pursuance of the agreement may renew the conspiracy or be evidence of a renewal, but do not change the nature of the original offense. So also, it is said, the fact that an unlawful contract contemplates future acts, or that the results of a successful conspiracy endure to a much later date, does not affect the character of the crime. The argument, so far as the premises are true, does not suffice to prove that a conspiracy, although it exists as soon as the agree-

that, because a prosecution based on the making of the agreement is barred by limitations, a prosecution based on the continuing partnership in the criminal purpose is also barred. To the contrary, in so far as such partnership continued into the period of limitations, it is not barred, and in this connection it is not essential to the continuance of the conspiracy, for this purpose, that anything be done in furtherance thereof within such period.⁵⁸

In a proper case, corporations and their officers may be joined as parties defendant in a single indictment,⁵⁹ and it has been held that

ment is made, may not continue beyond the moment of making it. It is true that the unlawful agreement satisfies the definition of the crime, but it does not exhaust it. It also is true, of course, that the mere continuance of the result of a crime does not continue the crime. * * * But when the plot contemplates bringing to pass a continuous result that will not continue without the continuous co-operation of the conspirators to keep it up, and there is such continuous co-operation, it is a perversion of natural thought and of natural language to call such continuous co-operation a cinematographic series of distinct conspiracies, rather than to call it a single one. Take the present case. A conspiracy to restrain or monopolize trade by improperly excluding a competitor from business contemplates that the conspirators will remain in business, and will continue their combined efforts to drive the competitor out until they succeed. If they do continue such efforts in pursuance of the plan, the conspiracy continues up to the time of abandonment or success." See also § 3392, *supra*.

⁵⁸ *Patterson v. United States*, 222 Fed. 599, 631. Said the court: "So long * * * as the partnership in a criminal purpose continues, the conspiracy continues. And it may continue without anything being done in furtherance of it. X. and Y. conspire on a day or two before the beginning of the period within which an indict-

ment on a certain date may be found to murder Z., or to commit some other crime, on a day certain one week off; i. e., several days after the beginning of that period. After the beginning thereof, they abandon the conspiracy, either by a formal understanding, or by allowing the day to go by without doing anything, and never renewing it. In such case the partnership in the criminal purpose continues into the period. In so far, then, as it continued into the period, it was not barred by the statute of limitations. The mere fact that the prosecution for the agreement which, initiated the partnership is barred is no reason for barring it as to so much of the partnership as has continued into the period. It may be important to show something done in furtherance of the conspiracy within the period to establish its continuance into it. It is not essential to its continuance thereinto."

Where an indictment under the Sherman Act for a conspiracy to restrain and monopolize interstate and foreign trade alleges, consistently with other facts, that such conspiracy, which was formed at a date outside of the period of limitations, actually continued to the date on which the indictment was presented, such allegation must be denied under the general issue and not by a special plea of limitations. *United States v. Kissel*, 218 U. S. 601, 54 L. Ed. 1168, rev'g 173 Fed. 826.

⁵⁹ In *United States v. MacAndrews*

an officer of the corporation which was the instrument by and through which the combination of those who promoted it, among them such officer, became effective is not entitled to a directed verdict merely

& Forbes Co., 149 Fed. 823, 832, the defendants, corporations and their presidents, demurred to the indictment on the ground of improper joinder of parties. Said the court: "By this branch of the demurrer all the defendants admit that the acts alleged were done. The individuals aver that, *ex rei necessitate*, the acts were of the corporation[s]. The corporations declare that, inasmuch as no corporation can commit a crime except through human instrumentality, the acts were human; but, as there was but one crime, it must be fundamentally wrong to charge both the corporation and its instrument therewith. This argument seems to depend upon the assumption that every factum set forth in the indictment is a piece of joint activity by all the defendants. This is not true. It is charged that the unlawful combination, conspiracy, or monopoly was the result of joint action, but all of the persons alleged to be jointly responsible were not necessarily all doing the same things at the same time. There is nothing inherently impossible in the corporations doing one thing and the individuals another at or about the same time, which things were utterly different; yet all, when dovetailed together, go to make up the joint product labeled by the act—combination, conspiracy, or monopoly. It is conceivable that the evidence may show that the individual defendants were not free agents, but acted under a species of corporate coercion, for which they should not be held personally responsible; but it is impossible to arrive at this conclusion on demurrer. The series of cases arising under the indictment regarding the Distilling & Cattle Feeding Company (*In re Greene*

[C. C.] 52 Fed. 104, *U. S. v. Greenhut*, 51 Fed. 205, and *In re Terrell* [C. C.] 51 Fed. 213), show no more than that the courts have conclusively presumed that the relation between a corporation and its stockholder is not such that the latter can be held to criminal responsibility for a violation of the law in which he is not alleged to have personally participated. It is not without significance that offenses as serious, in congressional opinion, as those created by this statute are made misdemeanors. When the statute declares that certain acts notoriously to be accomplished under modern business conditions only through corporate instrumentality shall be misdemeanors, and further declares that the word 'person' as used therein shall be deemed to include corporations, such statute seems to me clearly passed in contemplation of the elementary principle that in respect of a misdemeanor all those who personally aid or abet in its commission are indictable as principals. * * * I am compelled to the conclusion that, under this statute, if the officer or agent of a corporation charged with fault be also charged with personal participation, direction, or activity therein, both may be so charged in the same indictment. * * * If, as in this case and under this statute, that which is complained of is not one single act, which is at the same time individual by nature and corporate by act of Congress, but a condition of facts to which both corporate and individual action may be contributed, a joint indictment is not only permissible, but, if it be desired to bring in all the actors and produce all the evidence, it may even be necessary."

because the court directs a verdict in favor of the corporation.⁶⁰

Since the word "conspiracy," as used in the Sherman Act, "is to be interpreted independently of the preceding words⁶¹ * * * an indictment thereunder should * * * describe something that amounts to a conspiracy under the act conformably to the rules of pleading at common law, as perhaps modified by general federal statutes."⁶² Such an indictment must show the facts constituting the conspiracy and not merely allege the conclusion that the conspiracy existed.⁶³ It is not necessary that intent be specifically alleged where

⁶⁰ *Tribolet v. United States*, 11 Ariz. 436, 16 L. R. A. (N. S.) 223, 95 Pac. 85.

In *Nash v. United States*, 229 U. S. 373, 57 L. Ed. 1232, a criminal prosecution under the Sherman Act for a conspiracy in restraint of trade, and a conspiracy to monopolize trade, the verdict of the jury which formed the basis of the judgment complained of found certain of the natural persons who were defendants guilty and one of such persons not guilty but said nothing as to the corporations which were defendants, and "it was argued with a good deal of force that the only evidence of the alleged conspiracy was certain acts done on behalf of the corporations; that the only ground for charging the defendants who were found guilty was their relation to the companies and their being presumably cognizant of and more or less responsible for the corporate acts; that if those acts tended to prove a conspiracy, they proved that the corporations, more clearly than any one else, were parties to it, and therefore that a verdict that was silent as to them ought to be set aside," but since the judgment under review was required to be reversed on another ground, namely, error in the trial court's charge to the jury, the court deemed it unnecessary "to consider the effect of Rev. Stat. § 1036, U. S. Comp. Stat. 1901, p. 723 [2 Fed. St. Ann. p. 353, § 1036, which provides that "on an indictment against several, if the jury

cannot agree upon a verdict as to all, they may render a verdict as to those in regard to whom they do agree, on which a judgment shall be entered accordingly; and the cause as to the other defendants may be tried by another jury"]', on whether on the evidence it was possible to find the defendants guilty by reason of an intent not shown to be shared by the corporations."

⁶¹ Citing *United States v. Debs*, 64 Fed. 724, quoted in note 90, § 3392, *supra*.

⁶² *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823, 831.

Indictment for conspiracy, in violation of section 1 of the Sherman Act, to restrain foreign trade and commerce in munitions of war by instigating strikes and walkouts, etc., held sufficient as against a motion to quash. *United States v. Rintelen*, 233 Fed. 793, 795.

⁶³ *Steers v. United States*, 192 Fed. 1, 6.

On the principle that "in all charges of conspiracy, the conspiracy itself is the gist of the offense," an indictment, under section 1 of the Sherman Act, for conspiracy, which specifically alleges such crime, need not allege the details of such statute with the same accuracy that would be necessary "if the charge were directly of the violation of the law * * * and not of the conspiracy to violate it." *Knauer v. United States*, 237 Fed. 8, 12.

On a writ of error by the govern-

it appears⁶⁴ from the facts set out⁶⁵ nor to allege the conspirators themselves were all traders,⁶⁶ the means by which the conspiracy was to be accomplished,⁶⁷ nor any overt act pursuant to the conspiracy.⁶⁸

ment, under the Criminal Appeals Act of March 2, 1907 (Fed. St. Ann. 1909 Supp. p. 292), from the United States Supreme Court to a United States Circuit Court, to review the judgment of the latter court whereby it sustained demurrers to certain counts of an indictment, under the Sherman Act, for a conspiracy in restraint of and to restrain trade and commerce, on the ground that the acts charged were not denounced as criminal by the anti-trust law, the Supreme Court must accept the Circuit Court's construction of the counts on the question of what acts are charged therein and can consider only the question whether such court's decision that the acts found to be charged are not condemned as criminal by the statute involved is based upon an erroneous construction of such statute. *United States v. Patten*, 226 U. S. 525, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325, followed in *United States v. Winslow*, 227 U. S. 202, 57 L. Ed. 481.

⁶⁴*United States v. Patten*, 226 U. S. 525, 57 L. Ed. 333, 44 L. R. A. (N. S.) 325. "The conspirators must be held to have intended the necessary and direct consequences of their acts, and cannot be heard to say the contrary. In other words, by purposely engaging in a conspiracy which necessarily and directly produces the result which the statute is designed to prevent, they are, in legal contemplation, chargeable with intending that result." *United States v. Patten*, *supra*.

An indictment, under section 1 of the Oklahoma Anti-Trust Act (Laws 1907-08, c. 83, art. 1), "charging a conspiracy in restraint of trade, sufficiently sets out the time when it alleges the time when the several acts

relied on to establish the offense were done, and it is not essential to set out the precise time when the conspiracy was formed." *State v. Coyle*, 7 Okla. Cr. 50, 122 Pac. 243.

⁶⁵*United States v. King*, 229 Fed. 275, 279 on the authority of *United States v. Patten*, *supra*.

Indictment for conspiracy under section 1 of the Sherman Act held fairly to charge the defendants with knowledge that their acts were directed against an article which was in the course of shipment out of the state, and therefore, assuming that it was necessary to allege such knowledge, sufficient as regarded such matter. *Steers v. United States*, 192 Fed. 1, 6.

⁶⁶*Nash v. United States*, 229 U. S. 373, 57 L. Ed. 1232 (rev'g on another ground 186 Fed. 489), citing *Loewe v. Lawlor*, 208 U. S. 274, 52 L. Ed. 488, 13 Ann. Cas. 815 (*Danbury Hatters' case*).

⁶⁷*Tribolet v. United States*, 11 Ariz. 436, 16 L. R. A. (N. S.) 223, 95 Pac. 85.

Defendants in a prosecution for conspiracy under section 1 of the Sherman Act cannot attack the indictment as vague and uncertain because of the fact that a number of different contemplated means of accomplishing the conspiracy are alleged where the allegations of the various means in contemplation are not of simultaneous and inconsistent plans but of plans for successive action, one step of which was to be taken if previous steps failed. *Steers v. United States*, 192 Fed. 1, 7.

⁶⁸*Nash v. United States*, 229 U. S. 373, 57 L. Ed. 1232, rev'g on another ground 186 Fed. 489.

An indictment for a conspiracy in violation of section 1 of the Sherman

The charging in a single count of a conspiracy to violate more than one section of the Sherman Act does not render the indictment bad for duplicity⁶⁹ and both a combination and a conspiracy may be alleged in a single count.⁷⁰ Again, an indictment cannot be held bad for duplicity in that it charges both a conspiracy in restraint of trade and an actual restraint thereof when it clearly appears that what is charged is a conspiracy and that the overt acts alleged are alleged in support of that charge and not as separate crimes.⁷¹

Direct evidence of a conspiracy in restraint of trade is not required, and indefinite acts, circumstances and conditions may be sufficient. If it be proved that the defendants by their acts, pursued the same object, although by different means, with the common view of attaining that object, the jury will be warranted in finding that they were engaged in a conspiracy to effect the same.⁷² While it will be proper during

Act need not set out that one or more of the parties have done any act to effect the object of the conspiracy. *United States v. Rintelen*, 233 Fed. 793, 794.

⁶⁹ *Knauer v. United States*, 237 Fed. 8, 13.

Motion by the government to consolidate an indictment, under the Sherman Act, for a conspiracy to restrain trade, and an indictment, under section 37 of the Criminal Code, for a conspiracy to violate section 13 of the same Code, or, in other words, a conspiracy "to begin and set on foot, and provide and prepare the means for, certain military enterprises to be carried on from within the territory and jurisdiction of the United States against the territory and dominions of the King of Great Britain, a foreign prince with whom the United States was at peace"—both conspiracies which were entered into at the same time and place and which were to be made effective by the same means being directed against the munitions commerce of the United States with nations at war with Germany—sustained. *United States v. Bopp*, 237 Fed. 283.

⁷⁰ *Tribolet v. United States*, 11 Ariz.

436, 16 L. R. A. (N. S.) 223, 95 Pac. 85.

An indictment under the Sherman Act is not duplicious when the contract alleged is the basis of combination charged and an overt act in furtherance of conspiracy alleged. *Tribolet v. United States*, supra.

An indictment, under section 1 of the Oklahoma Anti-Trust Act (Laws 1907-08, c. 83, art. 1), "charging a conspiracy in restraint of trade, is not bad for duplicity, on the theory that it alleges what was agreed to be done, and the acts to have been done in pursuance of the alleged conspiracy." *State v. Coyle*, 7 Okla. Cr. 50, 122 Pac. 243.

⁷¹ *United States v. King*, 229 Fed. 275, 277.

As to when an indictment is not duplicious, see further *United States v. MacAndrews & Forbes Co.*, 149 Fed. 823, 831.

⁷² *Marsh-Burke Co. v. Yost*, 98 Neb. 523, 153 N. W. 573.

"It is elementary * * * that conspiracies are seldom capable of proof by direct testimony, and may be inferred from the things actually done." *Eastern States Retail Lumber Dealers' Ass'n v. United States*,

the progress of the trial of persons indicted for conspiracy, under section 1 of the Sherman Act, and when of necessity items of evidence are being received which, at the time, are competent against only one of the defendants, to caution the jury as to the lawful effect of such evidence, and to do so frequently enough that the trial court may be sure the jury understands the distinctions which should be made, and while it may often be advisable to give a direct instruction on this subject at an early stage of the trial, it does not follow that a judgment of conviction should be reversed because it does not appear from the record that the court of its own motion gave such caution.⁷³

Where an indictment under the Sherman Act for a conspiracy in restraint of trade and for a conspiracy to monopolize trade sets out a number of different means by which the conspiracies were to be carried into effect but one of the means alleged, taken by itself, shows cheating only and would not warrant a finding of conspiracy, and others of the means stated are actually withdrawn from the jury, it will be such error as demands the reversal of a judgment of conviction to instruct the jury to "consider carefully all the means which the indictment charges"; to "consider the evidence of the means which it is insisted by the prosecution tends to show a conspiracy," and that "it is sufficient if it be shown beyond a reasonable doubt that some of these means charged were a part of the common scheme, design or understanding or conspiracy by two or more of the defendants, and that these same means were of themselves sufficient to cause an essential obstruction and restraint of the free and untrammelled flow of trade and commerce between the states and foreign nations."⁷⁴

234 U. S. 600, 58 L. Ed. 1490, L. R. A. 1915 A 788, aff'g decree 201 Fed. 581.

The official proceedings of an association which tend to prove the guilt of its members, indicted under the Sherman Act for conspiracy, are admissible in evidence. *Knauer v. United States*, 237 Fed. 8, 21.

⁷³ *Steers v. United States*, 192 Fed. 1, 7. Thus holding, the court said: "The judge may know from what has been said in argument by counsel before the jury, or in casual discussion not taken down by the reporter, or from the jurors' experience in previous trials, that they do understand the proper effect of such evidence. Certainly we will not presume prejudice

from the court's failure to make a distinction of this kind, in a case where he was not asked so to do."

⁷⁴ *Nash v. United States*, 229 U. S. 373, 57 L. Ed. 1232 (rev'g 186 Fed. 489). Said the court by Mr. Justice Holmes: "While it may be admitted that not all the means alleged need be proved, the charge invited the jury to consider all, and permitted a verdict upon any one of them. The fifth, sixth, and eighth statements of means to be employed were withdrawn from the jury, but the jury's attention seems not to have been called to the fact that some of the charges were abandoned, in the connection in which it was important.

§ 3398. Injunction at suit of private person. Under the express terms of section 4 of the Sherman Act the circuit courts of the United

[See, however, the charge as reported in *United States v. American Naval Stores Co.*, 172 Fed. 455 from which it appears that the court told the jury that "as to three of these means stated there has been no testimony," and again, and immediately following the second objectionable phrase, that "no evidence as to three of the means has been offered, and you should not consider them."'] Furthermore, one of the means alleged was the false raising of grades and false gauging. Taken with other evidence, if it was shown to be systematic, it would have had a tendency to show the scheme alleged. But taken by itself, as the jury might have taken it under the instructions, it showed only cheating, and could not warrant a finding of the conspiracy with which the defendants were charged. It is unnecessary to consider whether there was any evidence sufficient to warrant a conviction upon some of the other means alleged, for instance, the first ["by bidding down turpentine and rosin so that competitors could sell them only at ruinous prices"], as the absence of such evidence only would add another reason for holding the instructions wrong upon a vital point." See also *Patterson v. United States*, 222 Fed. 599, 650.

On the trial of corporate officers and agents, indicted under the Sherman Act for conspiring to restrain and monopolize interstate trade and commerce, the court may properly instruct the jury at defendants' request that it was not unlawful for the defendants to compare by demonstration or otherwise the manufactured product of the corporation with that of its competitors for the purpose of proving the superiority of the corporation's product and thereby in-

duce its purchase by the prospective customer. *Patterson v. United States*, 222 Fed. 599.

It will not be error on the trial of corporate officers and agents, indicted under the Sherman Act for conspiring to restrain and monopolize interstate trade and commerce, to refuse to instruct the jury at defendants' request that it was not unlawful for them to sell or offer and try to sell the corporation's manufactured product to persons who had bought and owned the product of competitors in exchange at such price as was satisfactory to the parties, nor unlawful for them to require the agents of the corporation to report the names of persons who had purchased the product of competitors or to secure samples of the product which such competitors from time to time put upon the market, such propositions being too broad. *Patterson v. United States*, 222 Fed. 599, 650. Thus holding the court said: "It was unlawful for defendants to do as stated in the [first] * * * proposition, if the doing thereof involved the purchaser and owner of the competing [article] * * * breaking his contract with the competitor in any particular, or was done for the purpose of driving the competitor out of the * * * field. One competitor has the right to try to sell by fair means all of his goods that he can, and if the effect of his selling is to drive another competitor out of the field he is not to blame. But it is wrong for one competitor to want to drive another competitor from the field by unfair or illegal means, and to take steps to that end, so that he may have the field free from such competition and thereby be enabled to sell his goods. Then, as to reporting purchasers

States⁷⁵ have jurisdiction to prevent and restrain violations of the statute, and the several district attorneys of the United States are charged with the duty of invoking, under the direction of the attorney general, the exercise of this jurisdiction by proper equity proceedings.⁷⁶ Clearly, therefore, the federal government has a right to go into equity to obtain redress against persons violating or threatening to violate the act.⁷⁷

Whether a private person ever has a right to injunctive relief against an actual or threatened violation of the statute, and, if he has, in what particular circumstances he may sue therefor, is a question which, although raised in a case decided less than three years after the act was passed,⁷⁸ was still being argued—and this by the Supreme Court of the United States—as late as the year 1917.⁷⁹ In disposing of this question, the courts very generally have taken the position that no such right exists in a private person in any event when he claims it as one arising solely out of the Sherman Act,⁸⁰

* * * and securing samples [of the product of competitors], it all depends on the manner in which the information in the one instance and the samples in the other were obtained or secured. If in a proper manner, nothing unlawful was done.”

⁷⁵ Such courts were abolished and their powers and duties devolved upon the district courts of the United States by the Judicial Code of 1911, § 289 et seq. (1 Fed. St. Ann. 1912 Supp. p. 249).

⁷⁶ Relief to be awarded, see § 3399, *infra*.

⁷⁷ A restraining order may be issued without notice when the circumstances are such as are recognized by the established usages of equity practice. *United States v. Coal Dealers' Ass'n of California*, 85 Fed. 252, 259.

⁷⁸ *Blindell v. Hagan*, 54 Fed. 40, decided Feb. 9, 1893.

⁷⁹ *Paine Lumber Co., Ltd. v. Neal*, 244 U. S. 459, 61 L. Ed. 1256, decided June 11, 1917.

⁸⁰ *Paine Lumber Co., Ltd. v. Neal*, 244 U. S. 459, 61 L. Ed. 1256 (Pitney, McKenna and Van Devanter, JJ., dis-

senting); *National Fireproofing Co. v. Mason Builders' Ass'n*, 169 Fed. 259, 26 L. R. A. (N. S.) 148; *Greer, Mills & Co. v. Stoller*, 77 Fed. 1, 3; *Blindell v. Hagan*, 54 Fed. 40. See also *Corey v. Independent Ice Co.*, 207 Fed. 459, 461; *Michigan Aluminum Foundry Co. v. Aluminum Castings Co.*, 190 Fed. 879, 887. And compare *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133, 140.

The Sherman Act “gives no new right to bring a suit in equity, and a careful study of the act leads to the conclusion that suits in equity or injunction suits by other than the government of the United States are not authorized by it.” *Gulf, C. & S. F. R. Co. v. Miami S. S. Co.*, 86 Fed. 407, 420. See also *Post v. Southern Ry. Co.*, 103 Tenn. 184, 55 L. R. A. 481, 52 S. W. 301.

“The anti-trust law of July 2, 1890 [Sherman Act], has wrought no such change in the law as will enable the court to enforce its provisions in favor of a private party by a bill in equity. Under this act, the only remedy given to any other party than

and that the only remedy which can be available to him under the

the government of the United States is an action at law for threefold damages, with costs and attorney's fees, and the only party entitled to maintain a bill in equity for injunctive relief for an alleged violation of its provisions is the United States by its district attorney, on the authorization of the attorney general." *Southern Indiana Exp. Co. v. United States Exp. Co.*, 88 Fed. 659, 663, aff'd 92 Fed. 1022. See also *Post v. Southern Ry. Co.*, 103 Tenn. 184, 55 L. R. A. 481, 52 S. W. 301.

"If it were the intention of the lawmakers to vest in every irresponsible individual, who may deem himself aggrieved, the right to invoke the drastic and far-reaching remedies conferred by the act, is it not reasonable to suppose that they would have said so in unambiguous terms?" *Pidcock v. Harrington*, 64 Fed. 821, 822. Mr. Justice Pitney, however, in his dissenting opinion in *Paine Lumber Co., Ltd. v. Neal*, 244 U. S. 459, 61 L. Ed. 1256, says: "Nor is the omission of an express declaration that persons threatened with special injury through violations of the act may have relief by injunction, of particular significance. Declarations of that character are rarely met within the legislation of Congress. [A marginal note here dropped reads, in part, as follows: "Sec. 16 of the so-called Clayton Act * * * contains such a provision; but this was inserted only because some of the federal courts had held—erroneously, as I think—that private parties could have no relief by injunction against threatened violations of the Sherman Act."'] The reason is not far to seek. By § 2 of article 3 of the Constitution, the judicial power is made to extend to 'all cases, in law and equity, arising under this Constitution, the laws of

the United States,' etc. This had the effect of adopting equitable remedies in all cases arising under the Constitution and laws of the United States where such remedies are appropriate. The federal courts, in exercising their jurisdiction, are not limited to the remedies existing in the courts of the respective states, but are to grant relief in equity according to the principles and practice of the equity jurisdiction as established in England. * * * To speak accurately, it is not the statute that gives a right to relief in equity, but the fact that in the particular case the threatening effects of a continuing violation of the statute are such as only equitable process can prevent. The right to equitable relief does not depend upon the nature or source of the substantive right whose violation is threatened, but upon the consequences that will flow from its violation. * * * The fact that the threatened invasion of plaintiff's rights will amount at the same time to an offense against the criminal laws is no bar to relief by injunction at the instance of a private party. *Re Debs*, 158 U. S. 564, 593, 39 L. Ed. 1092, 1105, 15 Sup. Ct. Rep. 900. I find nothing in the letter or policy of the Sherman Act to exclude the application of the ordinary principles of equity, recognized in the constitutional grant of jurisdiction. * * * The special duty imposed upon the Attorney General and the district attorneys is not inconsistent with this view: 'The field to be covered by such public prosecutions, and the objects sought thereby, are quite different from the scope and effect of an injunction granted to a private party threatened with special and irreparable injury to his property rights through a violation of the act. The

terms of the statute is the one for treble damages given by section 7 of the act.⁸¹

The statute, it would seem, contemplates not only unity of jurisdiction to decree its enforcement but also unity of power to initiate proceedings to procure its enforcement.⁸² It has been held, how-

proceeding by the district attorney is a kind of equitable quo warranto, calculated to bring the entire combination to an end, whether it be in the form of a corporation or otherwise. But there may be and are cases of direct and irreparable injury to private parties resulting from violations of the act, not capable of being redressed through actions at law under § 7; and justice to the parties aggrieved requires that the act be construed, if the language admits of such a construction (and I think it does), so as to allow an injunction to prevent irreparable injury to a private party, otherwise remediless, without going to the extent of dissolving the combination altogether, which in some cases might not be a matter of public interest or importance unless so construed, the act must operate in many instances to deprive parties of a right of injunction that they would have had without it. So far, at least, as boycotting combinations are concerned,—and this case is of that character,—the act creates no new offense and gives no new right of action.”

A state cannot institute an original suit in its own name in a circuit court under section 4 when the injury to its proprietary interests is remote and indirect. *Minnesota v. Northern Securities Co.*, 194 U. S. 48, 48 L. Ed. 870, construed in Mr. Justice Pitney’s dissenting opinion (*McKenna and Van Devanter, JJ.*, concurring) in *Paine Lumber Co., Ltd. v. Neal*, 244 U. S. 459, 61 L. Ed. 1256, as denying the right of a private person to maintain a suit for an injunction under section 4 of the Sherman Act only when

such person has not been directly and specially injured.

⁸¹ *National Fireproofing Co. v. Mason Builders’ Ass’n*, 169 Fed. 259, 263; 26 L. R. A. (N. S.) 148; *Greer, Mills & Co. v. Stoller*, 77 Fed. 1, 3.

But for section 7 of the Sherman Act a private person would have no standing in court under the provisions of such act. *Pidcock v. Harrington*, 64 Fed. 821, 822.

A demurrer for multifariousness will lie to a bill by a minority stockholder to set aside a transfer of the corporate property and assets, alleged to have been made in the carrying out of a combination and conspiracy in restraint of trade, and to recover treble damages. *Metcalf v. American School Furniture Co.*, 108 Fed. 909, aff’d 113 Fed. 1020. See also *Metcalf v. American School Furniture Co.*, 122 Fed. 115.

⁸² In *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165, 59 L. Ed. 520, Ann. Cas. 1916 A 118 (aff’g 11 Ga. App. 588, 75 S. E. 918), an action for the purchase price of goods which was sought to be defended on the ground that the corporate seller was an illegal combination (see § 3402), the court said: “Founded upon broad conceptions of public policy, the prohibitions of the statute were enacted to prevent not the mere injury to an individual which would arise from the doing of the prohibited acts, but the harm to the general public which would be occasioned by the evils which it was contemplated would be prevented, and hence not only the prohibitions of the statute, but the remedies which

ever, that section 4 of the statute does not affect the general equity jurisdiction of the circuit courts of the United States⁸³ and that

it provided, were coextensive with such conceptions. Thus the statute expressly cast upon the Attorney General of the United States the responsibility of enforcing its provisions, making it the duty of the district attorneys of the United States in their respective districts, under his authority and direction, to act concerning any violations of the law. And in addition, evidently contemplating that the official unity of initiative which was thus created to give effect to the statute required a like unity of judicial authority, the statute in express terms vested the circuit court of the United States with 'jurisdiction to prevent and restrain violations of this act,' and besides expressly conferred the amplest discretion in such courts to join such parties as might be deemed necessary, and to exert such remedies as would fully accomplish the purposes intended. * * * It is true that there are no words of express exclusion of the rights of individuals to act in the enforcement of the statute, or of courts generally to entertain complaints on that subject. But it is evident that such exclusion must be implied for a twofold reason: First, because of the familiar doctrine that 'where a statute creates a new offense and denounces the penalty, or gives a new right and declares the remedy, the punishment or the remedy can be only that which the statute prescribes.' [Citing cases.] * * * Second, because of the destruction of the powers conferred by the statute, and the frustration of the remedies which it creates, which would obviously result from admitting the right of an individual, as a means of defense to a suit brought against him on his individual and otherwise legal contract,

to assert that the corporation or combination suing had no legal existence in contemplation of the anti-trust act. This is apparent since the power given by the statute to the Attorney General is inconsistent with the existence of the right of an individual to independently act, since the purpose of the statute was where a combination or organization was found to be illegally existing to put an end to such illegal existence for all purposes, and thus protect the whole public,—an object incompatible with the thought that such a corporation should be treated as legally existing for the purpose of parting with its property by means of a contract of sale, and yet be held to be civilly dead for the purpose of recovering the price of such sale, and then, by a failure to provide against its future exertion of power, be recognized as virtually resurrected and in possession of authority to violate the law."

Under section 237 of the Judicial Code (Fed. St. Ann. 1912 Supp. vol. 1, p. 230), one, suing in a state court, who pleads the Copyright and the Sherman Acts in support of his cause of action, may upon sustaining an adverse judgment in the state court of last resort, carry his case to the Supreme Court of the United States. *Straus v. American Publishers' Ass'n*, 231 U. S. 222, 58 L. Ed. 192, L. R. A. 1915 A 1099, Ann. Cas. 1915 A 369, pretermittting the question "whether an original action can be maintained in the state courts, seeking an injunction, and to recover damages under the Sherman law."

⁸³ Re Debs, 158 U. S. 564, 39 L. Ed. 1092, denying petition for writ of habeas corpus in United States v. Debs, 64 Fed. 724; *Bigelow v. Calumet & H. Min. Co.*, 155 Fed. 869,

even though a private suit for an injunction cannot be maintained in one of such courts as involving a federal question arising out of the act, the same facts which would cause the jurisdiction of the court to attach in a suit by the government for an injunction may give a private person the right to sue for an injunction in such court, under its general equity jurisdiction, on the ground of diversity of citizenship.⁸⁴ So also, jurisdiction over a bill by a private person for an injunction under the Sherman Act may attach under general principles of equity jurisdiction to supply an adequate remedy which the law does not provide and to prevent a multiplicity of suits.⁸⁵

But, except perhaps as to suits instituted prior to the passage of the Clayton Act, what has been said heretofore in this section relates to a question which, in view of section 16 of such act, is no longer live, and, therefore, to one which may be allowed to rest without further discussion. What the courts were, perhaps, unable to do, namely, give a private person the right to sue, under the Sherman Act, to enjoin its violation, Congress could do and has done. Section 16 of the Clayton Act expressly authorizes the issuance by a federal court of an injunction at the suit of a private person "against threatened

⁸⁴ *Bigelow v. Calumet & H. Min. Co.*, 155 Fed. 869.

Illinois stockholder in a New Jersey corporation doing business and owning property in Illinois held to have the right to sue in the state courts of Illinois to enjoin the sale of the property of the corporation in Illinois and the closing out of its business therein in furtherance of a trust scheme. *Harding v. American Glucose Co.*, 182 Ill. 551, 55 N. E. 577, 64 L. R. A. 738, 74 Am. St. Rep. 189, writ of error dismissed 187 U. S. 651, 47 L. Ed. 349. See also *Dunbar v. American Telephone & Telegraph Co.*, 238 Ill. 456, 87 N. E. 521, a suit by minority stockholders in an Illinois corporation to have a sale to a foreign corporation of the majority of the stock of the Illinois corporation set aside, and for injunctive and other relief, it being alleged that the stock was purchased by the foreign corporation as a step in the creation of a monopoly, wherein the Supreme Court of Illinois said: "It must be

borne in mind all the while that in this proceeding a court of equity is seeking to protect the public against an infringement of the public policy of the state, and, having determined that the transactions in question in their purpose and inevitable tendency are to stifle competition and create a monopoly of a business impressed with a public character, the court will not be deterred from administering full relief by forms of procedure or technical rules which might control its action under other circumstances. Regard for the public welfare is the highest law of the land."

⁸⁵ *Blindell v. Hagan*, 54 Fed. 40, aff'd 56 Fed. 696.

"We do not doubt the general jurisdiction of the circuit court as a court of equity to afford preventive relief in a proper case against threatened injury about to result to an individual from any unlawful agreement, combination, or conspiracy in restraint of trade." *Gulf, C. & S. F. Ry. Co. v. Miami S. S. Co.*, 86 Fed. 407, 421.

loss or damage by a violation of the anti-trust laws⁸⁶ * * * when and under the same conditions and principles as injunctive relief against threatened conduct that will cause loss or damage, is granted by courts of equity, under the rules governing such proceedings, and upon the execution of proper bond," etc., except against a common carrier subject to the provisions of the Interstate Commerce Act in respect of any matter subject to the regulation, supervision or other jurisdiction of the Interstate Commerce Commission. While it has been said that this section of the more recent Federal Anti-Trust Act has no retroactive effect,⁸⁷ it has also been declared that it would not be giving a retrospective operation thereto for the Supreme Court of the United States to grant an injunction thereunder at the suit of private persons even though the final decree of the district court which was adverse to the complainants was entered before the act took effect, since such relief would operate only in futuro.⁸⁸

§ 3399. Relief awarded government. The jurisdiction of the federal courts to prevent and restrain violations of the federal anti-trust laws⁸⁹ is broad and comprehensive⁹⁰ but the character of the relief

⁸⁶ As to what is included in the term "antitrust laws" as used in the Clayton Act, see note 67, § 3386, supra.

⁸⁷ *Union Pac. R. Co. v. Frank*, 226 Fed. 906, 911.

⁸⁸ Per Mr. Justice Pitney, dissenting, in *Paine Lumber Co., Ltd. v. Neal*, 244 U. S. 459, 61 L. Ed. 1256, "In an equity suit for injunction," said Justice Pitney, "the reviewing court should decide the case according to the law as it exists at the time of its decision."

⁸⁹ Petition in a suit under the Sherman Act to enjoin a combination in restraint of trade will be dismissed as to secretaries of defendant corporations who had no part in forming the combination and did nothing in connection with it except to attest in their official characters papers executed by their corporations. *United States v. Standard Sanitary Mfg. Co.*, 191 Fed. 172, 194 (decree awarding injunction affirmed 226 U. S. 20, 57 L. Ed. 107).

⁹⁰ "Our power," said the court in *United States v. E. I. Du Pont de Nemours & Co.*, 188 Fed. 127, 153, "is defined in the fourth section of the Anti-Trust Act. That section invests us 'with jurisdiction to prevent and restrain violations' of the act. The same section provides that the petition may contain a prayer that the violation of law therein alleged 'shall be enjoined or otherwise prohibited.' It is our purpose, as it is our duty, to exert the power thus conferred on us to the extent necessary to 'prevent and restrain' further violations of the act. In other words, the relief we can give in this proceeding is preventive and injunctive only. If our decree, limited to that purpose, shall necessitate a discontinuance of present business methods, it is only because those methods are illegal. The incidental results of a sweeping injunction may be serious to the parties immediately concerned; but in carrying out the command of the statute, which

awarded in a suit invoking such jurisdiction will be influenced by

is as obligatory upon this court as it is upon the parties to this suit, such results should not stay our hand. They should only challenge our care that our decree be no more drastic than the facts of the case and the law demand."

Whether proceedings in a suit to enjoin a violation of the Sherman Act shall be postponed, on motion of the defendants, until after the termination of a subsequently instituted criminal prosecution, against certain of their number, under such act—which prosecution is based on the same acts as is the suit for an injunction—in order that the natural persons who are defendants in each may testify fully and freely in the equity suit without fear that their testimony will be used against them in the criminal prosecution, is a matter which lies within the sound discretion of the trial court. *Standard Sanitary Mfg. Co. v. United States*, 226 U. S. 20, 57 L. Ed. 107, aff'g 191 Fed. 172, 192. In thus holding, Mr. Justice McKenna, delivering the opinion of the Supreme Court, said: "Error is assigned on the action of the circuit court in not granting a motion made by defendants for an enlargement of time to take testimony, on the ground that they had been prevented, by the action of the government in instituting criminal proceedings, from properly presenting their defense. The question arose upon the action of witnesses who were subpoenaed and called by the Colwell Lead Company, they being officers of some of the other manufacturers. The government apprehending, and as it now contends, that the witnesses were called to give them immunity from a criminal prosecution which was then pending in Michigan, notified them that if they testified they would do so at their

peril, as immunity could only be claimed by witnesses for the government. The witnesses thereupon, upon the advice of counsel, refused to testify, leaving, as it is contended, the Colwell Company particularly, and the other defendants as well, without the evidence such witnesses could have given, and which, it is said, they did give subsequently in the criminal trial. Whether the testimony, if given, would have conferred immunity, we are not called upon to determine. The only question is as to the extent of the court's discretion in such circumstances. The Sherman Act provides for a criminal proceeding to punish violations, and suits in equity to restrain such violations, and the suits may be brought simultaneously or successively. The order of their bringing must depend upon the government; the dependence of their trials cannot be fixed by a hard-and-fast rule, or made imperatively to turn upon the character of the suit. Circumstances may determine and are for the consideration of the court. An imperative rule that the civil suit must await the trial of the criminal action might result in injustice or take from the statute a great deal of its power. Besides a suit by the government, there may be an action for damages by a 'person injured by reason of anything forbidden by the act.' Must it also wait? Indeed, the reasons urged for the rule, if logically extended, would compel the postponement of the enforcement of the civil remedies until the exhaustion of criminal prosecutions or their expiration by lapse of time. Until either event occurs, the danger of incrimination cannot be said to have passed. It is manifest, therefore, that the most favorable view which can be taken of the rights of defendants in such

several important considerations⁹¹ which will be noted hereafter.

In the American Tobacco Case wherein the conclusion of the Supreme Court was "that the combination as a whole, involving all its co-operating or associated parts, in whatever form clothed, constitutes a restraint of trade within the 1st section, and an attempt to monopolize or a monopolization within the 2d section of the anti-trust act," such court approaching the subject of relief, said: "Such subject necessarily takes a twofold aspect,—the character of the permanent relief required, and the nature of the temporary relief essential to be applied pending the working out of permanent relief in the event that it be found that it is impossible, under the situation as it now exists, to at once rectify such existing wrongful condition. In considering the subject from both of these aspects three dominant influences must guide our action: 1. The duty of giving complete and efficacious effect to the prohibitions of the statute; 2, the accomplishing of this result with as little injury as possible to the interest of the general public; and, 3, a proper regard for the vast interests of private property which may have become vested in many persons as a result of the acquisition, either by way of stock ownership or otherwise, of interests in the stock or securities of the combination without any guilty knowledge or intent in any way to become actors or participants in the wrongs which we find to have inspired and dominated the combination from the beginning."⁹²

situation is that they depend upon the discretion of the court in the particular case. We find no abuse of such discretion in the case at bar."

⁹¹ Where a combination of ocean-steamship companies, attacked by the government under the Sherman Act, has been dissolved by the European war, and the question of its illegality has thus assumed a moot character, the Supreme Court, on appeal, will, since it may not decide such question on the merits, reverse the adverse decree sustained by the government and remand the case with directions to dismiss the bill without prejudice to the government's right to assail, in the future, any actual contract or combination deemed inimical to the Anti-Trust Act. *United States v. Hamburg-Amerikanische Packetfahrt-Actien Ge-*

sellschaft, 239 U. S. 466, 60 L. Ed. 387, rev'g *United States v. Hamburg-American S. S. Line*, 216 Fed. 971, and distinguishing *Southern Pac. Terminal Co. v. Interstate Commerce Commission*, 219 U. S. 498, 55 L. Ed. 310, and *United States v. Trans-Missouri Freight Ass'n*, 166 U. S. 290, 41 L. Ed. 1007. Followed in *United States v. American-Asiatic Steamship Co.*, 242 U. S. 537, 61 L. Ed. 479, rev'g *United States v. Prince Line*, 220 Fed. 230.

⁹² *United States v. American Tobacco Co.*, 221 U. S. 106, 55 L. Ed. 663. Continuing, the court said: "Looking at the situation as we have hitherto pointed it out, it involves difficulties in the application of remedies greater than have been presented by any case involving the anti-trust

Ordinarily where acts have been done in violation of the Sherman Act, adequate measure of relief will result from restraining the doing

law which has been hitherto considered by this court: First, Because in this case it is obvious that a mere decree forbidding stock ownership by one part of the combination in another part or entity thereof would afford no adequate measure of relief, since different ingredients of the combination would remain unaffected, and by the very nature and character of their organization would be able to continue the wrongful situation which it is our duty to destroy. Second. Because the methods of apparent ownership by which the wrongful intent was, in part, carried out, and the subtle devices which * * * were resorted to for the purpose of accomplishing the wrong contemplated, by way of ownership or otherwise, are of such a character that it is difficult, if not impossible, to formulate a remedy which could restore in their entirety the prior lawful conditions. Third. Because the methods devised by which the various essential elements to the successful operation of the tobacco business from any particular aspect have been so separated under various subordinate combinations, yet, so unified by way of the control worked out by the scheme here condemned, are so involved that any specific form of relief which we might now order in substance and effect might operate really to injure the public, and, it may be, to perpetuate the wrong. * * * We might at once resort to one or the other of two general remedies,—(a) the allowance of a permanent injunction restraining the combination as a universality, and all the individuals and corporations which form a part of or co-operate in it in any manner or form from continuing to engage in interstate commerce until the illegal situation be

cured, * * * or (b) to direct the appointment of a receiver to take charge of the assets and property in this country of the combination in all its ramifications, for the purpose of preventing a continued violation of the law, and thus working out, by a sale of the property of the combination or otherwise, a condition of things which would not be repugnant to the prohibitions of the act. But, having regard to the principles which we have said must control our action, we do not think we can now direct the immediate application of either of these remedies. * * * We think so far as the permanent relief to be awarded is concerned, we should decree as follows: 1st. That the combination, in and of itself, as well as each and all of the elements composing it, whether corporate or individual, whether considered collectively or separately, be decreed to be in restraint of trade and an attempt to monopolize and a monopolization within the 1st and 2d sections of the Anti-Trust Act. 2d. That the court below in order to give effective force to our decree in this regard, be directed to hear the parties, by evidence or otherwise, as it may be deemed proper, for the purpose of ascertaining and determining upon some plan or method of dissolving the combination and of recreating, out of the elements now composing it, a new condition which shall be honestly in harmony with and not repugnant to the law. 3d. That for the accomplishment of these purposes, taking into view the difficulty of the situation, a period of six months is allowed from the receipt of our mandate, with leave, however, in the event, in the judgment of the court below, the necessities of the situation require, to extend such period to a

of such acts in the future,⁹³ but "where the condition which has been brought about in violation of the statute, in and of itself is not only a continued attempt to monopolize, but also a monopolization, the duty to enforce the statute requires the application of broader and more controlling remedies. As penalties which are not authorized by law may not be inflicted by judicial authority, it follows that to meet the situation with which we are confronted the application of remedies two-fold in character becomes essential: 1st. To forbid the doing in the future of acts like those which we have found to have been done in the past which would be violative of the statute. 2d. The exertion of such measure of relief as will effectually dissolve the combination found to exist in violation of the statute, and thus neutralize the extension and continually operating force which the possession of the power unlawfully obtained has brought and will continue to bring about."⁹⁴

further time not to exceed sixty days. 4th. That in the event, before the expiration of the period thus fixed, a condition of disintegration in harmony with the law is not brought about, either as the consequence, of the action of the court in determining an issue on the subject, or in accepting a plan agreed upon, it shall be the duty of the court either by way of an injunction restraining the movement of the products of the combination in the channels of interstate or foreign commerce, or by the appointment of a receiver, to give effect to the requirements of the statute. Pending the bringing about of the result just stated, each and all of the defendants, individuals as well as corporations, should be restrained from doing any act which might further extend or enlarge the power of the combination, by any means or device whatsoever. In view of the considerations we have stated, we leave the matter to the court below to work out a compliance with the law without unnecessary injury to the public or the rights of private property."

⁹³ *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A.

(N. S.) 834, Ann. Cas. 1912 D 734, citing *Swift & Co. v. United States*, 196 U. S. 375, 49 L. Ed. 518.

Notwithstanding certain of the unfair practices complained of have ceased, some even before the petition was filed, and there is no reason to suppose that they will again be resumed, defendants in a suit by the government under the Sherman Act "are in no position to complain against a decree of court specifically forbidding them from any resumption of practices which were merely the incidental manifestations from time to time of a purpose which actuated them throughout their whole progress." *United States v. Corn Products Refining Co.*, 234 Fed. 964, 1015.

An injunction under section 4 of the Sherman Act is not granted as a remedy for past violations of such act but is directed against present and future violations thereof. *United States v. United States Steel Corporation*, 223 Fed. 55, 59 (per Buffington, Circuit Judge).

⁹⁴ *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734. "In applying remedies for this purpose,"

Dissolution will be decreed when necessary in order to make in-

continued the court, "the fact must not be overlooked that injury to the public by the prevention of an undue restraint on, or the monopolization of, trade or commerce, is the foundation upon which the prohibitions of the statute rest, and moreover that one of the fundamental purposes of the statute is to protect, not to destroy, rights of property." See also *United States v. Terminal R. Ass'n*, 224 U. S. 383, 56 L. Ed. 810, quoting in part the statement appearing *supra*, this note.

"Where the evil effects of past undue restraint or monopoly continue to be effective and harmful when the proceeding is begun—that is, 'where the inherent nature of the contemplated acts' is such as to bring about their continuance and repetition, or where, to use the expressive language of the Supreme Court in the *Standard Oil Case*, * * * a 'perennial violation' of the [Sherman] act exists—the jurisdiction to restrain present and prevent future violations vests under" section 4 of such act. *United States v. United States Steel Corporation*, 223 Fed. 55, 59 (per Buffington, Circuit Judge), denying a decree dissolving the *United States Steel Corporation*. At another place in his opinion in this case Judge Buffington said: "What is meant by the phrase 'the inherent nature of its contemplated acts,' [*Nash v. United States*, 229 U. S. 373, 57 L. Ed. 1232] which violate the statute when an illegal combination is originally formed, and which, continuing, because inherent elements warrant its dissolution whenever questioned, is illustrated by what was found to be the fact in the *Standard Oil Case*. There the court based its right and duty to dissolve the *Standard Oil Company* on the two facts that: First, the *Standard Oil Company* * * * destroyed the 'potentiality of competition'; and,

second, that it was 'a monopolization bringing about a perennial violation of the second section of the act.'

* * * At this point we deem it proper to specially note these vitally important terms used by the Supreme Court, viz., the destruction of 'the potentiality of competition,' and the 'perennial violation' of the statute. For when it comes to the question of the dissolution of the combination, and that is the phase of this case we are now considering, a dissolution must be decreed whenever the inherent nature of its contemplated acts is such that from its very nature the combination was bound to destroy 'the potentiality of competition,' and these violations were, from its inherent nature, bound to be perennial. In other words, the *Standard Oil Company* had to be dissolved because its inherent nature was such that it was bound to destroy the power to compete in petroleum, and it would not be heard to say it had no intent to destroy competition when its inherent nature had made it do so. It therefore follows that, if such destruction of the power of competition and that by perennial violation thus evidenced the original inherent illegal nature of the combination, it would seem that if a long series of years had not resulted in a combination either destroying actual competition of others, or of their power to compete, or had not resulted in the long years of the combination's business in constant, perennial violations of law, it could not reasonably be held that the inherent original nature of such combination was such as to make it unlawful when originally created and liable to dissolution whenever afterwards challenged. On the contrary, it would seem that the acts of a combination are fair tests of the real inherent nature of the combination,

junctive relief effective,⁹⁵ but such time will be allowed for the making of the readjustment required as will prevent, if possible, disastrous

and that in such case the time-tried rule, 'By their fruits ye shall know them,' might well serve to best gauge the source or tree from or on which the fruit matured.'" *United States v. United States Steel Corporation*, 223 Fed. 55, 115 (per Buffington, Circuit Judge) denying a decree dissolving the *United States Steel Corporation*.

The dissolution of a combination, illegal under the Sherman Act, held not to be defeated by the objection either that a dissolution will "have an immediate and disastrous effect upon the foreign trade" or that "a dissolution will involve the expenditure of large sums of money to readapt the several plants to stand upon a self-subsisting basis." *United States v. Corn Products Refining Co.*, 234 Fed. 964, 1016.

⁹⁵ *United States v. United States Steel Corporation*, 223 Fed. 55, 59 (per Buffington, Circuit Judge). See also *United States v. E. I. Du Pont de Nemours & Co.*, 188 Fed. 127.

United States v. Corn Products Refining Co., 234 Fed. 964, was a suit by the government, under the Sherman Act, against various corporations and certain officers and directors thereof in which it was prayed that the defendants be declared to be combinations in restraint of trade in starch, glucose, etc., and to be attempting to monopolize such trade; that the defendants be decreed to have entered into contracts in restraint of interstate and foreign trade in such commodities and to be engaged in an effort to restrain and destroy trade therein; that the principal corporate defendant be adjudged a combination in restraint of trade in starch, glucose, etc., and a monopolization thereof, and that there be granted such other relief as might be necessary. Upon the facts, as

set out in extenso in its opinion, the court found that certain corporate reorganizations were for the purpose of monopolizing and restraining trade in the manufacture of glucose and starch; that the defendants had attempted and were attempting to monopolize the trade in mixed syrups, consisting of from 85 to 90 per cent. glucose and the balance flavoring matter; that the defendants had attempted and were attempting to monopolize the trade in glucose and starch and derivatives thereof; that the corporate consolidations set out in the petition were made for the purpose of restraining competition in domestic and foreign commerce in starch and glucose and their derivatives; that the dismantling of certain plants by the defendants was done for the purpose of monopolizing or restraining trade; that in two instances the defendants exacted, from the owners of plants purchased, contracts not to engage in the trade and that this was done with the purpose of monopolizing the industry; that the defendants engaged between certain dates in a profit-sharing plan, and that this was part of an attempt to monopolize and restrain commerce; that the defendants guaranteed their prices against decline in many instances (but that it made no finding as to the purpose with which this was done); that the defendants attempted by threats to prevent the erection of the plant of a certain company; that they subsequently succeeded in restricting the grind of that company by agreement; that they secretly and deceitfully sold at unprofitable prices a part of the product of that company, representing that it came from outside producers when, in fact, it was owned by them; that the last two mentioned devices were with

results to the public from the accomplishing of the dissolution ordered.⁹⁶

If a combination was illegal at its inception, it should be dissolved, since "only thus can its inherent nature be prevented from continuing to work further violations of the statute."⁹⁷ It is no objection to the decreeing a dissolution of a monopolistic combination that the units combined were noncompeting when each one of such units represents a phase of the general business illegally controlled.⁹⁸

the purpose of monopolizing and restraining commerce; that the defendants attempted to restrict the grind of still another company and instituted a competition in candy at less than cost for the purpose of impeding the business of that company and of securing to itself the custom of candy manufacturers, and that this was done with monopolistic intent; that during certain years the defendants, having control of the prices at which glucose and starch could be manufactured, lowered prices to a sum less than a fair profit, for the purpose of securing the trade to themselves, and harassing, annoying, and, if possible, driving out their competitors, and that this was done with monopolistic intent; that the defendants had, since a certain date, endeavored to secure to themselves by low prices as much as possible of the trade in mixed syrup of a particular kind and that this was done with monopolistic intent, and that the defendants had not used their switching roads since a specified time as a covert means of obtaining rebates. The court, however, declined to find that the defendants fixed any resale prices. Holding the principal corporate defendant to be an illegal combination, the court awarded an injunction which would cover in detail specific matters considered "such as profit-sharing, a low-price campaign, bogus independents, price agreements, attempts in any way to prevent the entry of others into the industry, or to secure agreements to restrict competi-

tion from those already in, and such other details as" should be appropriate, and also decreed that the principal corporate defendant be dissolved.

In *United States v. Eastman Kodak Co.*, 226 Fed. 62, it was found that contracts relating to certain raw-paper stock whereby the trade was prevented from obtaining such stock, the acquisition of competing plants, businesses and stock houses, the dismantling of acquired plants, the restraining of their vendors from re-entering the business, the imposing on dealers of arbitrary and oppressive terms of sale and other regulations, the arbitrary enforcement of the same through the establishment of a system of espionage and the keeping of records of violations for the purpose of penalizing guilty dealers, the limiting of the number of dealers, etc., resulted in a monopoly of the interstate trade in photographic supplies, in violation of the Sherman Act, and such monopoly was (*United States v. Eastman Kodak Co.*, of New York, 230 Fed. 522) enjoined and ordered dissolved.

⁹⁶ *United States v. E. I. Du Pont de Nemours & Co.*, 188 Fed. 127, 154. See also *American Tobacco Co. v. United States*, 221 U. S. 106, 55 L. Ed. 653; *Standard Oil Co. v. United States*, 221 U. S. 1, 55 L. Ed. 619, 34 L. R. A. (N. S.) 834, Ann. Cas. 1912 D 734.

⁹⁷ *United States v. United States Steel Corporation*, 223 Fed. 55, 64 (per Buffington, Circuit Judge).

⁹⁸ *United States v. Eastman Kodak Co. of New York*, 230 Fed. 522 (con-

But "in cases where the illegality of the combination results alone from purely administrative conditions, which may be effectively eliminated, a prohibition of the offending practices may be sufficient to vindicate the statute."⁹⁹ Thus dissolution of an illegal terminal combination will not be decreed where a proper reorganization making the combination the impartial agent of each line under compulsion to use its facilities will vindicate the purpose of the Sherman Act and at the same time preserve to the public a system of great advantage.¹ Where the court deems such course proper, it may refuse a decree of dissolution, grant such injunctive or other relief as it then appears will vindicate the law, and retain jurisdiction of the bill for such further action by the government as future developments may require.²

sidering decree to be entered); *United States v. Eastman Kodak Co.*, 226 Fed. 62, 81 (opinion on the merits).

⁹⁹*United States v. Great Lakes Towing Co.*, 208 Fed. 733, 746. See also *United States v. Keystone Watch Case Co.*, 218 Fed. 502, 519.

¹*United States v. Terminal R. Ass'n*, 224 U. S. 383, 56 L. Ed. 810. Further as to the decree in this case see *United States v. Terminal R. Ass'n*, 236 U. S. 194, 59 L. Ed. 535.

²In *United States v. American Can Co.*, 230 Fed. 859, a suit in which the government sought the dissolution under the Sherman Act of the principal corporate defendant, it was proved that such defendant was organized to monopolize interstate trade in tin cans; that to attain that object such trade was unlawfully restrained by it, and by the persons who formed it and directed its earlier activities, and that some of those persons still participated in its management and control, but that, for some time prior to the filing of the government's petition, it had done nothing of which any competitor (defendant controlling as it did only about 50 per cent. of the can trade of the country) or any consumer complained, nor anything which would strike a disinterested outsider as unfair or unethical. Upon this proof, the

court was disinclined to enter a decree of dissolution and was of the opinion that the best way of disposing of the case would be for it to retain the bill and reserve the right to enter such a decree whenever it should be made to appear that the size and power of the defendant, brought about as they originally were, were being used to the injury of the public, or whenever such size and power, without being intentionally so used, had given to the defendant a dominance and control over the can industry, or some portion of it, so great as to make dissolution or restraint expedient. Such course, the court declared, it would take unless one or the other of the parties insisted on such a final decree as would enable it to seek at once a review by a higher court. "If either of them does," said the court, "I am not prepared now to say that they will not be within their rights, and that it will not be my duty to do what they ask. That question is reserved until the occasion for deciding it shall arise." Subsequently (*United States v. American Can Co.*, 234 Fed. 1019), however, the government, believing a review of the case to be desirable, moved for a decree of dissolution. Such a decree the court still deemed both unnecessary and unwise since it appeared probable that all

Under the express provision of section 7 of the Federal Trade Commission Act³ the court may refer the matter of the form of a dissolu-

potential restraints upon free competition then imposed by the size and power of the defendant would pass away as speedily without as with dissolution, and that dissolution would cause far more loss and business disturbance than, without dissolution, would attend the gradual re-establishment of competitive conditions by the operation of economic forces. But while the government conceded the general power of equity to shape its decrees to meet the conditions with which it has to deal, it denied that a decree whereby the court retained jurisdiction of the petition could be properly entered by a District Court of the United States because "such a decree is not final. No decree will lie from any decree which is not. The court of first instance may not take away the right of review." To this argument the court made answer: "There can be no question of the absolute soundness of the third of these propositions, and the second, correctly understood, is equally unquestionable; but the rule that an aggrieved party, before he may appeal, must await the entering of a final decree, was never intended to put limitations upon the power of a court of equity to give the relief most appropriate to the case before it. What it would be lawful for a court of chancery to do if there was no such rule as to appeals remains lawful, although such rule exists. The fact is that in this case the decree to be made would be final. The case has been brought regularly to hearing. Upon the record so made, the government says it is entitled to a decree of dissolution. The court upon that record denies the relief for which the government asks, which is a final determination of the issue, so far as it depends upon the record as it stands. No one would question that a dismissal

of the petition, albeit without prejudice, would be a final decree, from which an appeal would lie. Why should a mere retention of the petition make any difference? Dissolution is equally denied on the case as made. It is true that if, from something which has occurred since the filing of the petition, and which is subsequently brought to the attention of the court, a decree for dissolution becomes proper, it may then be made, precisely as the same result would follow if the petition had been dismissed without prejudice. The only difference is that in the latter case everybody would be put to far greater cost and trouble to reach the same end." Thus holding, the court declared that it would enter a decree which while it adjudged the illegality of the purpose and early effect of defendant's organization, etc., would deny the request or demand of the government for a decree of dissolution without prejudice to a renewal of such request or demand or the seeking of other appropriate relief if it should thereafter be made to appear from facts occurring subsequently to the filing of the government's original petition that the size and power of the defendant, brought about as they originally were, were being used to the injury of the public, etc. See also *United States v. Keystone Watch Case Co.*, 218 Fed. 502, 519, wherein the court, denying a decree of dissolution, stated that it would retain jurisdiction of the bill "in case conditions in the future should make it desirable for the government to ask for additional relief, even to the point of breaking up the defendant corporation, * * * with leave to the government to take such action hereafter as may seem appropriate."

³ 38 U. S. Stat. L. 722, Fed. St. Ann. 1916 Supp. p. 116.

tion decree in a suit under the Sherman Act to the Commission, as a master in chancery, the decree reported being subject to adoption or rejection by the court in its discretion.⁴ Such reference, however, is not obligatory.⁵

Under the express provisions of the statutes of some of the states, a forfeiture of the charter of a domestic corporation,⁶ and a revocation of the license of a foreign corporation⁷ will lie for illegal trust transactions. "That state legislatures," says the Supreme Court of the United States, "have the right to deal with the subject-matter and to prevent unlawful combinations to prevent competition and in restraint of trade, and to prohibit and punish monopolies is not open to question. * * * Having the power to pass laws of this character, of course the state may provide for proceedings to enforce the same. The state, keeping within constitutional limitations, may provide its own methods and procedure and determine the methods and means by which such laws may be made effectual."⁸ When, therefore, the fact of a violation of the anti-trust statute is found, the remedy of forfeiture or revocation, as the case may be, may unquestionably be invoked. But the subject of the dissolution of domestic corporations and the ouster of foreign corporations is treated at length elsewhere in this work⁹ and will, therefore, not be gone into further at this point.

§ 3400. Action for treble damages—In general. By its express terms, section 7 of the Sherman Act¹⁰ gives to a person the right to

⁴See *United States v. Corn Products Refining Co.*, 234 Fed. 964, 1018.

⁵See *United States v. Eastman Kodak Co.* of New York, 230 Fed. 522, 524; *United States v. Eastman Kodak Co.*, 226 Fed. 62, 80.

⁶See generally *State v. Mallinckrodt Chemical Works*, 249 Mo. 702, 156 S. W. 967, aff'd 238 U. S. 41, 59 L. Ed. 1192; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902; *San Antonio Gas Co. v. State*, 22 Tex. Civ. App. 118, 54 S. W. 289.

⁷See generally *Attorney General v. National Cash Register Co.*, 182 Mich. 99, Ann. Cas. 1916 D 638, 148 N. W. 420; *State v. International Harvester Co. of America*, 237 Mo. 369, 141 S. W. 672; *State v. Standard Oil Co.*, 218 Mo. 1, 116 S. W. 902; *Waters-Pierce Oil*

Co. v. State, 19 Tex. Civ. App. 1, 44 S. W. 936.

Under the express provision of the Louisiana Constitution (Const. 1913, art. 190), ouster proceedings against a foreign corporation will lie to enforce the constitutional prohibition against trusts, monopolies, etc. See *State v. American Sugar Refining Co.*, 138 La. 1005, 71 So. 137.

⁸*Waters-Pierce Oil Co. v. Texas*, 212 U. S. 86, 53 L. Ed. 417, aff'd 48 Tex. Civ. App. 162, 106 S. W. 918.

⁹See chapter on Forfeiture, Dissolution and Winding Up, and chapter on Foreign Corporations, *infra*.

¹⁰Section 4 of the Clayton Act is very similar to this section of the Sherman Act.

sue in the Circuit Court of the United States¹¹ for threefold damages when injured in his business or property¹² by anything forbidden or declared to be unlawful by the act.¹³ Prior to the passage of the Clayton Act, section 16 of which permits the bringing of a private suit for an injunction, an action for treble damages was, it was generally held, the only remedy available to a private person under the federal anti-trust law.¹⁴ What this section of the Sherman Act authorizes is a direct action¹⁵ and since the damages made recoverable do not, as matter of law, grow directly out of the combination, and, for a further reason, since they are unliquidated, they cannot be set off in an action, by a member of an illegal combination in restraint of trade, for the purchase price of goods sold and delivered by it to the defendant under contracts which were wholly collateral to the combination agreement.¹⁶

¹¹ Now, by force of the Judicial Code of 1911 as well as by the express provision of section 4 of the Clayton Act, in the District Court of the United States.

¹² That a distinction must, upon occasion, be drawn between being injured "in" property and an injury "to" property, see *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 51 L. Ed. 241.

¹³ "Section 7 of the Sherman Law is so clear and plain in its provisions that its meaning cannot be uncertain. It is not in its nature and substance a penal action; its vindication does not rest with the state; it has been held repeatedly to be a civil remedy for private injury, compensatory in its purpose and effect. It provides for the recovery of threefold damages sustained by the plaintiff, which are held to be exemplary damages." *Strout v. United Shoe Machinery Co.*, 195 Fed. 313, 317.

Upon the principles of the common law, a cause of action under section 7 is assignable where "the injury complained of is to the estate of the plaintiff's assignors and not to them personally." *United Copper Securities Co. v. Amalgamated Copper Co.*, 232 Fed. 574, 577.

¹⁴ See § 3398, *supra*.

¹⁵ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679.

The general rule is that the legality of a combination or trust must be determined in a direct proceeding instituted for the purpose or in an action growing out of or connected with the unlawful contract under which the combination or trust exists. *Bessire & Co. v. Corn Products Mfg. Co.*, 47 Ind. App. 298, 94 N. E. 353.

¹⁶ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, consolidated actions on promissory notes and open account. Following its holding above set out, the court said: "Besides, it is well settled in Illinois [the law of which state was controlling upon the facts] that 'unliquidated damages arising out of covenants, contracts, or torts disconnected with plaintiff's claim cannot be set off under the statute.'"

A direct action by a person, injured in his business as a result of a combination, made unlawful by the Ohio Anti-Trust Law (General Code, § 6391 et seq.), through the advance in price of goods purchased by him from a member of such combination, to recover the damages to which he is entitled under such law (General Code, § 6397) is not the only remedy available to him, but, under the Ohio

Not only must the action in which the recovery of triple damages is sought be a direct one; it must also be one, not in equity, but at law wherein the defendants can have a jury trial.¹⁷

All that is necessary to support an action under section 7 is that the business or property of the plaintiff shall have been in some way injured by reason of the illegal acts alleged, the language of such section "in no wise detailing or limiting in terms the character of injuries for which a right to sue is given."¹⁸ Where a person is

statutes relating to counterclaim and set-off (General Code, §§ 11317, 11319), he may plead such damages when sued by such member on the latter's book account with him by way either of counterclaim or set-off. *Guyton v. Eastern Elec. Co.*, 91 Ohio St. 106, Ann. Cas. 1916 D 944, 110 N. E. 189.

¹⁷*Fleitmann v. Welsbach St. Lighting Co. of America*, 240 U. S. 27, 60 L. Ed. 505, aff'g *Fleitmann v. United Gas Improvement Co.*, 211 Fed. 103.

¹⁸*Monarch Tobacco Works v. American Tobacco Co.*, 165 Fed. 774, 777, holding further that injury may have resulted even though the objects of the illegal combination were only partially accomplished.

A person who sells his manufacturing plant to an illegal trust but subsequently refuses to surrender possession thereof to the purchaser, cannot, as, a result of being deprived of possession through replevin proceedings, bring an action for damages under this section, the injury sustained by him not arising out of the illegal trust but out "of the exercise of the right, which every citizen possesses, to bring a lawsuit." *Bishop v. American Preservers Co.*, 105 Fed. 845, holding further that "there is another ground which might well be considered as placing plaintiff without the provision of said act, to wit, the fact that plaintiff was himself a party to the unlawful combination, and was injured by reason of his illegal connection therewith."

The fact that a corporation [com-

bination] engaged in interstate trade appoints an exclusive selling agent for a particular locality and that injury to a third person's business results therefrom does not of itself render the corporation liable to such third person for treble damages under section 7. If the corporation [combination] is not obnoxious to such statute it may lawfully appoint an exclusive selling agent for any place that it chooses. On the other hand, if it is an illegal combination and as such condemned by the Sherman Act damages directly caused by its appointment of such an agent may be shown on the same theory as damages caused by other of its acts. *American Sea Green Slate Co. v. O'Halloran*, 229 Fed. 77, rev'g judgment *O'Halloran v. American Sea Green Slate Co.*, 207 Fed. 187.

On writ of error by plaintiff from an adverse judgment, the court in *Frey & Son v. Welch Grape Juice Co.*, 240 Fed. 114, an action "for damages under the federal statutes forbidding combinations and discriminations in restraint of trade" based on the refusal of the defendant, a manufacturer, to sell its product to the plaintiff, a wholesale grocer, which had failed to exact of its customers the price for defendant's product required by defendant, except at such price, held that it was error to admit evidence over plaintiff's objection that the profit to dealers on defendant's product at defendant's list price was the average profit on other groceries;

harméd in his business or property by a violation of the Sherman Act, he suffers a legal injury and is entitled to bring an action therefor under this section.¹⁹ A person is injured in his property when such property "is diminished by a payment of money wrongfully induced,"²⁰ and hence where it appears that an illegal combination of ocean carriers charged a shipper excessive freight rates, it cannot

that the defendant was not in any combination with other manufacturers of the same product to control the price, and that by the custom of trade the price at which the jobber is expected to sell is fixed by the manufacturer. Said the court: "All of this evidence was irrelevant and incompetent. The issues made by the pleadings were whether there was an unlawful combination to control the price of [defendant's product] * * * or unlawful discrimination against the plaintiff in charging him a greater price than other jobbers. If there was such a combination to require all dealers to sell at the price fixed by the manufacturer upon the penalty of not being allowed to sell on an equality with other traders, and the plaintiff was the victim of it, it was no defense to show that the plaintiff was required to charge only an average profit, or that it was the custom of trade for manufacturers to violate the law. *Dr. Miles Medical Company v. Park & Sons*, 220 U. S. 373, 31 Sup. Ct. 376, 55 L. Ed. 502. Nor would it avail the defendant, against the charges made by the plaintiff, to show that it had not violated the law by making a combination with [other] manufacturers of * * * [its product]."

That a corporation "is guilty of an infraction of the Anti-Trust Act and in appropriate proceedings will be dissolved is not enough to constitute a case of unfair competition against a particular person. * * * Specific injury suffered by [such person] * * * different from that sustained

by it as a member of the community is essential to its recovery of damages or to restrain further infringement upon its rights." *Motion Picture Patents Co. v. Eclair Film Co.*, 208 Fed. 416.

A retail coal company, the business of which is ruined through a conspiracy formed by a rival coal dealer, the division sales agent and territorial manager of the producer of a particular coal for which the company had the exclusive agency in the city in which it was located and in which it had built up a large and profitable business, and the secretary of a coal dealers' association, which conspiracy, conceived by the rival dealer and grounded on the fact that the company did a mail order business in carload lots of coal, other than that for which it held the exclusive agency, in territory occupied by such rival dealer, resulted in the cancellation of the company's agency contract, the refusal of members of the dealers' association to sell coal to it, and the impairment of its credit, is entitled to recover compensatory damages in an action under the Nebraska statute relating to unlawful restraint of trade ("Junkin Act," Rev. St. 1913, c. 45, art. 8). *Marsh-Burke Co. v. Yost*, 98 Neb. 523, 153 N. W. 573.

¹⁹ *Wheeler-Stenzel Co. v. National Window Glass Jobbers' Ass'n*, 152 Fed. 864, 874, 10 L. R. A. (N. S.) 972.

²⁰ *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 51 L. Ed. 241. See also *Monarch Tobacco Works v. American Tobacco Co.*, 165 Fed. 774, 779.

be contended that the evidence does not show injury to such shipper within the meaning of section 7.²¹ The business injured may be either

²¹ *Thomsen v. Cayser*, 243 U. S. 66, 61 L. Ed. 597, Ann. Cas. 1917 D 322. This was an action against ocean carriers for treble damages under section 7. Plaintiffs, shippers of ocean freight, had had a judgment in the Circuit Court but the Circuit Court of Appeals (*Union Castle Mail S. S. Co., Ltd. v. Thomsen*, 190 Fed. 536) reversed such judgment, on the ground that the case had been tried in accordance with a doctrine—namely, that the Sherman Act condemned all restraints without regard to the question of reasonableness—which had been abrogated by the decisions of the Supreme Court in the *Standard Oil and Tobacco* cases, and sent the case back for a new trial. Plaintiffs, however, desired to carry the case to the Supreme Court without further delay and were willing to stand on the record, as made, and, yielding to their wishes in the matter, the Circuit Court of Appeals subsequently (*Union Castle Mail S. S. Co., Ltd. v. Thomsen*, 190 Fed. 1022) declared that it was “prepared to recall the mandate, order a rehearing, reverse the judgment, and direct the Circuit Court to dismiss the complaint.” When the case finally reached the Supreme Court on writ of error, such court found the defendants guilty of monopolizing the ocean trade involved and, reversing the judgment of the Circuit Court of Appeals, affirmed that of the Circuit (which had then become the District) Court. Characterizing the defendants’ plan for evading the Sherman Act as “simple and as effective as simple,” the court described such plan as follows: “They established a uniform freight rate, including in it what they called a prime charge. This charge was refunded subsequently, but only to shippers who shipped exclusively

by the lines of the combining companies, and who had not, directly or indirectly, made or been interested in any shipment by other vessels. And there was the further condition that the rebate was not payable on the goods of any consignee who directly or indirectly imported goods by vessels other than those of the ‘conference,’—to use the word employed by the witnesses to describe the combining companies. This loyalty on the part of the consignees was subsequently excused, but loyalty upon the part of shippers was continued to be exacted, and its reward was the refunding of the prime charge.” Disposing of certain argument by the defendants, the court said: “They assert first that they are voluntary agencies of commerce, free to go where they will, not compelled to run from New York to Africa [the trade between New York and certain points in South Africa being that monopolized], and that, ‘unlike railroads, neither law nor any other necessity fixes them upon particular courses’; and therefore, it is asked, ‘who can say that otherwise than under the plan adopted, any of the ships of the defendants would have supplied facilities for transportation of commodities between New York and South Africa during the time referred to in the complaint?’ The resultant good of the plan, it is said, was ‘regularity of service, with steadiness of rates’; and that ‘the whole purpose of the plan under which the defendants acted was to achieve this result.’ We may answer the conjectures of the argument by the counter one that if defendants had not entered the trade, others might have done so and been willing to serve shippers without constraining them,—been willing to com-

an existing business or a contemplated business, preparations to engage in which have been made.²² The fact that the business in which a person is injured is not interstate in character²³ or that the property in which he is injured is located wholly within the boundaries of a single state²⁴ will not preclude him from recovering under this section where the injury resulted from the acts of an illegal interstate

pete against others for the patronage of the trade. And it appears from the testimony that certain lines so competed until they were taken into the defendants' combination. Nor can it be said that under defendants as competitors, or that under competing lines, service would not be regular or rates certain, or, if uncertain, that they would be detrimentally so. That the combination was intended to prevent the competition of the lines which formed it is testified, and it cannot be justified by the conjectures offered by counsel; nor can we say that the success of the trade required a constraint upon shippers or the employment of 'fighting ships' to kill off competing vessels which, tempted by the profits of the trade, used the free and unfixed courses of the seas, to paraphrase the language of counsel, to break in upon defendants' monopoly. And monopoly it was; shippers constrained by their necessities, competitors kept off by the 'fighting ships.' And it finds no justification in the fact that defendants' 'contributions to trade and commerce' might 'have been withheld.' This can be said of any of the enterprises of capital, and has been urged before to exempt them from regulation even when engaged in business which is of public concern. The contention has long since been worn out and it is established that the conduct of property embarked in the public service is subject to the policies of the law." (For the steps in this litigation which preceded the judgment of the Circuit [District] Court above referred to, see

Thomsen v. Union Castle Mail S. S. Co., 166 Fed. 251, which reversed Thomson v. Union Castle Mail S. S. Co., Ltd., 149 Fed. 933.)

²² American Banana Co. v. United Fruit Co., 166 Fed. 261, in which the court held that "in order to state a cause of action for damages under the statute, it is not necessary to aver an injury to an existing business. As said by this court in Thomsen v. Union Castle Mail Steamship Co. * * * 166 Fed. 251, 'it is as unlawful to prevent a person from engaging in business as it is to drive a person out of business.' * * * But it is necessary to state facts showing an intention and preparedness to engage in business."

"A person has a legal right to engage in a lawful business. If he is unlawfully excluded from exercising this right, when he is prepared and intends to exercise it, he suffers an injury for which the law awards damages—he is 'injured' within the meaning of the federal statute. He may be unable to prove substantial compensatory damages, but in stating the infringement of his legal rights he states a cause of action at least for nominal damages, and may perhaps so state it as to call for exemplary damages." Pennsylvania Sugar Refining Co. v. American Sugar Refining Co., 166 Fed. 254, 260.

²³ Atlanta v. Chattanooga Foundry & Pipeworks, 127 Fed. 23, 64 L. R. A. 721.

²⁴ Chattanooga Foundry & Pipe Works v. Atlanta, 203 U. S. 390, 51 L. Ed. 241.

combination.²⁵ A person suing for treble damages for injury resulting from a conspiracy to create a monopoly must, in order to be entitled to recover, be engaged in a business directly or, at least, more than remotely, affected by such conspiracy, but he need not be engaged in interstate commerce nor need the business or property in which he is injured be interstate commerce.²⁶ The fact that a person injured by an illegal restriction on interstate trade or an illegal control thereof resides in the state wherein the entire trade which is the subject of the restriction or control originates does not preclude his bringing an action under section 7.²⁷ So again, the court will not concern itself

²⁵ Local interference with an interstate business may give a right of recovery even though no single act complained of related directly to interstate commerce. *Monarch Tobacco Works v. American Tobacco Co.*, 165 Fed. 774, 780.

²⁶ *United Copper Securities Co. v. Amalgamated Copper Co.*, 232 Fed. 574, 577. See also *Dowd v. United Mine Workers of America*, 235 Fed. 1.

To be "injured in business or property," within the meaning of section 11 of the California anti-trust statute ("Cartwright Act," Stats. 1907, p. 984, amended, Stats. 1909, p. 593), which gives a right to double damages to a person injured in his business or property by reason of anything which the statute forbids or declares to be unlawful, the injury must result directly "from the fact of the existence of the trust; that is to say, where the business or property has directly sustained injury solely by reason of the restrictions in trade or commerce which are fostered by such trust or combination. In other words, while one whose business or property has been injured solely because of the restrictions in trade carried out by a trust organized and maintained for that purpose may maintain an action under the provisions of the anti-trust law for double the damages he has actually suffered from the injury so inflicted, yet he could not maintain an

action based upon said law if the injury, although directly the result of the wrongful acts of the trust or the constituent members thereof, did not arise by reason of the restrictions in trade or commerce carried out by such trust or combination." *Krigbaum v. Sbarbaro*, 23 Cal. App. 427, 138 Pac. 364.

²⁷ *Hood Rubber Co. v. United States Rubber Co.*, 229 Fed. 583, an action by a Massachusetts corporation, manufacturing rubber boots and shoes, against a New Jersey corporation, engaged in the same business, and the manufacturers of the only lasts for such boots and shoes which were made in the United States, all of which manufacturers were resident in Massachusetts, the basis of the action being certain independent contracts whereby each last manufacturer agreed to hold all of its product adapted to rubber footwear for, or subject to the orders of, the New Jersey corporation.

A complaint charging a conspiracy to prevent the plaintiff, a sugar refinery, from procuring the raw product by means of interstate commerce, alleges a conspiracy prohibited by the Sherman Act, and none the less so because it goes further and charges a conspiracy to prevent the plaintiff from engaging in any business—interstate or intrastate—at all. *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed. 254, 258.

"with the question whether the acts in pursuance of the combination which injure the plaintiff are themselves a part of interstate commerce, for the illegality arises from the project or plan as a whole * * * and the performance, innocent without it, takes its color from its setting."²⁸ The fact that a sale of merchandise for which the purchaser was compelled to pay an unreasonable price was not so connected in its terms with an illegal combination as to itself be illegal in no way alters the fact that the motives and inducements underlying the sale may have been so affected by the combination as to constitute a wrong, actionable under section 7. "In most cases where the result complained of as springing from a tort is a contract, the contract is lawful, and the tort goes only to the motives which led to its being made, as when it is induced by duress or fraud."²⁹

§ 3401. — Persons who may sue and be sued; venue; limitations; pleading, etc. When the business or property as to which injury has resulted from a violation of the Sherman Act is that of a corporation, the right of action accruing under section 7 of such act belongs to the corporation as such, and cannot be enforced by a stockholder.³⁰

²⁸ *H. B. Marienelli, Ltd. v. United Booking Offices of America*, 227 Fed. 165, 170, cited in *Motion Picture Patents Co. v. Universal Film Mfg. Co.*, 235 Fed. 398, 401.

Where a conspiracy operates directly, not alone upon the manufacture, but upon the purchase, sale, transportation and delivery of an article of interstate commerce by preventing altogether such purchase, sale, transportation and delivery, as well as such manufacture, it "regulates interstate commerce to that extent, and to the same extent trenches upon the power of the national Legislature and violates the statute." *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed. 254, 259, quoting *Addyston Pipe & Steel Co. v. United States*, 175 U. S. 239, 44 L. Ed. 136.

²⁹ *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 51 L. Ed. 241.

"The rulings of the Supreme Court * * * seem clearly to show that even lawful acts may become agencies

of wrongdoing if the motive of doing those acts be to carry into effect a combination made illegal under the statute, and particularly if doing them does in fact effectuate the purposes of the unlawful scheme." *Monarch Tobacco Works v. American Tobacco Co.*, 165 Fed. 774, 781.

³⁰ "It is settled that a stockholder cannot maintain a suit at law authorized by section 7 of the [Sherman] Act for injury to the business of his corporation whereby the value of his stock is impaired. The right of action created by this section is in the corporation alone, representing all its stockholders." *Corey v. Independent Ice Co.*, 207 Fed. 459, 460. See also *Loeb v. Eastman Kodak Co.*, 183 Fed. 704, and compare *Bigelow v. Calumet & H. Min. Co.*, 155 Fed. 869, 879.

A stockholder in a corporation, the control of which has passed into the hands of a rival corporation which has used its power to prevent its competitor from doing business, has no right of action under this section for dam-

And what a stockholder cannot accomplish in this respect through an action at law, he cannot accomplish by a bill in equity,³¹ this, if for no other reason than the one that the defendants are entitled to a jury trial on the question of their liability.³²

ages resulting from the consequent depreciation in the value of his stock, the right of action which exists belonging to the corporation as such and not to the individual stockholders. *Ames v. American Telephone & Telegraph Co.*, 166 Fed. 820.

A corporation is not precluded from recovering, under this section, on the ground that it was a party to the illegal conspiracy productive of the injury complained of, by reason of the fact that the measure resulting in its injury was adopted by its own board of directors where a majority of such board were mere dummies in the hands of the leading conspirator. *Pennsylvania Sugar Refining Co. v. American Sugar Refining Co.*, 166 Fed. 254, 261.

The question whether the purchase by one telephone company of certain stocks and bonds of another was in violation of the Sherman Act cannot be determined on appeal by a private individual from the judgment of the Circuit Court affirming an order of the State Public Utilities Commission where the appellant does not show any special damage resulting to him from such purchase. *State Public Utilities Commission v. Romberg*, 275 Ill. 432, 114 N. E. 191.

As to the remedies of stockholders for injuries to the corporation, see Chap. 56.

³¹ *Corey v. Independent Ice Co.*, 207 Fed. 459.

The provisions of the Sherman Act generally are not subject to enforcement by a private individual. It is only when special damage, not suffered by the general public, accrues to such an individual through a violation of the statute that he has a right of ac-

tion thereunder. *Union Pac. R. Co. v. Frank*, 226 Fed. 906, 909.

And this rule is not changed by section 16 of the Clayton Act since the injunctive relief therein provided for can be awarded only in case of threatened loss or damage. *Union Pac. R. Co. v. Frank*, 226 Fed. 906, 911. See also *Paine Lumber Co., Ltd. v. Neal*, 244 U. S. 459, 61 L. Ed. 1256.

³² *Fleitmann v. Welsbach St. Lighting Co.*, 240 U. S. 27, 60 L. Ed. 505, aff'g *Fleitmann v. United Gas Improvement Co.*, 211 Fed. 103. Thus holding, the Supreme Court, by Mr. Justice Holmes, said: "Of course the claim set up is that of the corporation alone, and if the corporation were proceeding directly under the statute no one can doubt that its only remedy would be at law. Therefore the inquiry at once arises why the defendants' right to a jury trial should be taken away because the present plaintiff cannot persuade the only party having a cause of action to sue—how the liability which is the principal matter can be converted into an incident of the plaintiff's domestic difficulties with the company that has been wronged. No doubt there are cases in which the nature of the right asserted for the company, or the failure of the defendants concerned to insist upon their rights, or a different state system, has led to the whole matter being disposed of in equity; but we agree with the courts below that when a penalty of triple damages is sought to be inflicted, the statute should not be read as attempting to authorize liability to be enforced otherwise than through the verdict of a jury in a court of common law. On the contrary, it plainly provides the latter

In view, however, of section 8 of the Sherman Act,³³ which provides that the word "person" or "persons" as used in the statute shall include corporations,³⁴ a municipal corporation which maintains a system of waterworks and furnishes water to consumers, charging therefor precisely as would a private corporation engaged in a like business, will be injured in its business³⁵ or property³⁶ within the meaning of section 7 when, as a result of an unlawful combination, it is compelled to pay an unreasonable price for iron water pipe required by it, and may maintain an action for the treble damages given by such section in such a case.³⁷ Moreover, in order to be entitled to recover, it need not sue the member of the combination making the sale, but may sue any other member or members thereof that it chooses, each of the members of such combination being responsible for the torts committed pursuant thereto.³⁸

remedy, and it provides no other.
* * * Even [section 16 of the Clayton Act, which was] * * * passed since this suit was begun, does not go farther in terms than to give an injunction to private persons against threatened loss."

³³ *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 51 L. Ed. 241.

³⁴ An unincorporated labor union is an "association" within the meaning of section 8 of the Sherman Act which provides that "the word 'person,' or 'persons,' wherever used in this act, shall be deemed to include * * * associations," etc., and a suit under section 7 of such statute may be brought against it in its own name. *Dowd v. United Mine Workers of America*, 235 Fed. 1, 4.

³⁵ *Atlanta v. Chattanooga Foundry & Pipeworks*, 127 Fed. 23, 64 L. R. A. 721.

³⁶ *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 51 L. Ed. 241.

³⁷ In delivering the opinion of the court in *Atlanta v. Chattanooga Foundry & Pipeworks*, 127 Fed. 23, 25, 64 L. R. A. 721, Circuit Judge Lurton (later a member of the Supreme Court of the United States) said: "That a

municipal corporation may be empowered to engage in the business of furnishing water or gas, or in the operation of street railways, as well as many other quasi public occupations, must be conceded. That the property resulting inures to the public does not alter the fact that when thus engaged it is pro hac vice a business corporation. If its 'business' as a corporation engaged in the occupation of supplying water for a consideration has been injured by the unlawful combination complained of, it is just as much entitled to maintain this suit as a private corporation engaged in a like occupation." In delivering the opinion of the Supreme Court in *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 51 L. Ed. 241, Mr. Justice Holmes declared that the city "was injured in its property, at least, if not in its business of furnishing water, by being led to pay more than the worth of the pipe." See, generally, as to the public and private character of municipal corporations, 1 McQuillin Mun. Corp. p. 203, § 87.

³⁸ *Atlanta v. Chattanooga Foundry & Pipeworks*, 127 Fed. 23, 64 L. R. A. 721.

The complaint in an action for treble damages under section 7 of the

For purposes of venue, a corporation is "found" within the meaning of this section in a district in which it is doing business, and it may be sued therein, notwithstanding diverse citizenship in that it is of foreign origin and the plaintiff is a citizen of the state, as well as an inhabitant of the district in which the defendant is found.³⁹

Sherman Act for injury resulting from a combination or conspiracy among corporations and individuals is not bad for misjoinder of parties defendant when all of the defendants are asserted to be privy to the general plan, and it is immaterial "that the execution of different parts is confined to individuals. The rules regulating original conspiracies obtain in such cases." *H. B. Marienelli, Ltd. v. United Booking Offices of America*, 227 Fed. 165, 171.

A motion to require an election will be overruled where all of the defendants are jointly charged with having entered into each of the alleged combinations and conspiracies complained of, and, while one is charged with doing one thing and one another, all of the several acts are sufficiently alleged to have been done in pursuance of the common design. *Monarch Tobacco Works v. American Tobacco Co.*, 165 Fed. 774, 782.

Only those parties to a conspiracy, condemned by the Sherman Act, who are served should be declared against as defendants in an action under section 7 of such statute, "co-conspirators" being the proper manner to refer to those not served. *Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co.*, 196 Fed. 514, 520.

Executors of deceased persons should not be stricken as parties defendant to an action under section 7 of the Sherman Act since it may be proven that those deceased secured a benefit at the expense of the plaintiff in which case the cause of action would survive against their executors. *United Copper Securities Co. v. Amalgamated Copper Co.*, 232 Fed. 574, 578.

When the only connection which two

of the corporations, joined as parties defendant in an action under section 7, had with the alleged illegal combination was through the ownership or control of a majority of the stock of each by the third corporate defendant, which alone, of the three, manufactured and traded in the particular commodity the trade in which was claimed to have been monopolized or restrained, a directed verdict in favor of such two corporations will be proper. *Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co.*, 223 Fed. 881, 885.

Clayton Act held not to require a determination of price discrimination by the federal trade commission as a condition of the court's jurisdiction of plaintiff's action for damages. *Frey & Son v. Cudahy Packing Co.*, 232 Fed. 640, holding that it was unnecessary to determine whether the law laid down in *Texas & P. Ry. Co. v. Abilene Cotton Oil Co.*, 204 U. S. 426, 51 L. Ed. 553, 9 Ann. Cas. 1075, and the cases decided on the authority thereof was ever applicable to price discrimination forbidden by the Clayton Act since the facts alleged made a case analogous to *Pennsylvania R. Co. v. International Coal Min. Co.*, 230 U. S. 184, 57 L. Ed. 1446, Ann. Cas. 1915 A 315.

³⁹ *Michigan Aluminum Foundry Co. v. Aluminum Castings Co.*, 190 Fed. 879; *Thorburn v. Gates*, 225 Fed. 613, 615, involving validity of service of process, made in New York, on executrix of two decedents, appointed in Texas and sued under section 7 of the Sherman Act for the joint wrongs of her Texan decedents.

In providing that the defendant may be served where "found," section 7

Even if it be assumed that section 4 of the Clayton Act, which provides that suit for damages may be brought in any district in which the defendant has an agent, applies to corporate defendants, it cannot be construed as meaning that such a defendant may be sued in any district in which one of its agents happens to be on business foreign to that of the corporation, nor even that the presence of an agent in a district on business for the corporation would be sufficient if such presence was merely casual. "Clearer language than that used would be required to show that Congress intended to change the rule that an officer, agent, or employe of a corporation cannot carry it into any jurisdiction in which he is not acting for it. * * * The language used; viz. 'has an agent residing,' does not suggest that the mere casual presence of an agent would be sufficient. It seems as if Congress, in using it, had in mind those cases which have held that a corporation is not doing business generally in a district, unless it is there carrying on a fairly continuous series of transactions." ⁴⁰

The Sherman Act provides no period within which an action under section 7 must be commenced, and since such an action is not a suit for a penalty ⁴¹ within the meaning of the federal statute which fixes a limitation of five years for any "suit or prosecution for any penalty or forfeiture, pecuniary or otherwise, accruing under the laws of the United States," ⁴² and which is the only federal limitation statute which could apply, the time within which an action for treble damages must be brought must be determined by state law. ⁴³

The fullness and particularity necessary in an indictment for crime is not essential in the case of the petition in an action for damages under this section. Such action is a civil one and the sufficiency

did not extend the scope of the process of the federal district courts as does section 12 of the Clayton Act but merely removed the existing limitations upon the venue of actions between persons of diverse citizenship, and permitted "the plaintiff to sue the defendant wherever he could catch him with a process good where it was executed." *Thorburn v. Gates*, 225 Fed. 613, 615.

⁴⁰ *Frey & Son v. Cudahy Packing Co.*, 228 Fed. 209, holding that a foreign corporation transacts business in a district within the meaning of section 12 of the Clayton Act when it sells to jobbers therein through drum-

mers, creates a demand for its product on the part of retailers therein through agents, makes some sales directly to ultimate consumers therein, and always keeps a stock of its goods at a certain warehouse therein for the purpose of supplying the demands of its customers.

⁴¹ *Chattanooga Foundry & Pipe Works v. Atlanta*, 203 U. S. 390, 51 L. Ed. 241.

⁴² U. S. Rev. St. § 1047, 4 Fed. St. Ann. 865.

⁴³ *Atlanta v. Chattanooga Foundry & Pipeworks*, 127 Fed. 23, 64 L. R. A. 721.

of the petition is to be tested by the law relating to pleadings in civil actions.⁴⁴ The essential averments in a declaration under this section would appear to be: (1) That the defendant has done one or more of the things forbidden by the first and second sections of the statute; (2) that by such action of the defendant the plaintiff has been injured in his business or property; and (3) that damages were sustained,⁴⁵ and these averments must be made in such clear

⁴⁴ *Monarch Tobacco Works v. American Tobacco Co.*, 165 Fed. 774.

"To require the party injured by the conspiracy denounced by the Anti-Trust Act [and suing under section 7 thereof] to set out his cause of complaint with that degree of nicety and precision in stating times, places, methods, and persons, as is required in the ordinary common-law pleading, would be to nullify the beneficent purpose of the statute. If the pleader sets out with reasonable certainty and definiteness the causes which resulted to his injury, and connects the defendant therewith, and from such allegations the defendant is apprised of the character of the accusation, and it is not apparent that he will be prejudiced in making his defense, a declaration will not be struck out, even though it may contain some statements of a general and indefinite character, and shall fail to disclose the exact times and places when some of the alleged steps in furtherance of the conspiracy were carried on, or the names of all the persons employed therein. If as to such general statements the defendant deems himself entitled to more specific information, he may apply for a bill of particulars in regard thereto; but the right of the plaintiff to have his cause judicially inquired into is not to be made dependent upon his ability to state with exactness each step or each of the several parts of a step which either from the results presumably took place or which he alleges took place. He is not required to allege more than is necessary to be proven,

nor is he to be unduly limited in making his allegations of steps taken because at the time of making them he is not in possession of the specific data which at the trial he will find necessary to establish such step, unless such step or steps by the very framework of his pleadings are essential to his cause of action, and it is apparent that without more definite data the defendant will be prejudiced in his defense in meeting such allegation. To insist that the plaintiff insert in his declaration only such steps as would be sufficient to maintain his action would be to unduly limit or skeletonize his pleading, a course apt to prove embarrassing, if not disastrous, at the trial, where the range of evidence may be limited by the paucity of the allegations, and one which would be antagonistic to, rather than co-operative with, the legislative purpose manifested in the Anti-Trust Act." *Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co.*, 196 Fed. 514, 522.

⁴⁵ *Cilley v. United Shoe Machinery Co.*, 202 Fed. 598, 599, citing *People's Tobacco Co. v. American Tobacco Co.*, 170 Fed. 396, in which the court said: "The first and second sections [of the Sherman Law] condemn certain acts, and punish them as misdemeanors. The seventh section is to the effect that those who do the forbidden things, commit the misdemeanors, may be sued in a civil action for threefold damages by one who is injured in his business or property. It follows therefore that the petition should charge,

and unambiguous language and with such reasonable certainty that the defendants and the court may be apprised of the cause of action relied on, "that it may be known by the former how to answer and

and that is all that is required: (1) That the defendants have done one or more of the forbidden things; (2) that by such action of the defendants, the plaintiff has been injured in its business or property; and (3) the amount or value of such injury. If the petition contains these essential averments, it is not subject to an exception of no cause of action, although it may contain surplusage and may specify some items of damages which may not be recoverable."

Plaintiff in an action under section 7 of the Sherman Act must allege as well as prove the commission by the defendant of an act prohibited by the statute and consequent injury to plaintiff's business or property. *Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co.*, 196 Fed. 514, 517.

"While, in a criminal prosecution [under the California anti-trust statute ("Cartwright Act"), Stats. 1907, p. 984, amended, Stats. 1909, p. 593] against persons for maintaining a trust or combination in restraint of commerce or trade, the gist of the offense is in the formation and maintenance of such trust or combination, and the fact of the existence of the combination for the purpose of doing some prohibited act is all that need be proved to support and sustain the charge, yet, in a civil action for [double] damages [by a person injured in his business or property] based upon [section 11 of such statute] * * *, it is incumbent upon the complaining party, not only to allege and prove the existence of an unlawful trust or combination, but also to allege and prove that his business or property has been injured by the very fact of the existence and prosecution of such unlawful trust or combination." *Munter v.*

Eastman Kodak Co., 28 Cal. App. 660, 153 Pac. 737, holding that a demurrer will lie to a complaint in an action for double damages, when the effect of such complaint is merely an allegation that the defendant, a manufacturer and wholesaler, refused to recognize the plaintiff as a retail dealer within the purview of the terms and conditions of its annual circular wherein was fixed the prices at which retail dealers could sell its goods and wares, and refused to sell such goods and wares to him at the prices charged other retail dealers, and there is no statement in the complaint that a combination had been formed and was being maintained by and between the defendant and its alleged allied companies to do anything prohibited by the statute and nothing therein which indicated or tended to show that the terms and conditions established and published by the defendant in its circular were unreasonable or that their effect was to create restrictions in trade or commerce, or prevent or in any way circumvent free and unhampered competition to the detriment of the public.

Plaintiff, awarded judgment in an action for injury to its business resulting from a conspiracy in restraint of trade, cannot predicate error on the refusal of the trial court to triple its damages under section 4062 of the Nebraska statute ("Junkin Act"), which provides that any person injured in his business or property by reason of anything which the article forbids or declares to be unlawful shall be entitled to threefold damages, when the prayer of the petition was for compensatory damages only and no claim for triple damages was made until after judgment had been rendered on the

prepare for trial, and by the latter what is the nature of the issue, and, if it be one of fact, to control the character of the proofs offered at the trial, and to pronounce and enforce a judgment that will settle the rights involved in such issues.”⁴⁶ When the declaration, in

verdict, and, in addition, plaintiff filed the remittitur required by the court and requested the court to render judgment for the reduced amount. *Marsh-Burke Co. v. Yost*, 98 Neb. 523, 153 N. W. 573 (pretermittting question of constitutionality of such statutory provision).

⁴⁶ *Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co.*, 196 Fed. 514, 517.

Complaint, in an action by a theatrical “clearing house,” which acted as an agent for members of the theatrical profession, against theater owners and booking offices which acted as their agents, for treble damages under section 7, held good on demurrer. *H. B. Marienelli, Ltd. v. United Booking Offices of America*, 227 Fed. 165.

As against the objection that the declaration in an action under section 7 which alleges an illegal combination does not show damage to the plaintiff, it is sufficient that such declaration charges that the result of the combination was to deprive plaintiff of its customers and prevent its making a profit from its legitimate business as theretofore existing. *Wheeler-Stenzel Co. v. National Window Glass Jobbers’ Ass’n*, 152 Fed. 864, 874, 10 L. R. A. (N. S.) 972.

Where upon the allegations of the declaration in an action for treble damages under section 7 nothing more appears than that each of the defendants, other than the principal one, independently agreed to hold all of its product, which was essential to the principal defendant’s business and to the business of those similarly engaged, among whom was the plaintiff, for the principal defendant or subject to its orders, such declaration

does not state a cause of action against the defendants, other than such principal one—no one of such secondary defendants, apparently, occupying a dominating position in the particular trade in which they were engaged; and is to be supported against the principal defendant, if at all, not as alleging a combination or conspiracy in restraint of trade—although it is charged that the principal defendant had effected the control of other corporations engaged in the same business as it and the plaintiff—but as alleging the making of contracts in unreasonable restraint of trade or a monopolization thereof, it relating, as it does, to a restraint of the trade in which the secondary defendants were engaged rather than to a restraint of the trade to which the principal defendant and the plaintiff directed their attention. *Hood Rubber Co. v. United States Rubber Co.*, 229 Fed. 583. In this action, plaintiff and the principal defendant (the latter, a corporation which had effected the control of other corporations engaged in the same business) were manufacturers of rubber boots and shoes, and the secondary defendants were the makers of lasts for such boots and shoes and the only makers thereof in the United States. In disposing of the defendants’ demurrer to the declaration, the court said: “There are no allegations that any one of the last companies knew that the rubber company [the principal defendant] was making contracts with other last companies, or was aware of any purpose or intent by the rubber company to restrain and control trade by the contract made with it, or was informed in any way that its contract was part

an action for threefold damages, is founded upon the theory that under section 7 the thing "forbidden or declared to be unlawful by this act" may reside in the scheme or combination as a whole, the court will not hold it void for duplicity and uncertainty on the defendant's objection that each of the things forbidden by sections 1 and 2 of the statute are distinct offenses and that the declaration should charge these separate offenses in separate counts.⁴⁷ It is to

of an effort by the rubber company to control and restrict interstate commerce by a series of such contracts tying up all the last companies. No one of the last companies, apparently, occupied any dominating position in that trade. Upon the allegations of the declaration, nothing more is shown than that each independently agreed to hold all its product adapted to rubber footwear for the defendant, or subject to its orders. In the absence of any purpose or intent on the part of any of the last companies to restrict and control trade by its contract, and of any knowledge that the other party to the contract was making it in pursuance of a plan to restrict, control, or monopolize interstate commerce, and of any sufficient reason to believe that such would be the natural effect of the contract with the defendant, the last companies were, in my opinion, clearly within their rights in making the contracts in question, and are not liable under the Sherman Act for having done so. Upon the same reasoning, it seems to me apparent that this declaration does not allege any combination or conspiracy in restraint of the trade in lasts. There is an entire absence of that joint or common purpose and action which are the essence of a combination or conspiracy. The attempted control was reached for by the rubber company on its own account, and, so far as is alleged, without taking any other person into its confidence or apprising any other defendant of its intent. No other per-

son participated or knowingly assisted in the illegal plan afoot. As to the last companies, no cause of action under the Sherman Act is stated. As against the United States Rubber Company [the principal defendant], the declaration does not set out any combination or conspiracy in restraint of trade. It is to be supported, if at all, as alleging contracts made by the rubber company in unreasonable restraint of interstate trade, or a monopolization of that trade. It plainly relates to restraint or control of trade in lasts, not in boots and shoes, and it alleges a complete and intentional restraint and control thereof by the defendant."

Where the manner of stating an alleged cause of action under section 7 "is challenged, the court will exercise its undoubted prerogative to notice unchallenged defects, and expunge the objectionable parts, if necessary to a proper disposition of the motion to strike out the whole declaration." *Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co.*, 196 Fed. 514, 520, denying the motion to strike out the declaration but expunging therefrom certain faulty parts thereof without costs to either party.

⁴⁷ *Cilley v. United Shoe Machinery Co.*, 202 Fed. 598. See also *Strout v. United Shoe Machinery Co.*, 202 Fed. 602.

Ruling in an action under section 7 whereby the plaintiff was required to elect whether it would insist before the jury on a violation of section 1 or

be noted, however, that it has been held that a contract and a combination or conspiracy cannot be declared upon as identical wrongs and charged in a single count.⁴⁸

Prior to the passage of the Clayton Act which by section 5 provides that "a final judgment or decree hereafter rendered * * * in any suit or proceeding in equity brought by or on behalf of the United States under the anti-trust laws to the effect that a defendant has violated such laws shall be prima facie evidence against such defendant in any suit or proceeding brought by any other party against such defendant under said laws as to all matters respecting which said judgment or decree would be an estoppel as between the parties thereto," neither the evidence nor the decree in a successful dissolution suit brought against a combination by the government was available to the plaintiff in a subsequent action under section 7 against certain of the parties defendant in such dissolution suit.⁴⁹ Moreover, by the express terms of such section, it was only judgments and decrees in suits by the government which should be rendered after the enactment of the statute that were to have the effect of prima facie evidence in subsequent suits and proceedings by third persons.⁵⁰

The damages which may be awarded in an action under section 7 are those of a direct character which may be proven with reasonable exactness and not those which are remote and speculative.⁵¹

section 2 of such statute held harmless even if formally erroneous. *Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co.*, 223 Fed. 881, 886.

A demurrer for multifariousness will lie to a bill seeking damages under the Sherman Act and also an injunction against defendant's use of complainants' trade-mark and trade name. *Block v. Standard Distilling & Distributing Co.*, 95 Fed. 978.

⁴⁸ *Rice v. Standard Oil Co.*, 134 Fed. 464, 466.

Where the illegal contracts and combinations alleged in the declaration in an action under section 7 are but steps in the conspiracy charged, "and such conspiracy has for its purpose the alleged monopoly," the declaration will not be bad for duplicity. *Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co.*, 196 Fed.

514, 517, holding that the cause of action set out by plaintiff was single.

⁴⁹ *Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co.*, 223 Fed. 881, 884.

⁵⁰ *Buckeye Powder Co. v. E. I. Du Pont de Nemours Powder Co.*, 223 Fed. 881, 884.

⁵¹ "To recover under the seventh section [of the Sherman Act] plaintiffs must show that, as a result of defendants' acts, actual damages were sustained—damages in some amount which is susceptible of expression in figures. These damages must be proved by facts from which their existence is logically and legally inferable—not by conjectures, or estimates. They must not be speculative, remote, or uncertain. As we understand the law, a jury may not merely guess that plaintiff lost \$1,000 or \$10,000 which they might have made,

§ 3402. Violation of anti-trust statute as defense to action. Aside from the fundamental rule that a court will not lend its assistance in the matter of enforcing the terms of an illegal contract,⁵² anti-trust statutes very generally provide, in effect, that contracts in violation of their provisions shall be void,⁵³ and therefore an action will not lie to enforce the terms of such a contract, and, if one is actually brought, it may be defended on the ground of the contract's illegality.⁵⁴

even if they feel reasonably sure that some loss was sustained. They cannot award damage[s] as they do for pain or suffering in an action for personal injuries, or for reputation as they do in a libel suit." *American Sea Green Slate Co. v. O'Halloran*, 229 Fed. 77, rev'g judgment *O'Halloran v. American Sea Green Slate Co.*, 207 Fed. 187.

A wholesale grocer suing a manufacturer for damages "under the federal statutes forbidding combinations and discriminations in restraint of trade," the action being based on the refusal of the defendant to sell its product to the plaintiff, which had failed to exact of its customers the price for defendant's product required by defendant, except at such price, may recover the damages which arose from the unlawful interruption of its business in selling defendant's product but cannot recover for the incidental loss of general business in other commodities, damages therefor being "too remote and uncertain. Indeed, that loss, if any, the plaintiff might have prevented altogether by purchasing and selling [defendant's product] * * * without profit." *Frey & Son v. Welch Grape Juice Co.*, 240 Fed. 114, 117.

⁵² *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227, 53 L. Ed. 486, quoting *McMullen v. Hoffman*, 174 U. S. 639, 43 L. Ed. 1117; *Camors-McConnell Co. v. McConnell*, 140 Fed. 412, 414, aff'd 140 Fed. 987.

⁵³ The Sherman Act (sections 1 and

3) pronounces certain contracts "illegal."

⁵⁴ A private individual sued upon a contract which is void as in violation of the Sherman Act may plead such fact as a defense to the action. *E. Bement & Sons v. National Harrow Co.*, 186 U. S. 70, 46 L. Ed. 1058. Thus holding the court said: "The plaintiff contends * * * that only the Attorney General of the United States can bring an action under the statute, excepting that by § 7 of the act any person injured in his business or property, as provided for therein, may himself sue in any circuit court of the United States in the district in which the defendant resides or is found. Assuming that the plaintiff is right so far as regards any suit brought under that act, we are nevertheless of opinion that anyone sued upon a contract may set up as a defense that it is a violation of the act of Congress, and, if found to be so, that fact will constitute a good defense to the action. The 1st section of the act provides that 'every contract, combination in the form of trust, or otherwise, or conspiracy, in restraint of trade or commerce among the several states or with foreign nations, is hereby declared to be illegal.' Every person making such a contract is deemed guilty of a misdemeanor, and on conviction is to be punished by fine or by imprisonment, or both. As the statute makes the contract in itself illegal, no recovery can be had upon it when the defense of illegality is shown to the court. The act pro-

The important question in this connection is the one whether the contract in a given case really is "in violation of the provisions" of the statute.⁵⁵ When the contract is the one which initiated or called into being the illegal trust or combination, or which constitutes the conspiracy, no doubt of its contravention of the statute can arise. But a contract so obviously unenforceable is not the only one which has no standing in court as being inimical to the statute.⁵⁶ Thus in order to offend, the contract, it would seem, need not be one indispensably necessary to the existence of the illegal trust or combination in the first instance, but need only have a direct and immediate effect looking to the successful carrying out of the purpose of the trust or combination. So, the Supreme Court of the United States, in a leading case,⁵⁷ has held that a contract whereby an illegal combination of wall paper manufacturers sold wall paper to a dealer there-

vides for the prevention of violations thereof, and makes it the duty of the several district attorneys, under the direction of the Attorney General, to institute proceedings in equity to prevent and restrain such violations, and it gives to any person injured in his business or property the right to sue; but that does not prevent a private individual when sued upon a contract which is void as in violation of the act from setting it up as a defense, and we think when proved it is a valid defense to any claim made under a contract thus denounced as illegal." See also *Stewart v. W. T. Rawleigh Medical Co.*, — Okla. —, 159 Pac. 1187.

A corporation which has been guilty of practices illegal under the Sherman Act is not for that reason alone to be deprived of injunctive relief against the enforcement against it of an unconstitutional statute. *American Sugar Refining Co. v. McFarland*, 229 Fed. 284, *aff'd* 241 U. S. 79, 60 L. Ed. 899.

⁵⁵ A federal district court violates no anti-trust law of the United States or the state of Missouri by taking possession of and operating through receivers an insolvent railroad system claimed to be an offender against the

federal and state statutes. *Kansas City Southern Ry. Co. v. Lusk*, 224 Fed. 704.

⁵⁶ A judgment will not lie in favor of a plaintiff suing *ex contractu* when it would, in effect, aid in the execution of agreements which constitute a combination illegal under the Sherman Act. *Stewart v. W. T. Rawleigh Medical Co.*, — Okla. —, 159 Pac. 1187 (contract of absolute sale of goods in which seller was given right to fix retail price).

A promissory note given pursuant to a contract illegal under section 22, article 12 of the Washington Constitution, prohibiting monopolies, etc., but in an attempt to circumvent such constitutional provision is unenforceable. *Manson v. Hunt*, 82 Wash. 291, 144 Pac. 45.

Nonliability on notes, consideration for which was profit in transaction between parties to conspiracy to corner wheat market, see *Lane v. Leiter*, 237 Fed. 149.

⁵⁷ *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227, 53 L. Ed. 486, *aff'g* 148 Fed. 939, and distinguishing *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, considered *infra*, this section.

in on terms looking to the accomplishment of the combination's illegal purpose, namely, the establishing of a monopoly in the wall paper trade, which terms the dealer was compelled to agree to unless he was willing to accept the alternative of being forced out of business and financially ruined, was a contract, the trade involved being of an interstate character, in violation of the Sherman Act and hence unenforceable by such combination.⁵⁸

Where, however, the contract of purchase was not inherently illegal and was wholly collateral to the combination agreement and therefore untainted by its illegality, a purchaser of goods cannot defend an action for their purchase price on the ground that the seller was a member of an illegal combination in restraint of trade or to create a monopoly.⁵⁹ This is true regardless of whether the combination's

⁵⁸ Mr. Justice Harlan, delivering the opinion of the court, said: "Stated shortly, the present case is this: The plaintiff comes into court admitting that it is an illegal combination whose operations restrain and monopolize commerce and trade among the states, and asks a judgment that will give effect, as far as it goes, to agreements that constituted that combination, and by means of which the combination proposes to accomplish forbidden ends. We hold that such a judgment cannot be granted without departing from the statutory rule, long established in the jurisprudence of both this country and England, that a court will not lend its aid, in any way to a party seeking to realize the fruits of an agreement that appears to be tainted with illegality, although the result of applying that rule may sometimes be to shield one who has got something for which, as between man and man, he ought, perhaps, to pay, but for which he is unwilling to pay. In such cases the aid of the court is denied, not for the benefit of the defendant, but because public policy demands that it should be denied without regard to the interests of individual parties. It is of no consequence that the present defendant company had knowledge of the

alleged illegal combination and its plans, or was directly or indirectly a party thereto. Its interests must be put out of view altogether when it is sought to have the assistance of the court in accomplishing ends forbidden by the law." *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, supra.

A sale and its conditions which are inherently legal cannot be made illegal so as to defeat an action for the purchase price of the goods sold by reference to the illegality of the corporate seller under the Sherman Act and the aid to be afforded to its wrongful purpose by the fulfillment of the stipulated conditions. *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165, 59 L. Ed. 520, Ann. Cas. 1916 A 118, reconciling *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, supra, and *Connolly v. Union Sewer Pipe Co.*, infra.

⁵⁹ *National Distilling Co. v. Cream City Importing Co.*, 86 Wis. 352, 39 Am. St. Rep. 902, 56 N. W. 864.

"Where the sale is in no way connected with the illegal character of the selling corporation, but one made in the regular course of business, resting upon a valid and independent consideration, it is no defense to an action for the goods sold that the plaintiff is an unlawful combination,

illegality results from the operation of the common law,⁶⁰ of a state statute,⁶¹ unless, of course, such statute declares otherwise,⁶² or of

since the sale is collateral to the illegality of the combination." *Bessire & Co. v. Corn Products Mfg. Co.*, 47 Ind. App. 298, 94 N. E. 353.

"The fact, if it be a fact, that the complainant is one of an association or combination of corporations, which constitutes a monopoly, and that its general business is illegal, as one in restraint of trade, cannot be invoked collaterally to affect in any manner its independent contract obligations or rights. * * * It is held that one who voluntarily and knowingly deals with the parties so combined cannot, on the one hand, take the benefit of his bargain, and, on the other, defend against the contract on the ground of the illegality of the combination." *Camors-McConnell Co. v. McConnell*, 140 Fed. 412, 415, aff'd 140 Fed. 987.

⁶⁰ *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, aff'g 99 Fed. 354 (consolidated actions on promissory notes and open account); *Corn Products Refining Co. v. Oriental Candy Co.*, 168 Ill. App. 585.

⁶¹ *Chicago Wall Paper Mills v. General Paper Co.*, 147 Fed. 491, 8 Ann. Cas. 889; *Harrison v. Glucose Sugar Refining Co.*, 116 Fed. 304, 58 L. R. A. 915.

It is no defense to an action for the purchase price of goods sold and delivered that the contract of sale contained terms violative of the state anti-trust act, the action not being one to enforce such terms but merely to enforce a claim which common honesty demands be settled. *McCall Co. v. Hughes*, 102 Miss. 375, 42 L. R. A. (N. S.) 63, 59 So. 794, followed in *McCall Co. v. Parson, May, Oberschmidt Co.*, 107 Miss. 865, 66 So. 274.

"The mere fact that the plaintiff corporation was [under the Wisconsin

statute] an unlawful combination would not relieve the defendant from paying for the goods purchased from it, provided the contract of purchase was not in itself unlawful." *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N. W. 1058.

⁶² Section 6 of the Illinois Anti-Trust Act of 1891 (Laws 1891, p. 206; J. & A. Ann. St. § 3555) and section 10 of the act of 1893 (Laws 1893, p. 182)—which latter act has been held unconstitutional (*Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 46 L. Ed. 679, aff'g 99 Fed. 354. See J. & A. Ann. St. vol. 2, p. 2000), and which therefore and if for no other reason did not repeal the act of 1891 (*People v. Butler St. Foundry & Iron Co.*, 201 Ill. 236, 66 N. E. 349)—expressly provide to the contrary of the general rule, as do also the statutes of some of the other states.

In order to avail of this statutory defense, defendant must show that the combination alleged is illegal under the statute and not merely illegal at common law. *Ferd Heim Brewing Co. v. Belinder*, 97 Mo. App. 64, 71 S. W. 691.

In order for section 6 of the Illinois Anti-Trust Act of 1891 to be available as a defense to an action upon a contract, a violation of such act in Illinois must be shown. *Corn Products Refining Co. v. Oriental Candy Co.*, 168 Ill. App. 585. See also *Chicago Wall Paper Mills v. General Paper Co.*, 147 Fed. 491, 8 Ann. Cas. 889.

Such a state statute cannot be applied in the case of interstate contracts. *International Harvester Co. of America v. Oliver*, 192 Fed. 59, 65. See also *Hadley Dean Plate Glass Co. v. Highland Glass Co.*, 143 Fed. 242;

the Sherman Act.⁶³ Nor can such purchaser recover back the whole

Frank A. Menne Factory v. Harback, 85 Ark. 278; 107 S. W. 991.

Under the rules of county, such a statute may be availed of in a foreign state when not contrary to the public policy thereof. *Wagner v. Minnie Harvester Co.*, 22 Okla. 890, 106 Pac. 969.

Although the language of the Kansas statute, providing that it shall be lawful to plead in bar or in abatement of an action begun in the state that the plaintiff or some other person interested in the prosecution of the action is a member or agent of an unlawful combination or trust, "is general, it is manifest that the legislature was aiming to prevent the enforcement of the illegal arrangements or contracts prohibited by the act. Obviously, the legislature intended that parties engaged in such an unlawful combination or trust should not use the law and its machinery to promote the unlawful combination or conspiracy, nor to enforce any agreement or contract growing out of it. It was evidently not intended to deprive persons of any civil rights, to place them outside of the protection of the law, or to inflict penalties and punishments without a trial conducted under the safe-guards which the constitution provides. It will hardly be contended that a person remotely connected with a corporation which has entered into such unlawful combination is deprived of the right to defend his home and family when assailed, or of the right to resort to the courts for the protection of his property and interests that are in no way connected with the unlawful combination. Such an interpretation of the law would give it somewhat the character of a bill of attainder. We cannot assume that the legislature was unaware that the federal consti-

tution forbids enactments of that character, nor that it intended to take from persons the protection of the courts, the rights of a citizen, or to outlaw them in advance of trial and conviction. We think, rather, that * * * [such] provision * * * was intended to apply where the unlawful arrangement, contract, or interest was sought to be enforced, or some step taken designed to promote the operation of the unlawful trust, combination, or conspiracy." (*Barton v. Mulvane*, 59 Kan. 313, 52 Pac. 883, 885. See also *Boatmen's Bank of St. Louis v. Fritzen*, 175 Fed. 183; *State v. Jack*, 69 Kan. 387, 1 L. R. A. (N. S.) 167, 2 Ann. Cas. 171, 76 Pac. 911); and therefore the assignee of promissory notes is not precluded from maintaining an action of replevin to recover the articles, for a part of the purchase price of which the notes were given, by reason of his being a member of an illegal trust. *Barton v. Mulvane*, 59 Kan. 313, 52 Pac. 883. Upon the authority of *Barton v. Mulvane*, supra, the court which decided that case subsequently held (*Larabee Flour Mills Co. v. Missouri Pac. R. Co.*, 85 Kan. 214, 116 Pac. 901) that membership in an association, illegal under the anti-trust laws of Kansas, does not deprive a milling company of its right to damages for a railroad company's wrongful refusal of switching service where the service desired was not a part of the purposes of the organization of the association nor in any sense necessary to the carrying out of any of such purposes.

For cause of action held to have grown of transactions of an unlawful combination within the meaning of the Tennessee statute, see *American Handle Co. v. Standard Handle Co.* (Tenn. Ch. App.), 59 S. W. 709.

⁶³ *Connolly v. Union Sewer Pipe*

or any part of the purchase price which has been actually paid by

Co., 184 U. S. 540, 46 L. Ed. 679, aff'g 99 Fed. 354 (consolidated actions on promissory notes and open account). See also *Cincinnati, P., B. S. & P. Packet Co. v. Bay*, 200 U. S. 179, 50 L. Ed. 428; *Chicago Wall Paper Mills v. General Paper Co.*, 147 Fed. 491, 8 Ann. Cas. 889; *Corn Products Refining Co. v. Oriental Candy Co.*, 168 Ill. App. 585; *Pulp Wood Co. v. Green Bay Paper & Fiber Co.*, 157 Wis. 604, 147 N. W. 1058.

"If the contract between the plaintiff corporation and the other named corporations, persons, and companies, or the combination thereby formed was illegal under the act of Congress," said the Supreme Court in *Connolly v. Union Sewer Pipe Co.*, supra, "then all those, whether persons, corporations, or associations, directly connected therewith, become subject to the penalties prescribed by Congress. But the act does not declare illegal or void any sale made by such combination, or by its agents, or property it acquired or which came into its possession for the purpose of being sold,—such property not being at the time in the course of transportation from one state to another or to a foreign country. The buyer could not refuse to comply with his contract of purchase upon the ground that the seller was an illegal combination which might be restrained or suppressed in the mode prescribed by the act of Congress; for Congress did not declare that a combination illegally formed under the act of 1890 should not, in the conduct of its business, become the owner of property which it might sell to whomsoever wished to buy it. So that there is no necessary legal connection here between the sale of pipe to the defendants by the plaintiff corporation, and the alleged arrangement made by it with other

corporations, companies, and firms. The contracts under which the pipe in question was sold were * * * collateral to the arrangement for the combination referred to, and this is not an action to enforce the terms of such arrangement. That combination may have been illegal, and yet the sale to the defendants was valid. * * * Nor can the defendants refuse to pay for what they bought, upon the ground that the 7th section of the Sherman Act gives the right to any person 'injured in his business or property by any other person or corporation by reason of anything forbidden or declared to be unlawful' by the act, to sue and recover treble the damages sustained by him. We shall not now attempt to declare the full scope and meaning of that section of the act of Congress. It is sufficient to say that the action which it authorizes must be a direct one, and the damages claimed cannot be set off in these actions based upon special contracts for the sale of pipe that have no direct connection with the alleged arrangement or combination between the plaintiff and other corporations, firms, or companies. * * * If the act of Congress expressly authorized one who purchased property from a combination organized in violation of its provisions to plead, in defense of a suit for the price, the illegal character of the combination, that would present an entirely different question. But the act contains no such provision."

A sale of goods by a corporation which is claimed by the purchaser of the goods to be a combination inimical to the Sherman Act is not inherently illegal so as to prevent a recovery of the price of such goods by reason of the purchaser's having been offered the benefit of the seller's profit-sharing scheme which demanded of its

him.⁶⁴ "The test whether a demand connected with an illegal transaction is capable of being enforced at law, is whether the plaintiff requires the aid of the illegal transaction to establish his case. If he cannot open his case, without showing that he has broken the law, a court will not assist him. But if he does not claim through the medium of the illegal transaction, but upon a new contract bottomed on independent consideration, he may recover."⁶⁵

There being no statutory rule to the contrary, agents of a corpora-

beneficiaries that they give all of their custom to the seller nor by reason of the clause in the contract of sale to the effect that the goods were bought by the purchaser for its own use and not for resale. *D. R. Wilder Mfg. Co. v. Corn Products Refining Co.*, 236 U. S. 165, 59 L. Ed. 520, Ann. Cas. 1916 A 118 (aff'g 11 Ga. App. 588, 75 S. E. 918), holding also that the purchaser having admitted that it had not fulfilled the condition of exclusive dealing was not entitled to a judgment for the share of the profits claimed by it. In holding as first above noted the court said: "Considered from the point of view of the alleged illegality of the corporation, the attack on its existence was absolutely immaterial because the right to enforce the sale did not involve the question of combination, since, conceding the illegal existence of the corporation making the sale, the obligation to pay the price was indubitable, and the duty to enforce it not disputable. This is true because the sale and the obligations which arose from it depended upon a distinct contract, with reciprocal considerations moving between the parties,—the receipt of goods on the one hand, and the payment of the price on the other. And this is but a form of stating the elementary proposition that courts may not refuse to enforce an otherwise legal contract because of some indirect benefit to a wrongdoer which would be afforded from doing so, or some remote

aid to the accomplishment of a wrong which might possibly result,—doctrines of such universal acceptance that no citation of authority is needed to demonstrate their existence, especially in view of the express ruling in *Connolly v. Union Sewer Pipe Co.* [supra] * * * applying them to the identical general question here involved."

A manufacturer suing for the balance due under a contract of absolute sale of its goods is not entitled to judgment when such contract contained a provision, illegal under the Sherman Act, whereby the manufacturer was given the right to fix the price at which such goods should be sold to consumers, and, in this connection, it is immaterial that the purchaser sued did not invariably abide by this provision. *Stewart v. W. T. Rawleigh Medical Co.*, — Okla. —, 159 Pac. 1187.

Rule announced in *Connolly v. Union Sewer Pipe Co.*, supra, held applicable by analogy in case involving sale of good will and property of corporation. *Metcalf v. American School Furniture Co.*, 122 Fed. 115. See also *Steele v. United Fruit Co.*, 190 Fed. 631 (sale of corporate stock).

⁶⁴ *Dennehy v. McNulta*, 86 Fed. 825, 829, 41 L. R. A. 609.

⁶⁵ *The Charles E. Wiswall*, 86 Fed. 671, 674, 42 L. R. A. 85, approved in *Bessire & Co. v. Corn Products Mfg. Co.*, 47 Ind. App. 298, 94 N. E. 353.

tion are not relieved from their legal liability to their principal for moneys collected by them in their fiduciary capacity and for the purchase price of goods sold to them by the corporation merely by reason of the fact that the latter is a trust or monopoly.⁶⁶ So, money advanced to a third person by a member of an illegal combination to be expended in purchasing necessary raw material for the latter but not thus used may be recovered.⁶⁷ The fact that a corporation contracting

⁶⁶ *International Harvester Co. of America v. Eaton*, Circuit Judge, 163 Mich. 55, 30 L. R. A. (N. S.) 580, Ann. Cas. 1912 A 1022, 127 N. W. 695. See also *International Harvester Co. of America v. Oliver*, 192 Fed. 59.

⁶⁷ *Epstein v. Buckeye Cotton Oil Co.*, 106 Ark. 241, 153 S. W. 587. "In the present case," said the court, "we deem it unnecessary to enter into a discussion of the question whether the contract between appellant [defendant below] and appellee [plaintiff below] for the purchase of seed should be treated as part of the alleged illegal combination or whether it was collateral; for, in either view of the case, this is not a suit upon the contract, and appellee does not invoke its enforcement. Even if the contract be treated as entirely void, appellee is entitled to recover the money advanced to buy the seed with. It would be different, of course, if appellee was suing to enforce the contract, or to recover damages for its breach. The question would arise whether the contract was valid, and, if found to contravene any statute of this state or of the United States, no recovery could be had upon it. But * * * this is merely a suit to recover money which appellee had advanced to appellant, to be used for the purchase of seed, and which was not so used. The money was the property of appellee, and continued to be until used for the prescribed purposes; and when appellant failed or refused to use it for those purposes there was an implied obligation to return it. It is not im-

portant to inquire whether, strictly speaking, the contract created the relation of principal and agent between the parties; for, in any event, appellee was entitled to recover the money, which had been advanced for certain purposes only, and was not used pursuant to the terms of the contract. * * * Some of the funds, it is contended, were advanced to appellant to use in constructing or repairing a gin in aid of his business of purchasing seed. If that be true, it did not lessen his obligation to return the money so used, where he failed to carry out the contract."

Bank taking a promissory note to cover a loan made by it directly to the maker, and in renewal of other notes, secured by a chattel mortgage, which, in good faith and without knowledge that a part of their consideration was based on a violation of the Kansas Anti-Trust Act (Laws 1897, p. 481, c. 265; Gen. St. 1901, §§ 7864-7874), it had taken as collateral security for a loan to the payee held not precluded from enforcing payment by the provision in section 7 of such act that any contract or agreement in violation of any of the act's provisions shall be absolutely void and unenforceable in any of the courts of the state. *Boatmen's Bank of St. Louis v. Fritzlen*, 221 Fed. 154, distinguishing *Continental Wall Paper Co. v. Louis Voight & Sons Co.*, 212 U. S. 227, 53 L. Ed. 486, and *State v. Wilson*, 73 Kan. 334, 117 Am. St. Rep. 479, 84 Pac. 737, 80 Pac. 639.

to manufacture and deliver certain of its product is a party to a combination to restrain trade, which combination is illegal under the Sherman Act, will not preclude the corporation from recovering damages for a breach of the contract by the purchaser, where the contract is collateral to the illegal combination.⁶⁸ Neither the common-law nor the contractual duty of a railroad company to furnish cars to a coal mining company is affected by the facts that the latter is a member of a pool or trust, that it sells all of its coal through another member of such pool or trust, and that all of the profits which it has made or will make should cars be furnished it, have been and will be the result of its membership in the pool or trust; and hence such facts do not constitute a defense to an action by the mining company for damages for the failure of the railroad company to furnish cars.⁶⁹ A combination, notwithstanding its illegal status, may recover for the tortious injury or destruction of its property.⁷⁰

It has been held, however, that a corporate conduit for illegal trust operations, which, in the carrying out of the trust scheme, has purchased and paid for (this latter, with corporate stock afterwards exchanged for trust certificates) certain property, which is left in the possession of the vendor as the agent of the trust, cannot sue such vendor in replevin to obtain possession thereof.⁷¹

⁶⁸ *Hadley Dean Plate Glass Co. v. Highland Glass Co.*, 143 Fed. 242.

⁶⁹ *Midland Valley R. Co. v. Hoffman Coal Co.*, 91 Ark. 180, 120 S. W. 380. See also *Larabee Flour Mills Co. v. Missouri Pac. R. Co.*, 85 Kan. 214, 116 Pac. 901, considered in note 62, *supra*, this section.

⁷⁰ "We are aware that courts have gone a long way in their effort to protect the people against the encroachments of trusts, monopolies, and other combines with monopolistic tendencies; but we have found no authority holding that the property of such monopoly, trust, or combine, operated in violation of the federal statute, or in restraint of trade, could be either intentionally or negligently destroyed by any one and the owner thereof held to be without remedy or right to redress. If one might negligently destroy the property of another and escape liability on the ground that

the property so destroyed was the property of an illegal combination or trust, he might with equal propriety forcibly take possession of it and resist its recovery by the owner upon the same ground. The position is utterly untenable." *Louisville & N. R. Co. v. Burley Tobacco Society*, 147 Ky. 22, 143 S. W. 1040. See also *Barton v. Mulvane*, 59 Kan. 313, 317, 52 Pac. 883, quoted in note 62, *infra*, this section.

⁷¹ *Bishop v. American Preservers' Co.*, 157 Ill. 284, 48 Am. St. Rep. 317, 41 N. E. 765, rev'g 51 Ill. App. 417. Contra, see *Gilbert v. American Surety Co. of New York*, 121 Fed. 499, 61 L. R. A. 253. See also, in connection with this last cited case, *Buckhorn Plaster Co. v. Consolidated Plaster Co.*, 47 Colo. 516, 108 Pac. 27.

To determine the question whether the transaction, long since consummated, which rendered advisable the

The illegality under the Sherman Act of the contract under which a corporation dispenses its manufactured product is not ground for denying such corporation protection against an infringement of the trade-mark covering such product, since an award of protection will not involve the enforcement of the illegal contract.⁷²

It is no defense in a suit against ticket brokers to enjoin them from trafficking in nontransferable railroad tickets that the complainant railroad company is a member of an unlawful combination that is engaged in dictating in what form and for what price such tickets shall be issued.⁷³

§ 3403. Section 3 of Clayton Act. In view of the fact that no contract of the prohibited character, whatever the time at which it was entered into, was expressly excluded from the operation of section 3 of the Clayton Act,⁷⁴ it must be presumed that Congress intended to render unlawful further performance of pre-existing contracts which offended against the statute.⁷⁵ "Understanding" as used in

disaffirmance, by railroad receivers appointed on the insolvency of the company by the federal court, of a contract theretofore entered into by the company, constituted a violation of the Sherman Act would be irrelevant to the issue raised by the application of such receivers for approval of their disaffirmance of such contract. *Kansas City Southern Ry. Co. v. Lusk*, 224 Fed. 704.

⁷² *Coca-Cola Co. v. Deacon Brown Bottling Co.*, 200 Fed. 105. See also *R. J. Reynolds Tobacco Co. v. Allen Bros. Tobacco Co.*, 151 Fed. 819.

⁷³ *Pennsylvania Co. v. Bay*, 138 Fed. 203, 207.

⁷⁴ Quoted note 66, § 3386, *supra*.

The language of section 3 of the Clayton Act is plain and contains no ambiguity which would make it necessary to resort to any source outside of the act itself, as, for example, the debates in Congress, for aid in its construction. *United States v. United Shoe Machinery Co.*, 234 Fed. 127, 146.

Since, in framing section 3 of the Clayton Act, Congress stated what acts should be unlawful, if they sub-

stantially lessened competition or tended to create a monopoly, in plain and unequivocal language, instead of using the generic words found in sections 1 and 2 of the Sherman Act, the presumption is, that Congress intended, not that the construction of the Sherman Act should control that of the Clayton Act, but, on the contrary, that it should not control. *United States v. United Shoe Machinery Co.*, 234 Fed. 127, 150.

⁷⁵ *Elliott Mach. Co. v. Center*, 227 Fed. 124. Said the court: "The statute does not in terms exclude from its operation any agreements or contracts, past, present, or future, and, in the absence of such exception, it is to be presumed that Congress intended to prohibit, not only the making of future contracts, but also the further performance of past contracts of the kind specified." See also *United States v. United Shoe Machinery Co.*, 227 Fed. 507, *rev'd* 232 Fed. 1023 (*mem. dec.*).

Clayton Act applies to contracts made before its passage. *Motion Picture Patents Co. v. Universal Film*

this section has been said to mean more than "oral agreement": "it means an implied agreement, resulting from the expressed terms of the agreement, whether written or oral, or where the law from certain acts of the parties implies an agreement to do a certain act,"⁷⁶ and leases of machinery which penalize the violation of their "tying clauses"⁷⁷ are none the less illegal because of the fact that they contain no covenants on the part of the lessees to be bound by such clauses.⁷⁸

Where the only compensation derived by the lessor of machinery is the royalty on the product manufactured in part by such machinery, clauses in the lease requiring the lessee to use the machinery to its full capacity and providing that in case the lessee shall have more machines adapted for doing the same work than is necessary for a period of 12 consecutive months, the lessor may remove the unnecessary machines, are not unreasonable nor violative of any provision of the Clayton Act.⁷⁹

The lessees in leases of machinery are neither indispensable nor necessary parties defendant to a suit by the government to enjoin the enforcement of certain clauses in such leases on the ground that they are prohibited by section 3 of the Clayton Act, since the relief prayed, if granted, will affect neither them nor their rights "except that it may relieve them of an onerous, and, as the complaint alleges, illegal, burden."⁸⁰

When it appears from the complaint in a suit by the government for an injunction for a violation of such section that the corporation, actually executing the objectionable leases, is but a subsidiary of a second corporation and that both of these corporations are under the absolute control, through stock ownership, of still a third corporation, and the acts of the lessor corporation are thus in reality the acts of such third corporation, the latter and the corporation of

Mfg. Co., 235 Fed. 398, 401, decree affirmed, without reference to Clayton Act, 243 U. S. 502, 61 L. Ed. 871, Ann. Cas. 1917 E 1187. Compare *Union Pac. R. Co. v. Frank*, 226 Fed. 906, 911, holding that such act has no retroactive effect.

⁷⁶ *United States v. United Shoe Machinery Co.*, 234 Fed. 127, 148.

⁷⁷ Scope of meaning of term "tying clause," see opinion of Brown, District Judge, in *United States v. United Shoe Machinery Co. of New Jersey*, 222 Fed. 349, 393.

⁷⁸ *United States v. United Shoe*

Machinery Co., 234 Fed. 127, 147.

⁷⁹ *United States v. United Shoe Machinery Co.*, 234 Fed. 127, 151.

The forbidding, by a trading stamp company, of the use of their stamps by nonsubscribing merchants held not within the prohibitions of section 3 of the Clayton Act. *Sperry & Hutchinson Co. v. Fenster*, 219 Fed. 755.

⁸⁰ *United States v. United Shoe Machinery Co.*, 234 Fed. 127, distinguishing *State of Minnesota v. Northern Securities Co.*, 184 U. S. 199, 46 L. Ed. 499.

which the lessor is a subsidiary are properly joined with the lessor as parties defendant.⁸¹ The complaint in a suit by the government for an injunction for a violation of section 3 of the Clayton Act need only charge that the defendant committed a prohibited act and that such act tends to substantially lessen competition or create a monopoly in interstate commerce, without further alleging that the act was "unduly and improperly exercised."⁸²

⁸¹ *United States v. United Shoe Machinery Co.*, 234 Fed. 127, 140.

⁸² *United States v. United Shoe Machinery Co.*, 234 Fed. 127, 136. Dealing with the sufficiency of the complaint, the court said: "It is claimed that the allegations in the complaint are not specific enough to enable the court to determine whether the acts charged are within the meaning of the statute, nor sufficient to enable the defendants to prepare their defense. Counsel in their arguments, as well as in their briefs, stated their position as follows: 'In any pleading, whether criminal, at law, or in equity, the thing charged should be stated with such precision and certainty that the defendant may know with what he is charged, that he may prepare his defense, and so that the court may be able to determine whether the offense charged is within the provisions of the statute.' While this rule is applied to indictments in criminal proceedings, the rule in civil actions, either at law or in equity, is much more liberal. Mr. Justice Holmes, delivering the opinion of the court in *Swift & Co. v. United States*, 196 U. S. 375, 395, 25 Sup. Ct. 276, 279 (49 L. Ed. 518), which was an action under the Sherman Anti-Trust Act, held: 'Whatever may be thought concerning the proper construction of the statute, a bill in equity is not to be read and construed as an indictment would have been read and construed 100 years ago, but it is to be taken to mean what it fairly conveys to a dispassionate reader by a fairly exact use of the

English speech.' Nor does the old rule, that 'every intendment is against the pleader, and therefore the pleadings must be strictly construed against him,' govern the courts at this day; but, on the contrary, the courts now recognize the fact that it is of more importance to determine issues than pleadings, provided, of course, the facts alleged in the complaint entitle the plaintiff to the relief sought. The new equity rules, which in effect are similar to the Code procedure prevailing in most of the states, are clearly intended to simplify pleadings and do away with many of the technicalities theretofore required. That under the Codes a demurrer upon mere technical grounds would not lie, but that the proper remedy is a motion to make the complaint more specific, is now well settled. * * * Equity rule 20 (198 Fed. xxiv, 115 C. C. A. xxiv) offers the defendants an adequate remedy, if the allegations in the complaint are not specific enough to enable them to prepare their defense. Even under the old rule general certainty only was required in pleadings in equity. * * * Only when the uncertainty in the pleadings is of such a nature that it does not state a cause of action will a demurrer, or, under the present equity rules, a motion to dismiss, lie. The complaint does not lack that certainty which is necessary to enable the court to determine whether it states a cause of action; nor can it be said that the allegations are too uncertain to enable the defendants to prepare their defense."

Unless it appears from the complaint that the setting out in extenso of the leases, which contain the clauses claimed to be illegal and sought to be enjoined, is essential to the proper construction of such clauses, the latter only, and not the leases in full, need be set out.⁸³

⁸³ United States v. United Shoe Machinery Co., 234 Fed. 127, 138. Said the court: "The failure to set out the leases in full only tends to reduce the size of the record, as the complaint expressly alleges that only the parts set out in the exhibits are contrary to the statute, and only as to them is relief sought. If other provisions of the leases would show that these excerpts are misleading, that the lease as a whole would show a different state of facts than is alleged in the complaint, they may be set out in full in the answer, as counsel during the argument admitted that they had the original leases in their possession; or,

if they believe that with the entire leases before the court it would appear that they are not subject to the construction put upon the clauses set forth in the complaint, and that they do not violate any statute of the United States, a motion under equity rule 20 [providing that "a further and better statement of the nature of the claim or defense, or further and better particulars of any matter stated in any pleading, may in any case be ordered, upon such terms, as to costs and otherwise, as may be just"] would give them all the relief needed."

CHAPTER 55

CONTEMPT

- § 3404. Classification of contempts.
- § 3405. Liability of corporations—In general.
- § 3406. — Intent.
- § 3407. What constitutes corporate contempt.
- § 3408. Liability of officers, agents, directors, etc.
- § 3409. Liability of corporation as affected by liability of officer.
- § 3410. Proceedings to punish for contempt.
- § 3411. Punishment inflicted.
- § 3412. Proceedings subsequent to judgment.

§ 3404. Classification of contempts. Proceedings against a corporation for contempt are subject to the same general principles which apply where the offender is a natural person. Such proceedings are of two classes: those prosecuted to preserve the power and vindicate the dignity of the court, and to punish for disobedience of its orders; and, secondly, those instituted to preserve and enforce the rights of parties to suits, and to compel obedience to orders and decrees made to enforce the rights, and to administer the remedies to which the court has found them to be entitled. The former are criminal and punitive in their nature, and the government, the courts, and the people are interested in their prosecution. The latter are civil, remedial and coercive in their nature, and the parties chiefly in interest, in their conduct and prosecution, are the individuals whose private rights and remedies they are instituted to protect or enforce.¹ The character and purpose of the punishment decreed may serve to determine the class of a contempt as civil or criminal. If it is for civil

¹ *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 48 L. Ed. 997; *Merchants' Stock & Grain Co. v. Board Trade City of Chicago*, 201 Fed. 20, 223 U. S. 639, 56 L. Ed. 584; *Indianapolis Water Co. v. American Strawboard Co.*, 75 Fed. 972; *Thompson v. Pennsylvania R. Co.*, 48 N. J. Eq. 105, 21 Atl. 182, 49 N. J. Eq. 318, 24 Atl. 544.

"Civil contempts are those quasi contempts which consist in failing to

do something which the contravenor is ordered by the court to do for the benefit or advantage of another party, to the proceeding before the court; while criminal contempts are all acts in disrespect of the court or its process, which obstruct the administration of justice, or tend to bring the court into disrespect." *Adams v. Gardner*, 176 Ky. 252, 195 S. W. 412.

contempt, the chief purpose of the decree is remedial; if it is for criminal contempt, the sentence is punitive, to vindicate the authority of the court.²

The process to punish for contempt criminally is merely incidental to, and largely independent of, the original proceeding in which it may be invoked. This proceeding is in its nature criminal, to punish a disobedience to civil authority, whereby the civil arm is weakened and the majesty of the law dethroned.³

A contempt may have a double aspect: Criminal, in that it interferes with the discharge of the court's duty and obstructs justice; civil, in that the interference and obstruction result in pecuniary injury to a party to a cause affected thereby.⁴

Blackstone also classifies contempts as either direct, which openly insult or resist the powers of the courts, or the persons of the judges who preside there; or else as constructive, which (without such gross insolence or direct opposition) plainly tend to create a universal disregard of their authority.⁵

§ 3405. Liability of corporations—In general. Proceeding on the reasoning of some earlier English decisions that a corporation cannot be attached in the sense that it can be personally seized or taken,⁶

² *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; *State v. North Shore Boom & Driving Co.*, 55 Wash. 1, 107 Pac. 196, 103 Pac. 426.

Thus, where, during the pendency, in a circuit court of the United States, of a suit in equity, the parties defendant were charged by complainant with having wilfully violated an injunction theretofore granted in the suit at the instance and for the benefit of complainant and at the hearing upon that complaint were adjudged guilty of contempt of the court's authority and ordered unconditionally to pay into its registry certain fines, three-fourths of each fine to go to complainant, "as compensation in part for the expenses incurred in prosecuting these contempt proceedings," and one-fourth to the United States, it was held that the proceeding was punitive in character because of the provision making a part of the fine payable to

the United States. *Re Merchants' Stock & Grain Co.*, 223 U. S. 639, 56 L. Ed. 584, following *Re Christensen Engineering Co.*, 194 U. S. 458, 48 L. Ed. 1072.

³ *First Congregational Church v. Muscatine*, 2 Iowa (2 Clarke) 69.

⁴ *Gompers v. Buck's Stove & Range Co.*, 221 U. S. 418, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 329, 48 L. Ed. 997; *In re Independent Pub. Co.*, 228 Fed. 787.

⁵ 3 Blackstone, p. 284.

⁶ *Smith v. Butler*, Comb. 326; *London v. Lynn*, 1 H. Bl. 206; *Mills' Case*, T. Raym. 152. See also *King v. Hammond & Co., Ltd.*, [1914] 2 K. B. 866; *In re Hooley*, 79 L. T. R. (N. S.) 706, 6 Manson 404.

See generally Chap. 53, *supra*, as to the view that corporations are, for this reason, not subject to criminal prosecution.

the view has been taken in some decisions that a corporation could not be punished for contempt at all.⁷ In opposition to this view it has been said: "A corporation through its agents and officers has physical power to violate or disobey the orders of the court, notwithstanding its intangibility. Though the officers and agents are punishable for the act of disobedience, their liability does not preclude liability on the part of the corporation itself. Of course the corporation cannot be imprisoned. This is a physical impossibility, but it is possible and practicable to impose a fine upon it and enforce payment thereof. Accordingly, it has been held, consistently with reason and legal principles, that a corporation may be held guilty of contempt and punished therefor by fine."⁸ The frequency with which courts now impose

⁷ *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 305, 61 L. R. A. 739, 43 S. E. 780; *Auto Highball Co. v. Sibbett*, 11 Ga. App. 618, 75 S. E. 914; *First Congregational Church v. Muscatine*, 2 Iowa (2 Clarke) 69; *Davis v. New York*, 8 N. Y. Super. Ct. (1 Duer) 451; *Demorest v. Midland R. Co.*, 10 Ont. Pr. 82.

⁸ *State v. Baltimore & O. R. Co.*, 73 W. Va. 1, 79 S. E. 834.

In still another case, frequently cited, the court reasoned as follows: "The proceeding by injunction is an important branch of the remedial power of this court. It operates with great and salutary effect, to prevent many public and private injuries, for which no other equally effective and comprehensive remedy exists. To render it of any avail, it must of course, be capable of being enforced. * * * It is not denied that an injunction may issue against a corporation. It is every day's practice, to issue process of that character. A corporation is an actual existence, in a legal sense, as much as a natural person. It is an artificial being, it is true, but it can act, and frequently with great, and it may be, with ruinous effect. It is conceded it may, by the courts, in a proper case, be restrained from acting, that is, be ordered, not to act in a given way. Is it possible that this

order cannot be enforced? Are courts so impotent, is the law so defective, that the order of the court cannot be carried into effect against the offending party? It would be a gross reflection upon the law of the land, if this were so. It is not so. The power that makes the order can enforce it. The party who disobeys the order, may be punished for it. I acknowledge no exception to the rule. For this purpose, the court is the government; the representative of the people; the embodiment of the law. Every person within its jurisdiction, high or low, natural or artificial, is, in a proper case, subject to its power, and in case of disobedience, amenable to punishment. It is no answer, to say that the act of the corporation is manifested and carried into effect by individuals, and that those persons are always liable to the process of the law, and may be punished, and therefore, an injured party has always the means of redress. It is a poor compliment to the law to say that, while the principal is the real offender, though you cannot reach him, you can reach his agent, his instrument. Besides, the agent may be entirely irresponsible or comparatively innocent. And why cannot a corporation be punished for contempt? It is said because it cannot be attached, that is, personally

punishment upon corporations for contempt in defying or disobeying

seized or taken. This shows no sufficient reason. In the former equity practice, it sometimes became necessary to order a corporation to answer a bill in chancery. If it refused it was not strictly attached, as a natural person would be; but a distringas or writ authorizing a distress upon its property was issued; this failing, a second, and sometimes a third was issued, and if all these were insufficient then process of sequestration was issued against it, and its property sequestered for the benefit of the aggrieved party (1 Barb. Ch. Pr. 76). Why may not process of sequestration be issued against it, to punish it for contempt in violating an injunction, as well as contempt in refusing to answer? Why may it not be fined for the contempt and the fine collected in the ordinary way? Corporations are often indicted for neglect of duty, or for positive misfeasance, and the punishment, upon conviction, is by the imposition of a fine. The punishment by fine for a contempt is one of the usual modes of punishment and directly recognized by statute (2 R. S. 538). So, also, the sequestration of property is recognized among the elementary writers and in adjudicated cases, as an appropriate and lawful mode of punishment for a contempt (2 Barb. Ch. Pr. 280; Van Santvoord's Eq. Pr. 635; People agt. Rogers, 2 Paige 103; Lupton agt. Hescott, 1 Sim. & Stew. 274). It is quite true, as before stated, that the parties directly guilty in their own persons, of a violation of the injunction, may be punished. That may be necessary or expedient to be done; but that may not be enough; it may be, and often is, quite proper that the principal offender who sets on foot the violation of the injunction, should be punished and made to feel the power of the

law. Nor is it any answer to say, that thus the innocent stockholders may suffer for the offensive or unlawful acts of the directors of a corporation. That is always so; that is incident to the very nature of a corporation. The directors are the agents of the stockholders, appointed by them, and they like all others, who appoint unworthy or indiscreet agents, must take the consequences of their own unfortunate selection. I cannot coincide in the opinion expressed by the late Mr. Justice Duer, of the Superior Court of New York, in Davis agt. The Mayor, &c., of New York (1 Duer 484), as to the inefficiency of this process upon the corporation itself. It is true that a corporation cannot be personally attached or apprehended, but I do not agree that there are no means by which its obedience to an injunction can be compelled, or its disobedience punished, or that as to the corporation itself, the injunction is a mere brutum fulmen. On the contrary, I think the means of punishment are within the reach of the court, and though not probably quite so effective as in the case of natural person (for imprisonment cannot be resorted to), yet they are sufficiently so in most cases to effect the desired object. Much of the supposed impunity of corporations, as such, from punishment for contempt, when spoken of in the elementary treatises on this subject, is founded, I think, upon the idea that they cannot be attached, from which it by no means follows, that other modes of punishment may not be administered. * * * I am satisfied, therefore, of the power of the court to punish a corporation for a willful disobedience of the order of the court, * * *." People v. Albany & V. R. Co., 12 Abb. Pr. (N. Y.) 171, 20 How. Pr. (N. Y.) 358.

the authority of the court in a case within its jurisdiction shows that any doubt as to their power to do so has been finally set at rest and that it is no longer questioned that their power over corporations is, in this regard, coextensive with their power over natural persons,⁹ and, without regard to the amenability of corporations to attachment, that they are subject to punishment for contempt.¹⁰ Nor does the fact

⁹ As illustrating the manner and extent of the present use of contempt proceedings against corporations, see the following decisions:

United States. Consolidated Rendering Co. v. Vermont, 207 U. S. 541, 52 L. Ed. 327; Re Christensen Engineering Co., 194 U. S. 458, 48 L. Ed. 1072; Merchants' Stock & Grain Co. v. Board Trade City of Chicago, 201 Fed. 20, 223 U. S. 639, 56 L. Ed. 584; Continental Gin Co. v. Murray Co., 162 Fed. 873; Carey Mfg. Co. v. Acme Flexible Clasp Co., 108 Fed. 873, 187 U. S. 427, 47 L. Ed. 244; Indianapolis Water Co. v. American Strawboard Co., 75 Fed. 972; American Const. Co. v. Jacksonville, T. & K. W. R. Co., 52 Fed. 937; In re North Bloomfield Gravel Min. Co., 11 Sawy. 590, 27 Fed. 795; Southern Development Co. v. Houston & T. C. R. Co., 27 Fed. 344; Wells Fargo & Co. v. Oregon Ry. & Nav. Co., 9 Sawy. 601, 19 Fed. 20; In re Tift, 11 Fed. 463; United States v. Memphis & L. R. R. Co., 6 Fed. 237.

California. Seventy-Six Land & Water Co. v. Superior Court, 93 Cal. 139, 28 Pac. 813; Golden Gate Consol. Hydraulic Min. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628.

Illinois. Franklin Union No. 4 v. People, 220 Ill. 355, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248, 77 N. E. 176; In re Western Marine & Fire Ins. Co., 38 Ill. 289.

Kentucky. Stratton & Terstegge Co. v. Meriwether, 154 Ky. 839, 159 S. W. 613.

Massachusetts. Com. v. New York Cent. & H. River R. Co., 206 Mass.

417, 19 Ann. Cas. 529, 92 N. E. 766; Globe Newspaper Co. v. Com., 188 Mass. 449, 3 Ann. Cas. 761, 74 N. E. 682; Telegram Newspaper Co. v. Com., 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280, 52 N. E. 445; Jones v. Boston Mill Corporation, 4 Pick. 507, 16 Am. Dec. 358.

Michigan. Detroit & B. Plank-Road Co. v. Detroit Citizens' St. Ry. Co., 97 Mich. 583, 56 N. W. 940.

Nebraska. State v. Bee Pub. Co., 60 Neb. 282, 50 L. R. A. 195, 83 Am. St. Rep. 531, 83 N. W. 204.

New Jersey. West Jersey Traction Co. v. Board Public Works City of Camden, 58 N. J. L. 536, 37 Atl. 578.

New York. Schreiber v. Garden, 152 App. Div. 817, 137 N. Y. Supp. 747; In re Westminster Realty Corporation, 123 App. Div. 797, 108 N. Y. Supp. 551; Manhattan Elec. Light Co. v. Harlem Lighting Co., 63 Hun 631, 44 N. Y. St. Rep. 169, 18 N. Y. Supp. 371; Prince Mfg. Co. v. Prince Metallic Paint Co., 51 Hun 443, 4 N. Y. Supp. 348; Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co., 48 Hun 190, 15 N. Y. St. Rep. 686; Taber v. New York El. R. Co., 12 Misc. 460, 34 N. Y. Supp. 29.

South Carolina. State v. Cape Fear Lumber Co., 72 S. C. 322, 51 S. E. 873.

Virginia. Baltimore & O. R. Co. v. Wheeling, 13 Gratt. 40.

¹⁰ Golden Gate Consol. Hydraulic Min. Co. v. Superior Court, 65 Cal. 187, 3 Pac. 628; Franklin Union No. 4 v. People, 220 Ill. 355, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248, 77 N. E. 176; Com. v. New York Cent. & H. River R. Co., 206 Mass. 417, 19

that the only method by statute for the punishment of contempt in disobeying an injunction is by imprisonment deprive a court of the power to punish a corporation for such a contempt, as the power of constitutional courts to punish for contempt exists in the court independently of statute and is not subject to curtailment by the legislature, it being essential to the maintenance of jurisdiction.¹¹ The power to punish corporations for contempt is not affected by the fact that statutory provisions as to the offense of contempt and the punishment therefor employ the word "persons," as such term covers, in this connection, corporations as well as natural persons.¹² The rule as to a corporation's amenability to punishment for contempt is the same whether or not the state is a party to the contempt proceeding.¹³ Moreover, the corporation's liability is not limited to cases of civil contempt; it may be guilty of criminal contempt as well. Its property may be taken, either as compensation for a private wrong, or as a punishment for a public wrong.¹⁴

The power to punish contempts is not limited to those emanating from domestic corporations, but a foreign corporation so offending also renders itself subject to a fine, where the court has jurisdiction,¹⁵ and, similarly, the fact that the act in violation of the injunction was committed in another jurisdiction does not prevent the court that issued the order from punishing a violation of it.¹⁶

It is incident to all courts to enforce obedience to their process and it is by no means a peculiar incident of a court of equity more than any other court of record.¹⁷

Ann. Cas. 529, 92 N. E. 766; *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280, 52 N. E. 445; *Fiedler v. Bambrick Bros. Const. Co.*, 162 Mo. App. 528, 142 S. W. 1111.

See the cases cited in this chapter, *passim*.

¹¹ *Fiedler v. Bambrick Bros. Const. Co.*, 162 Mo. App. 528, 142 S. W. 1111.

¹² *Fiedler v. Bambrick Bros. Const. Co.*, 162 Mo. App. 528, 142 S. W. 1111. See § 54, *supra*.

¹³ *Fiedler v. Bambrick Bros. Const. Co.*, 162 Mo. App. 528, 142 S. W. 1111.

¹⁴ See § 3406, *infra*; *Re Merchants' Stock & Grain Co.*, 223 U. S. 639, 56 L. Ed. 584; *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 52 L. Ed. 327; *Re Christensen Engineering*

Co., 194 U. S. 458, 48 L. Ed. 1072; *Merchants' Stock & Grain Co. v. Board Trade City of Chicago*, 201 Fed. 20; *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280, 52 N. E. 445; *People v. Dwyer*, 90 N. Y. 402; *Baltimore & O. R. Co. v. Wheeling*, 13 Gratt. (Va.) 40.

¹⁵ *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 52 L. Ed. 327, 12 Ann. Cas. 658; *United States v. Memphis & L. R. R. Co.*, 6 Fed. 237.

¹⁶ *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 52 L. Ed. 327, 12 Ann. Cas. 658; *Prince Mfg. Co. v. Prince Metallic Paint Co.*, 51 Hun (N. Y.) 443, 4 N. Y. Supp. 348.

¹⁷ *First Congregational Church v. Muscatine*, 2 Iowa (2 Clarke) 69.

§ 3406. — Intent. That the fact that intent or malice is an essential element of liability for a particular type of tort or crime does not prevent a corporation from being held liable for such tort or crime has been seen in preceding chapters of this work.¹⁸ This applies also where it is sought to hold a corporation liable for contempt, and it has been held that there is no more difficulty in imputing to a corporation a specific intent in a criminal proceeding than in a civil.¹⁹ Where something is done which has a direct tendency to obstruct the administration of justice in a court, then in order to subject one to punishment for contempt, no intent is necessary other than the intent to do the act itself which is objectionable,²⁰ or, as was stated by Justice Taney, the question of contempt is not dependent upon the party's intention, but upon the act which he did,²¹ and especially is this true in cases of civil contempt, as the injury suffered by the complainant is neither increased nor diminished, nor in any wise affected, by the state of mind of the person doing the forbidden act. In such cases it is generally conceded that the breach of the injunction consists in doing or failing to do the thing commanded, and not in the intention with which the act was done.²² Accordingly, what the corporation has done through its officers is no less legally a contempt because they did not think that they were offending, or were advised that

¹⁸ See Chaps. 52 and 53, *supra*.

¹⁹ *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280, 52 N. E. 445; *People v. Rochester Railway & Light Co.*, 195 N. Y. 102, 21 L. R. A. (N. S.) 998, 133 Am. St. Rep. 770, 16 Ann. Cas. 837, 88 N. E. 22.

Thus, it was said that, in order to hold an officer of a corporation guilty of contempt of court in publishing a libelous account of a pending case, it was necessary to prove first that the officer had knowledge of the fact that the case was pending. *Metropolitan Music Hall Co. v. Lake*, 58 L. J. Ch. (N. S.) 513, 60 L. T. R. (N. S.) 749. But this case was later discussed, and its authority practically nullified by a case in which it is pointed out that innocent intent is an answer neither to the punishment nor to the technical offense. *King v. Freeman's Journal*, [1902] Ir. R. 2 K. B. 82.

²⁰ *Globe Newspaper Co. v. Com.*, 188 Mass. 449, 3 Ann. Cas. 761, 74 N. E. 682.

²¹ *Wartman v. Wartman*, Taney, 362, 370.

²² *In re North Bloomfield Gravel Min. Co.*, 11 Sawy. 590, 27 Fed. 795; *State v. Cape Fear Lumber Co.*, 72 S. C. 322, 51 S. E. 873; *Spokes v. Banbury Local Board of Health*, 11 Jur. (N. S.) Part 1, 1910, L. R. 1 Eq. 42.

When the contempt consists in the failure or refusal to do or refrain from doing an act which one has been ordered by the court to do or refrain from doing, for the benefit or advantage of the opposite party, the intention with which the contempt was committed is immaterial except as affecting the punishment to be imposed. *Indianapolis Water Co. v. American Strawboard Co.*, 75 Fed. 972.

they were not, but the animus goes only to the extent of the punishment.²³ So proof that the respondent had no criminal or contumacious intent may reduce the penalty to the payment of costs alone, where the proceedings are for criminal contempt,²⁴ though the latter statement is not applicable to civil contempt proceedings, nor to cases arising partly out of civil, and partly out of criminal, contempt.²⁵

Where it is held that a corporation may be guilty of contempt of court because of its "wilful" violation of an injunction, or other "wilful" disregard of the court's authority,²⁶ the word "wilful," when used in this connection, means "a determination to do what is known to be forbidden."²⁷ But the use of this expression does not necessitate the proof of a corporate intent to violate the law. For if a corporation is restrained by injunction from doing a particular act, it is liable for contempt if it performs the act, and it is no answer to say that the act was not contumacious in the sense that in doing it there was no direct intention to disobey the order. The expression "wilful" is intended to exclude only casual, or accidental and unintentional acts.²⁸ To render a corporation liable for contempt in pub-

²³ **United States.** *Merrimack River Sav. Bank v. Clay Center*, 219 U. S. 527, 55 L. Ed. 320, Ann. Cas. 1912 A 513; *Atlantic Giant Powder Co. v. Dittmar Powder Mfg. Co.*, 9 Fed. 316; *United States v. Memphis & L. R. R. Co.*, 6 Fed. 237.

New Jersey. *West Jersey Traction Co. v. Board Public Works City of Camden*, 58 N. J. L. 536, 37 Atl. 578; *Cape May & S. L. R. Co. v. Johnson*, 35 N. J. Eq. 422.

New York. *People v. Compton*, 1 Duer 512.

Washington. *State v. North Shore Boom & Driving Co.*, 55 Wash. 1, 107 Pac. 196, modifying 103 Pac. 426.

England. *King v. Freeman's Journal*, [1902] Ir. R. 2 K. B. 82.

But the attorney for the company, who in good faith and with some foundation for his opinion, so advised his client that the client disregarded the order of court, is not himself to be held in contempt of court for this reason. *State v. North Shore Boom & Driving Co.*, 55 Wash. 1, 107 Pac. 196, modifying 103 Pac. 426.

²⁴ *Merrimack River Sav. Bank v. Clay Center*, 219 U. S. 527, 55 L. Ed. 320, Ann. Cas. 1912 A 513.

²⁵ *In re Independent Pub. Co.*, 228 Fed. 787.

²⁶ *In re Independent Pub. Co.*, 228 Fed. 787; *Franklin Union No. 4 v. People*, 220 Ill. 355, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248, 77 N. E. 176; *Hughson v. People*, 91 Ill. App. 396.

In New York the statute (Code Civ. Proc. §§ 8, 14) distinguishes between criminal and civil contempts with respect to disobedience to the orders of a court in that "wilful" disobedience is a criminal contempt, while a mere disobedience by which the right of a party to an action is defeated or hindered may be a civil contempt. *In re Westminster Realty Corporation*, 123 N. Y. App. Div. 797, 108 N. Y. Supp. 551; *People v. Dwyer*, 1 N. Y. Civ. Proc. 484, 90 N. Y. 402.

²⁷ *People v. Compton*, 1 Duer (N. Y.) 512.

²⁸ *Stancomb v. Trowbridge Urban District Council*, [1910] 2 Ch. 190,

lishing an article written by one of its reporters, it is not necessary that the article shall have been published with the wilful intent to obstruct the administration of justice, mere intent to publish being sufficient. The lack of intent to obstruct justice may, however, be considered in mitigation of the punishment.²⁹

§ 3407. What constitutes corporate contempt. The character of acts or conduct which may constitute contempt on the part of a corporation are not other than or different from those which will constitute contempt on the part of an individual and are, properly speaking, a part of the law relative to Contempts rather than of the law of Corporations. They may be said, broadly, to be such acts and conduct as are in disobedience of the commands of the court or tend to interfere with the orderly administration of justice. So a corporation may be punished for those contempts which consist in the disobedience to the judgments, decrees or orders of a court of justice, made in a case within its jurisdiction.³⁰ Violation of an injunction is a frequent source of contempt proceedings. In such a case the test as to whether there has been a contempt is not whether the order of the court was erroneous and subject to review on appeal, but whether the court had jurisdiction to hear and determine the class of cases to which the case at bar belongs,³¹ and whether the jurisdiction over the

substantially reversing, on this point, *Fairelough v. Manchester Ship Canal Co.*, [1897] W. N. 7; *Attorney-General v. Walthamstow Urban Council*, 11 T. L. R. 533; *Meters (Ltd.) v. Metropolitan Gas Meters (Ltd.)*, [1907] 51 Sol. J. 499.

²⁹ *In re Independent Pub. Co.*, 228 Fed. 787.

³⁰ *Illinois*. *Franklin Union No. 4 v. People*, 220 Ill. 355, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248, 77 N. E. 176.

New York. *King v. Barnes*, 113 N. Y. 476, 21 N. E. 182.

Pennsylvania. *Crossman v. Penrose Ferry Bridge Co.*, 26 Pa. St. 69.

South Carolina. *State v. Cape Fear Lumber Co.*, 72 S. C. 322, 51 S. E. 873.

Washington. *State v. Ball*, 5 Wash. 387, 34 Am. St. Rep. 866, 31 Pac. 975.

³¹ See generally Chap. 51, *supra*. See also the following decisions:

United States. *Gompers v. Buck's Stove & Range Co.*, 37 Wash. L. R. 706, 221 U. S. 418, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874; *United States v. Memphis & L. R. R. Co.*, 6 Fed. 237.

Illinois. *Franklin Union No. 4 v. People*, 220 Ill. 355, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248, 77 N. E. 176.

Iowa. *First Congregational Church v. Muscatine*, 2 Iowa (2 Clarke) 69.

New Jersey. *West Jersey Traction Co. v. Board Public Works City of Camden*, 58 N. J. L. 536, 37 Atl. 578; *Una v. Dodd*, 39 N. J. Eq. 173.

New York. *Mayor, etc., of New York v. New York & S. I. Ferry Co.*, 64 N. Y. 622; *Marson v. Rochester*, 112 App. Div. 51, 97 N. Y. Supp. 881, *aff'd* 185 N. Y. 602, 78 N. E. 1106;

particular case had already attached at the time when the injunction was ordered.³² Each act violative of the injunction is a separate contempt.³³ In order to render the corporation amenable to the injunction or order of court, it is not always necessary that it should have been a party to the suit in which the order was given; this is particularly the case where the corporation is the real party in interest, and has actual knowledge of the proceedings.³⁴ The only defense that can be made in such a case is that the injunction upon its face was null and void, for the reason that there was an entire want of jurisdiction in the court by which it was issued.³⁵ The court's order may relate to the procedure in the trial of the case, may require the performance of a specific act on the part of the corporation, or may be implied from the general rules prevailing in the conduct of a case. Furthermore, injunction orders must be fairly and honestly obeyed by the corporation. A subterfuge, invented to evade the effect of the order of court, will subject all those participating therein to punishment for contempt of court.³⁶ But a new company, formed bona fide

People v. Dwyer, 1 N. Y. Civ. Proc. 484, 90 N. Y. 402.

³² *State v. Ball*, 5 Wash. 387, 34 Am. St. Rep. 866, 31 Pac. 975.

Where the injunction proceedings have been discontinued, this seems of itself a sufficient barrier to any effort by any of the parties to recover further damages by way of civil contempt; but this does not prevent the court itself from taking further action in criminal contempt for the purpose of vindicating its own authority. *Gompers v. Buck's Stove & Range Co.*, 37 Wash. L. R. 706, 221 U. S. 418, 55 L. Ed. 797, 34 L. R. A. (N. S.) 874.

³³ *Golden Gate Consol. Hydraulic Min. Co. v. Superior Court*, 65 Cal. 187, 3 Pac. 628.

³⁴ *Eagle Mfg. Co. v. Miller*, 41 Fed. 351, rev'd on other grounds 151 U. S. 186, 38 L. Ed. 121; *Golden Gate Consol. Hydraulic Min. Co. v. Superior Court*, 65 Cal. 187, 3 Pac. 628; *Fiedler v. Bambrick Bros. Const. Co.*, 162 Mo. App. 528, 142 S. W. 1111; *Abell v. New York, etc., R. Co.*, 18 N. Y. Wkly. Dig. 554.

This is even the case where the stat-

ute provides in terms that a "party" to the action may be punished for civil contempt. In *re Westminster Realty Corporation*, 123 N. Y. App. Div. 797, 108 N. Y. Supp. 551.

Yet where the proceedings are against one not a party to the suit, the case comes within the punitive rather than the remedial class. It is regarded like misconduct in a court room, or disobedience of a subpoena, as among those acts primarily against the power of the court. *Bessette v. W. B. Conkey Co.*, 194 U. S. 324, 48 L. Ed. 997.

³⁵ *Davis v. New York*, 8 N. Y. Super. Ct. 451.

³⁶ *Morton v. Superior Court*, 65 Cal. 496, 4 Pac. 489; *Manhattan Elec. Light Co. v. Harlem Lighting Co.*, 63 Hun (N. Y.) 631, 44 N. Y. St. Rep. 169, 18 N. Y. Supp. 371.

Thus, if, after an injunction has been granted against a corporation, an officer buys the equipment of the corporation and individually performs the act which the corporation had been enjoined from performing, he becomes subject to punishment for contempt of court. A person, bound to

to take over the business of a corporation against which an injunction has been granted, and not formed colorably for the sake of evading the order, is not liable for the breach of such injunction.³⁷

Another form which contempt takes is a publication concerning a pending case which is intended or calculated to embarrass the judge or jury in the trial.³⁸ The violation by a corporation of a writ of certiorari operating as a stay of all proceedings is a contempt rendering it liable.³⁹ And where corporations which are parties to an action enter into a stipulation with another party thereto under which an order is granted staying proceedings, a violation of the terms and spirit of the order by the corporations renders them liable for contempt.⁴⁰

Failure to comply with an order of court to produce the corporate books and records may also be contempt.⁴¹

By refusing in the absence of indemnity to pay interest due on bonds belonging to another to a receiver appointed in sequestration proceedings, as directed by the order appointing the receiver, the corporation and its president become liable to punishment for contempt, even though the corporation was adjudged a bankrupt before the judgment was rendered in the sequestration proceedings, where its discharge in bankruptcy was not pleaded in such proceeding.⁴²

Under a statute making putting in fictitious bail or fictitious surety

obey an injunction, may be guilty of a violation thereof, as well by aiding, abetting, counseling and countenancing another, as by doing it directly. *Mayor, etc., of New York v. New York & S. I. Ferry Co.*, 64 N. Y. 622.

And an injunction against the directors of a corporation prohibiting the use of certain patented articles is violated by their acting as directors in a new corporation, formed to do the same acts. *Iowa Barb Steel Wire Co. v. Southern Barbed-Wire Co.*, 30 Fed. 123.

³⁷ *Bosch v. Simms Mfg. Co.*, [1909] 25 T. L. R. 419.

³⁸ *United States v. Providence Tribune Co.*, 241 Fed. 524; *Toledo Newspaper Co. v. United States*, 237 Fed. 986, aff'g 220 Fed. 458; *In re Independent Pub. Co.*, 228 Fed. 787, aff'd 240 Fed. 849, L. R. A. 1917 E 703, Ann. Cas. 1917 C 1084; *Telegram*

Newspaper Co. v. Com., 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280, 52 N. E. 445; *State v. Bee Pub. Co.*, 60 Neb. 282, 50 L. R. A. 195, 83 Am. St. Rep. 531, 83 N. W. 204; *King v. Freeman's Journal*, [1902] Ir. R. 2 K. B. 82.

³⁹ *West Jersey Traction Co. v. Board Public Works City of Camden*, 58 N. J. L. 536, 37 Atl. 578.

⁴⁰ *Manhattan Elec.-Light Co. v. Harlem Lighting Co.*, 63 Hun (N. Y.) 631, 44 N. Y. St. Rep. 169, 18 N. Y. Supp. 371.

⁴¹ See § 2805.

⁴² *Schreiber v. Garden*, 152 N. Y. App. Div. 817, 137 N. Y. Supp. 747. (This was a suit by a receiver in sequestration proceedings brought to reach bonds of a corporation and the interest thereon to apply on payments of alimony due from the owner of the bonds.)

in a civil action civil contempt, a corporation and its president may be found guilty of a civil contempt for the act of the corporation in filing a fraudulent bond for the release of a mechanic's lien on the corporate property.⁴³

§ 3408. Liability of officers, agents, directors, etc. A duty imposed by an order of court of competent jurisdiction upon a corporation applies to the officers, agents and employees of that corporation, and takes effect, as to them, as soon as they have been served with the writ, or in fact have actual notice of the nature and scope of the order; it is not necessary to make them parties. The duty of the corporation, upon being served with the injunction, is to see to it that the injunction is obeyed by all persons acting for it or in its name.⁴⁴

⁴³ *In re Westminster Realty Corporation*, 123 N. Y. App. Div. 797, 108 N. Y. Supp. 551.

⁴⁴ See generally Chap. 51. See also the following decisions:

United States. *Puget Sound Trac-tion, Light & Power Co. v. Lawrey*, 202 Fed. 263; *Merchants' Stock & Grain Co. v. Board Trade City of Chicago*, 201 Fed. 20, 223 U. S. 639, 56 L. Ed. 584; *Heinze v. Butte & B. Consol. Min. Co.*, 129 Fed. 274; *Sidway v. Missouri Land & Live Stock Co., Ltd.*, 116 Fed. 381; *Stahl v. Ertel*, 62 Fed. 920; *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 746, 19 L. R. A. 395, aff'd in *Ex parte Lennon*, 166 U. S. 548, 41 L. Ed. 1110; *American Const. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 52 Fed. 937; *Mex-ican Ore Co. v. Mexican Guadalupe Min. Co.*, 47 Fed. 351; *Williams v. Hintermeister*, 26 Fed. 889; *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.*, 9 Sawy. 601, 19 Fed. 20; *In re Tift*, 11 Fed. 463; *United States v. Mem-phris & L. R. R. Co.*, 6 Fed. 237; *Fan-shaw v. Tracy*, 4 Biss. 490, Fed. Cas. No. 4,643; *Sickels v. Borden*, 4 Blatchf. 14, Fed. Cas. No. 12,833.

California. *Golden Gate Consol. Hydraulic Min. Co. v. Superior Court*, 65 Cal. 187, 3 Pac. 628.

Illinois. *Sercomb v. Catlin*, 128 Ill. 556, 21 N. E. 606.

Iowa. *First Congregational Church v. Muscatine*, 2 Iowa (2 Clarke) 69.

Kansas. *State v. Pittsburg*, 80 Kan. 710, 25 L. R. A. (N. S.) 226, 133 Am. St. Rep. 227, 104 Pac. 847; *State v. Cutler*, 13 Kan. 131.

Nebraska. *Nebraska Children's Home Society v. State*, 57 Neb. 765, 78 N. W. 267.

New Jersey. *Cape May & S. L. R. Co. v. Johnson*, 35 N. J. Eq. 422.

New York. *King v. Barnes*, 113 N. Y. 476, 21 N. E. 182; *People v. Dwyer*, 90 N. Y. 402, 1 N. Y. Civ. Proc. 484; *In re Westminster Realty Corpora-tion*, 123 App. Div. 797, 108 N. Y. Supp. 551; *Marson v. Rochester*, 112 App. Div. 51, 97 N. Y. Supp. 881, aff'd 185 N. Y. 602, 78 N. E. 1106; *Rochester, H. & L. R. Co. v. New York, L. E. & W. R. Co.*, 48 Hun 190, 15 N. Y. St. Rep. 686; *Simon v. Aldine Pub. Co.*, 12 Civ. Proc. 290, 8 N. Y. St. Rep. 334, aff'd 14 Daly 279, 8 N. Y. St. Rep. 377; *People v. Albany & V. R. Co.*, 20 How. Pr. 358, 12 Abb. Pr. 171, aff'd 64 N. Y. 622.

Washington. *State v. North Shore Boom & Driving Co.*, 55 Wash. 1, 107 Pac. 196, modifying 103 Pac. 426.

Canada. *In re Bolton*, 23 Ont. L.

Where the act to be done is a corporate function, the order is usually directed to the corporation, its officers, agents and employees; when the duty appertains to the officer of the corporation in his official capacity, the order is directed to the officer himself. Yet where the injunction runs to the corporation itself, this is sufficient to make it binding upon all corporate officers to whose notice it comes,⁴⁵ as it is not chiefly addressed to an abstract metaphysical being, but rather to each individual member of the whole corporate body, and controls the personal action of every member whose consent or co-operation may be necessary to the completion of the corporate act which it strictly prohibits,⁴⁶ and, directed to the corporate body, restrains the officers from doing the act prohibited in their official capacity, or in their individual capacity, for the benefit or in the interest of the corporation enjoined.⁴⁷ If, after they have knowledge of the writ directed to the corporation, they prevent compliance or fail to take appropriate action within their power for the performance of the corporate duty, they, no less than the corporation itself, are guilty of disobedience and may be punished for contempt.⁴⁸ But mere failure

Rep. 390, 18 Ont. W. R. 795, 2 Ont. W. N. 827; *Demorest v. Midland R. Co.*, 10 Ont. Pr. 82.

In Georgia, apparently, no officer or servant of the corporation can be attached for refusing to obey a writ directed to the corporation. *Simmons v. Georgia Iron & Coal Co.*, 117 Ga. 305, 61 L. R. A. 739, 43 S. E. 780; *Auto Highball Co. v. Sibbett*, 11 Ga. App. 618, 75 S. E. 914.

⁴⁵ *Wilson v. United States*, 221 U. S. 361, 55 L. Ed. 771, Ann. Cas. 1912 D 558; *Hatch v. Chicago, R. I. & P. R. Co.*, 6 Blatchf. 105, Fed. Cas. No. 6,204; *New York v. New York & S. I. Ferry Co.*, 64 N. Y. 622; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536.

See Chap. 51, *supra*.

⁴⁶ *Morton v. Superior Court*, 65 Cal. 496, 4 Pac. 489; *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536; *Davis v. New York*, 8 N. Y. Super. Ct. 451, *aff'd* 9 N. Y. 263, 59 Am. Dec. 536; *In re Bolton*, 23 Ont. L. Rep. 390, 18 Ont. W. R. 795, 2 Ont. W. N. 827.

⁴⁷ *Mexican Ore Co. v. Mexican Guadalupe Min. Co.*, 47 Fed. 351.

⁴⁸ *Wilson v. United States*, 221 U. S. 361, 55 L. Ed. 771, Ann. Cas. 1912 D 558; *Fanshaw v. Tracy*, 4 Biss. 490, Fed. Cas. No. 4,643.

Thus, if a corporation is appointed a depository of court funds, and an order of court is passed directing that the funds be paid to a particular person, the officers of the corporation having control of its funds, with the means of payment in their hands, might be proceeded against as for contempt, if they should refuse to carry out the order of the court. *Franklin Union No. 4 v. People*, 220 Ill. 355, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248, 77 N. E. 176.

Nevertheless, if it is conceded that a bank, by designation of the court, and by acceptance, became an officer of the court, and that the funds deposited therein were court funds, and that therefore the bank was liable for misconduct in misappropriating such funds as in case of contempt, it does not follow that each servant or agent of the bank also became, *pro hac vice*, an officer of the court, and therefore

or refusal of the corporation to comply with the order of the court does not render the officer guilty. He must have neglected or refused to perform his part in carrying out the act required by the order of the court; if he lacked authority or opportunity to perform the act or any part of it, he is not guilty of contempt.⁴⁹ Or, he may show that he advised and counseled obedience when first he had knowledge of the injunction, and did nothing afterwards in furtherance of the corporation's disobedience thereof.⁵⁰ Moreover, if the officer has in fact no notice of the injunction, and in ignorance of it executes in good faith the orders of the defendant, he does not render himself legally liable to be punished for contempt.⁵¹

The managing officers cannot shield themselves from individual liability upon the plea that what they did was done by them as officers and agents of the corporation, and not in their own behalf as principals.⁵² So the president is a proper person to punish for contempt.⁵³ Moreover, when an injunction against a corporation has been served upon its president, it is his duty to prevent the other officers of the corporation from doing anything contrary to the order of court; if he conceals from the officers the fact that an injunction has been served upon him, and allows them to go on and do acts in violation of it, it is a breach of the injunction on his part.⁵⁴ The manager of the company

amenable to the court, as in case of contempt, for misconduct in dealing with bank funds. *Southern Development Co. v. Houston & T. C. Ry. Co.*, 27 Fed. 344.

Newly elected officers of the corporation may be punished for contempt, if they perform the enjoined act after having actual knowledge of an outstanding injunction. *Avery v. Andrews*, 51 L. J. Ch. (N. S.) 414.

⁴⁹ *Hughson v. People*, 91 Ill. App. 396.

⁵⁰ *United States v. Memphis & L. R. Co.*, 6 Fed. 237; *Trimmer v. Pennsylvania, S. & N. E. R. Co.*, 36 N. J. Eq. 411.

⁵¹ *Guirney v. St. Paul, M. & M. Ry. Co.*, 43 Minn. 496, 19 Am. St. Rep. 256, 46 N. W. 78.

⁵² *Iowa Barb Steel Wire Co. v. Southern Barbed-Wire Co.*, 30 Fed. 123.

⁵³ *United States v. Wilson v. United States*, 221 U. S. 361, 55 L. Ed. 771,

Ann. Cas. 1912 D 558; *Merchants' Stock & Grain Co. v. Board Trade City of Chicago*, 201 Fed. 20, 223 U. S. 639, 56 L. Ed. 584; *In re Tift*, 11 Fed. 463.

California. Morton v. Superior Court, 65 Cal. 496, 4 Pac. 489.

Kansas. State v. Cutler, 13 Kan. 131.

New Jersey. Una v. Dodd, 39 N. J. Eq. 173; *Trimmer v. Pennsylvania, S. & N. E. R. Co.*, 36 N. J. Eq. 411.

New York. Schreiber v. Scho-macker Piano Forte Mfg. Co., 152 App. Div. 817, 137 N. Y. Supp. 747; *In re Westminster Realty Corporation*, 123 App. Div. 797, 103 N. Y. Supp. 551.

But the president is not subject to contempt for default in performing an act which he cannot himself, without authority from others, perform. *Demorest v. Midland*, 10 Ont. Pr. 82.

⁵⁴ *Trimmer v. Pennsylvania, S. & N. E. R. Co.*, 36 N. J. Eq. 411; *Bank*

is likewise liable,⁵⁵ also the secretary and treasurer.⁵⁶ The editor of a newspaper published by a corporation may be subjected to a fine in a criminal contempt proceeding against him and the corporation for the publication in the newspaper of matter interfering with the administration of justice.⁵⁷

The directors are bound to obey an injunction against the company if it comes to their notice.⁵⁸ An injunction against the corporation is also violated by the stockholders, if they cause or aid the corporation to do the prohibited act.⁵⁹ And if it can be shown that a person holding no office in the corporation does in fact actually control or largely affect the conduct of its affairs, that person may be found guilty of contempt of court for aiding and abetting the corporation's neglect or refusal to obey.⁶⁰ If the officers of a corporation which has, by an order of court, been made a depository of court funds, have control of the corporation's funds and refuse to pay over the court funds on the court's order, though they have the means of payment belonging to the corporation in their hands, they may be proceeded against as for contempt. But where the depository, holding such funds under a general deposit only, becomes insolvent and makes an assignment, its assignee cannot be proceeded against for

Commissions v. City Bank of Buffalo, cited in 1 Barb. Ch. 636.

⁵⁵ *Merchants' Stock & Grain Co. v. Board Trade City of Chicago*, 201 Fed. 20, 223 U. S. 639, 56 L. Ed. 584; *Indianapolis Water Co. v. American Strawboard Co.*, 75 Fed. 972; *Iowa Barb Steel Wire Co. v. Southern Barbed-Wire Co.*, 30 Fed. 123; *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.*, 9 Sawy. 601, 19 Fed. 20; *United States v. Memphis & L. R. R. Co.*, 6 Fed. 237; *Sercomb v. Catlin*, 128 Ill. 556, 21 N. E. 606; *Una v. Dodd*, 39 N. J. Eq. 173; *Ex parte Green*, 7 T. L. R. 411.

⁵⁶ *Auto Highball Co. v. Sibbett*, 11 Ga. App. 618, 75 S. E. 914.

⁵⁷ *United States v. Toledo Newspaper Co.*, 220 Fed. 458.

⁵⁸ *United States. Mexican Ore Co. v. Mexican Guadalupe Min. Co.*, 47 Fed. 351; *Williams v. Hintermeister*, 26 Fed. 889; *United States v. Memphis & L. R. R. Co.*, 6 Fed. 237; *Hatch*

v. Chicago, R. I. & P. R. Co., 6 Blatchf. 105, Fed. Cas. No. 6,204.

California. *Morton v. Superior Court*, 65 Cal. 496, 4 Pac. 489.

New Jersey. *Trimmer v. Pennsylvania, S. & N. E. R. Co.*, 36 N. J. Eq. 411.

New York. *People v. Sturtevant*, 9 N. Y. 263, 59 Am. Dec. 536.

England. *Lewis v. Pontypridd, etc., Ry. Co.*, 11 T. L. R. 203; *Ex parte Green (In re Robbins)*, [1893] 7 T. L. R. 411.

Nor can the director evade his responsibility by leaving the state. *Williams v. Hintermeister*, 26 Fed. 889.

⁵⁹ *Miller & Lux v. Rickey*, 146 Fed. 574, aff'd 152 Fed. 11.

⁶⁰ *Stahl v. Ertel*, 62 Fed. 920; *Morton v. Superior Court*, 65 Cal. 496, 4 Pac. 489; *King v. Barnes*, 113 N. Y. 476, 21 N. E. 182.

contempt on his failure to pay over the funds to the court on its order.⁶¹

An employee, having actual notice of an order of court outstanding against his employer, may resign in order to avoid obedience to the order. But if he remains in the employ of the corporation, and assists the corporation in the performance of the enjoined act, he is liable to punishment for contempt of court, and cannot plead his superior's orders as an excuse for the unlawful act.⁶² The resignation, however, must be bona fide.⁶³

The question is whether the employee exercised the authority with which he was clothed by the company in good faith, with an intention and purpose, to the best of his ability, to enforce obedience to the mandate of the court. An appearance of evasion on his part or failure to do what might reasonably be required of him, will be fatal to his claim for relief. Where an honest effort has been made by the employee, the consequence of failure should not be visited upon him personally. For such a failure the corporation must respond, and not its servant.⁶⁴

§ 3409. Liability of corporation as affected by liability of officer. The corporation is not relieved from liability by the fact that the officer through whom the contempt was committed may be punished therefor.⁶⁵ Thus, although natural persons who publish or assist in

⁶¹ *In re Western Marine & Fire Ins. Co.*, 38 Ill. 289.

⁶² *Mexican Ore Co. v. Mexican Guadalupe Min. Co.*, 47 Fed. 351; *Morton v. Superior Court*, 65 Cal. 496, 4 Pac. 489.

⁶³ *Toledo, A. A. & N. M. Ry. Co. v. Pennsylvania Co.*, 54 Fed. 746, 19 L. R. A. 395, *aff'd Ex parte Lennon*, 166 U. S. 548, 41 L. Ed. 1110.

⁶⁴ *Pennsylvania R. Co. v. Thompson*, 49 N. J. Eq. 318, 24 Atl. 544.

⁶⁵ *Merchants' Stock & Grain Co. v. Board Trade City of Chicago*, 201 Fed. 20, 223 U. S. 639, 56 L. Ed. 584; *United States v. Memphis & L. R. R. Co.*, 6 Fed. 237; *People v. Albany & V. R. Co.*, 20 How. Pr. (N. Y.) 358, 12 Abb. Pr. 171, *aff'd* 64 N. Y. 622; *State v. Cape Fear Lumber Co.*, 72 S. C. 322, 51 S. E. 873; *State v. Baltimore & O. R. Co.*, 73 W. Va. 1, 79 S. E. 834.

Incautious obiter statements may be

found to the effect that either the corporation committing the contempt may be punished, or the agent through whom it acts, thus indicating that the punishment of the one would absolve the other. *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.*, 9 Sawy. 601, 19 Fed. 20.

Similarly, a dictum occurs in *Sercomb v. Catlin*, 128 Ill. 556, 15 Am. St. Rep. 147, 21 N. E. 606, to the effect that a corporation can only be punished for contempt through its officers, or those acting in aid of it. Yet in this case the proceedings were brought against an officer of the corporation, and not against the corporation itself; and, as was pointed out in *Franklin Union No. 4 v. People*, 220 Ill. 355, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248, 77 N. E. 176, the dictum in the *Sercomb* case is distinctly not in point.

publishing a libel in a newspaper owned by a corporation may be punished criminally by fine or imprisonment, or both, the corporation publishing it may also be held liable for contempt of court, where the libelous matter concerns a case then pending before the court, and interferes with the fair and impartial trial thereof.⁶⁶ And the fact that the agents who, acting under the corporation's orders, violated an injunction were subject to a fine does not prevent the imposition of a fine on the corporation also.⁶⁷ Nor does the fact that the court sees proper to discharge the operating officers and servants of the corporation from the citation for contempt and thereby to absolve them from punishment prevent it from finding the corporation guilty. It is within the court's discretion whether the officers and agents shall be discharged from the citation.⁶⁸

Conversely, in addition to punishing the corporation itself for violating an injunction, the responsible officer of the corporation may be punished. On such a proceeding the court has withheld from fixing the nature and extent of the punishment to be imposed on the officer for a sufficient length of time to afford him an opportunity to explain the nature and extent of his personal connection with the contempt.⁶⁹

§ 3410. Proceedings to punish for contempt. In cases of civil contempt, the first proceeding against the corporation for refusal to carry out an order of court or for acting contrary to the court's express or implied order, is by a complaint or petition to the court, asking that the corporation be ordered to attend and show cause on or before a certain day why it should not be punished for contempt.⁷⁰ Under

On a contempt proceeding against the business manager and agent of a foreign corporation for prosecuting on behalf of his corporation an attachment against goods for which a receiver had been appointed, where the agent admits that he caused the attachment suit to be instituted and that it was prosecuted under his direction and that it was at all times in his power to dismiss it, it is sufficient to compel him as manager of the corporation to answer the contempt proceedings, without making the corporation eo nomine a party thereto. *Sercomb v. Catlin*, 128 Ill. 556, 15 Am. St. Rep. 147, 21 N. E. 606.

⁶⁶ *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280, 52 N. E. 445.

⁶⁷ *United States v. Memphis & L. R. Co.*, 6 Fed. 237.

⁶⁸ *Fiedler v. Bambrick Bros. Const. Co.*, 162 Mo. App. 528, 142 S. W. 1111.

⁶⁹ *In re Tift*, 11 Fed. 463.

⁷⁰ *United States. In re Tift*, 11 Fed. 463.

Illinois. *Franklin Union No. 4 v. People*, 220 Ill. 355, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248, 77 N. E. 176.

Missouri. *Fiedler v. Bambrick Bros. Const. Co.*, 162 Mo. App. 528, 142 S. W. 1111.

modern practice the appearance of a corporation is, under statute, compelled by the issue and service of a summons, and in equity by a subpoena.⁷¹

For criminal contempt the corporation may be indicted,⁷² or it may be proceeded against, not only without indictment, but even without a formal complaint, upon the mere motion of the court against which the contempt has been committed. Such a power in the court is necessary for its own protection against an improper interference with the due administration of justice, and it is not dependent upon the complaint of any of the parties litigant.⁷³ If the corporation refuses to obey the summons to appear, or simply disregards it, the rule was clearly established at common law that the court would authorize the issuance of a writ of distringas, issued to the sheriff, directing him to levy on the lands, tenements, goods and chattels of the corporation, and to hold the same until the corporation appeared in court, and answered the alleged contempt. If the sheriff returned nulla bona to this writ, or if the corporation refused to appear, an alias or second distringas to distrain on additional lands, tenements and chattels of the defendant would issue; if nulla bona was returned to this also, a pluries distringas would issue, commanding the sheriff to levy on all the corporate property within the jurisdiction. The purpose of these writs, then, was to give the defendant ample time to yield obedience and come into court. If the defendant still failed to appear, a decree or fine would be entered against him on an ex parte hearing.⁷⁴

New Jersey. *West Jersey Traction Co. v. Board Public Works City of Camden*, 58 N. J. L. 536, 37 Atl. 578.

South Carolina. *State v. Cape Fear Lumber Co.*, 72 S. C. 322, 51 S. E. 873.

England. *King v. Freeman's Journal*, [1902] Ir. R. 2 K. B. 82.

While a rule laid on a limited company to show cause why it and its officers should not be attached for contempt of court is not the correct form, yet this mistake will not prevent the court from inflicting the appropriate punishment of a fine and costs. *King v. Hammond & Co., Ltd.*, [1914] 2 K. B. 866.

Under the Illinois statute authorizing service on a foreign corporation by service on its agent, where service is had upon the business manager and agent of such a corporation, it is sub-

ject to the jurisdiction of the state courts as far as a proceeding against it for contempt is concerned. *Sercomb v. Catlin*, 128 Ill. 556, 15 Am. St. Rep. 147, 21 N. E. 606.

⁷¹ *Fiedler v. Bambrick Bros. Const. Co.*, 162 Mo. App. 528, 142 S. W. 1111.

⁷² *United States v. Memphis & L. R. R. Co.*, 6 Fed. 237; *Com. v. New York & H. River R. Co.*, 206 Mass. 417, 19 Ann. Cas. 529, 92 N. E. 766; *Queen v. Birmingham & G. R. Co.*, 3 Q. B. 708, 43 E. C. L. 708, 9 C. & P. 469.

⁷³ *Com. v. New York Cent. & H. River R. Co.*, 206 Mass. 417, 19 Ann. Cas. 529, 92 N. E. 766; *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280, 52 N. E. 445.

⁷⁴ **Maryland.** *McKim v. Odom*, 3 Bland Ch. 407.

§ 3411. Punishment inflicted. Where a corporation is found guilty of contempt in violating an injunction, it may be punished by the imposition of a fine for the benefit of the government and be required to pay a counsel fee to the complainants and to pay the cost of the contempt proceeding.⁷⁵ Or a fine may be imposed payable partly to the government and partly to the person injured by the violation of the injunction.⁷⁶ The court may impose a fine to be paid to the clerk to the use of the one injured by the violation of the injunction together with the costs of the contempt proceeding.⁷⁷

Where the proceedings are a part of the original cause and the defendant has done that which was forbidden, the court imposes a fine for the use of the complainant, measured in some degree by the pecuniary injury caused by the act of disobedience.⁷⁸

The rule that in criminal contempts the penalty is usually punitive, while in civil contempts it is remedial, the amount of the fine in the latter case being determined, to some extent, by the pecuniary damage entailed upon the injured party, is applied in fixing the penalty to be paid by a corporation offender.⁷⁹ On a contempt proceeding, where the contempt has a twofold aspect: criminal, in that it interfered with the discharge of the court's duty and obstructed justice, and civil, in that it caused the failure of a trial and inflicted pecuniary damage on a party thereto to the extent of costs uselessly paid, the fine may be adjusted to cover the pecuniary damage and the costs of the contempt proceeding.⁸⁰

Missouri. *Fiedler v. Bambrick Bros. Const. Co.*, 162 Mo. App. 528, 142 S. W. 1111.

New Jersey. *West Jersey Traction Co. v. Board Public Works City of Camden*, 58 N. J. L. 536, 37 Atl. 578.

New York. *People v. Albany & V. R. Co.*, 20 How. Pr. 358, 12 Abb. Pr. 171, aff'd 64 N. Y. 622; *Hillis v. Peekskill Sav. Bank*, 18 N. Y. Wkly. Dig. 287.

England. *London v. Lynn*, 1 H. Bl. 206; *Spokes v. Banbury Board of Health*, 11 Jur. (N. S.) Part 1, 1010, L. R. 1 Eq. 42; *Lawten v. Colchester*, 2 Meriv. 393.

⁷⁵ *Continental Gin Co. v. Murray*, 162 Fed. 873.

⁷⁶ *In re Merchants' Stock & Grain Co.*, 222 U. S. 639, 56 L. Ed. 584; *Re Christensen Engineering Co.*, 194 U. S.

458, 48 L. Ed. 1072; *Cary Mfg. Co. v. Acme Flexible Clasp Co.*, 187 U. S. 427, 47 L. Ed. 244.

⁷⁷ *Indianapolis Water Co. v. American Strawboard Co.*, 75 Fed. 972.

⁷⁸ *In re North Bloomfield Gravel Min. Co.*, 11 Sawy. 590, 27 Fed. 795; *Wells, Fargo & Co. v. Oregon Ry. & Nav. Co.*, 9 Sawy. 601, 19 Fed. 20; *In re Tift*, 11 Fed. 463; *Fiedler v. Bambrick Bros. Const. Co.*, 162 Mo. App. 528, 142 S. W. 1111; *Taber v. New York El. R. Co.*, 12 N. Y. Misc. 460, 34 N. Y. Supp. 29.

As to intent as affecting the amount, see § 3406, supra.

⁷⁹ *In re Independent Pub. Co.*, 228 Fed. 787.

⁸⁰ *In re Independent Pub. Co.*, 228 Fed. 787.

Where an injunction against the sale of a bankrupt's property levied on by a corporate creditor is violated by such creditor, the corporation will be held liable to the bankrupt to the amount of the loss and damage caused him by its contempt and, in addition thereto, may be required to pay him a sum sufficient to reimburse him for the trouble and expenses caused the bankrupt by the contempt proceeding.⁸¹

Where the damages arising from the contempt are unliquidated and difficult of ascertainment, the court will not ascertain them on the contempt proceeding, though it has been intimated that in such case the court would have power to require the offender to give security for the payment of damages to be ascertained by the verdict of a jury.⁸²

The punishment for the violation of an injunction by agents of a corporation acting under the direction of the corporation may be by the imposition of a fine on the corporation.⁸³

The fact that the judgment of the court imposing a fine on a corporation for contempt in violating an injunction does not provide for the disposition of the fine does not render the judgment a nullity.⁸⁴

§ 3412. Proceedings subsequent to judgment. The proper method of collecting a fine imposed upon a corporation is by a levy of an execution issued by the court.⁸⁵ On a proceeding for criminal contempt brought against a corporation publishing a newspaper and the editor of the paper for publications affecting the administration of justice, where the character of the corporation's offense was considered to call for the imposition of a substantial fine, the court imposed such a fine, with the costs of the contempt proceeding added, and awarded a writ of execution therefor, but stayed the writ a sufficient time to allow the corporation, at its option, to apply for a modification of the amount of the fine on the ground of excessiveness, requiring the corporation to show thereupon that such fine was excessive in view of the financial condition of the corporation and the rate per cent. of its profits.⁸⁶ If the proceedings at law to enforce the payment of the fine have been exhausted, a writ of sequestration is the proper remedy

⁸¹ *In re Tift*, 11 Fed. 463.

⁸² *Indianapolis Water Co. v. American Strawboard Co.*, 75 Fed. 972.

⁸³ *United States v. Memphis & L. R. R. Co.*, 6 Fed. 237.

⁸⁴ *Fiedler v. Bambrick Bros. Const. Co.*, 162 Mo. App. 528, 142 S. W. 1111.

⁸⁵ *Consolidated Rendering Co. v. Vermont*, 207 U. S. 541, 52 L. Ed. 327,

12 Ann. Cas. 658; *Telegram Newspaper Co. v. Com.*, 172 Mass. 294, 44 L. R. A. 159, 70 Am. St. Rep. 280, 52 N. E. 445; *Fiedler v. Bambrick Bros. Const. Co.*, 162 Mo. App. 528, 142 S. W. 1111; *Demorest v. Midland*, 10 Ont. Pr. 82; *The Counsellor*, vol. 5, page 197.

⁸⁶ *United States v. Toledo Newspaper Co.*, 220 Fed. 458.

in equity to enforce the penalty for disobeying an order of court.⁸⁷

A corporation cannot appeal from an order finding one of its officers guilty of contempt and fining him therefor when it is not aggrieved thereby. Accordingly it has been held that a corporation has no right of appeal from an order, made upon a motion to punish it and its vice president, who was not a party to the suit involved, for contempt in that it had during the period of a stay of execution following a certain judgment against it and in plaintiff's favor disposed of some of its property, which reads that it is "Ordered, that the said motion be and the same is hereby in all respects granted. I hereby adjudge said S. (the vice president), guilty of a contempt of this court," and adjudicates that he was instrumental in impeding and prejudicing the rights of the judgment creditor for which he is fined the amount of the judgment, etc., the implied reference to the corporation, in the recital in the order "that said motion is in all respects granted," being purely casual.⁸⁸

87 United States. United States v. Memphis & L. R. R. Co., 6 Fed. 237.

Illinois. Franklin Union No. 4 v. People, 220 Ill. 355, 4 L. R. A. (N. S.) 1001, 110 Am. St. Rep. 248, 77 N. E. 176.

Missouri. Fiedler v. Bambrick Bros. Const. Co., 162 Mo. App. 528, 142 S. W. 1111.

New Jersey. West Jersey Traction Co. v. Board Public Works City of Camden, 58 N. J. L. 536, 37 Atl. 578.

New York. People v. Albany & V. R. Co., 20 How. Pr. 358, 12 Abb. Pr. 171, aff'd 64 N. Y. 622.

England. Aberdonia Cars, Ltd. v. Brown, Hughes & Strachan, Ltd., [1915] 59 Sol. J. 598; Fairclough v.

Manchester Ship Canal Co., [1897] W. N. 7.

Canada. Demorest v. Midland R. Co., 10 Ont. Pr. 82.

In a proper case, the writ will be ordered to lie in the office for a fixed time, to enable the corporation to comply with the order. Stancomb v. Trowbridge Urban Dist. Council, [1910] 2 Ch. 190; Meters, Ltd. v. Metropolitan Gas Meters, Ltd., [1907] 51 Sol. J. 499; Lee v. Aylesbury Urban Dist. Council, [1902] 19 T. L. R. 106; Attorney-General v. Walthamstow Urban Council, 11 T. L. R. 533.

88 Peters v. A. Schwoerer & Sons, Inc., 162 N. Y. Supp. 917.

CHAPTER 56

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I. GENERAL CONSIDERATIONS

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¹ **United States.** *Powers v. Detroit, G. H. & M. R. Co.*, 201 U. S. 543, 50 L. Ed. 860, aff'g 138 Fed. 264; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. Ed. 830; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558. See also *Railroad Companies v. Gaines*, 97 U. S. 697, 24 L. Ed. 1091.

Alabama. *Commercial Fire Ins. Co. v. Board of Revenue of Montgomery County*, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

Arkansas. *St. Louis, I. M. & S. R. Co. v. Loftin*, 30 Ark. 693, aff'd 98 U. S. 559, 25 L. Ed. 222.

Connecticut. *Stamford Trust Co. v. Yale & Towne Mfg. Co.*, 83 Conn. 43, 75 Atl. 90; *Smith v. Dana*, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep.

51, 60 Atl. 117; *Security Co. v. Town of Hartford*, 61 Conn. 89, 23 Atl. 699; *State v. Norwich & W. R. Co.*, 30 Conn. 290.

Illinois. *Consolidated Coal Co. of St. Louis v. Miller*, 236 Ill. 149, 86 N. E. 205.

Indiana. *Markle v. Burgess*, 176 Ind. 25, 95 N. E. 308.

Kentucky. *Henderson Bridge Co. v. Com.*, 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486, aff'd 166 U. S. 150, 41 L. Ed. 953.

Missouri. *Bent v. Hart*, 10 Mo. App. 143, aff'd 73 Mo. 641.

New Jersey. *American Pig Iron Storage Co. v. State Board of Assessors*, 56 N. J. L. 389, 29 Atl. 160; *State v. Tunis*, 23 N. J. L. 546; *State*

tributed by its stockholders or otherwise obtained by it, to the extent

v. Morristown Fire Ass'n, 23 N. J. L. 195; *Wetherbee v. Baker*, 35 N. J. Eq. 501.

Ohio. *Iron R. Co. v. Lawrence Furnace Co.*, 49 Ohio St. 102, 30 N. E. 616; *Jones v. Davis*, 35 Ohio St. 474.

Oregon. *American Life Ins. Co. v. Ferguson*, 66 Ore. 417, 134 Pac. 1029.

Pennsylvania. *Cooke v. Marshall*, 196 Pa. St. 200, 64 L. R. A. 413, 46 Atl. 447, 191 Pa. St. 315, 64 L. R. A. 413, 43 Atl. 314.

Tennessee. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

Texas. *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield*, — Tex. Civ. App. —, 184 S. W. 776; *General Bonding & Casualty Ins. Co. v. Mosely*, — Tex. Civ. App. —, 174 S. W. 1031.

Virginia. *Com. v. Charlottesville Perpetual Building & Loan Co.*, 90 Va. 790, 44 Am. St. Rep. 950, 20 S. E. 364.

Wisconsin. See *Wells v. Green Bay & M. Canal Co.*, 90 Wis. 442, 64 N. W. 69.

"The capital stock is the money paid or authorized or required to be paid in as the basis of the business of the bank, and the means of conducting its operations." *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558, quoted with approval in *Powers v. Detroit, G. H. & M. R. Co.*, 201 U. S. 543, 50 L. Ed. 860, aff'g 138 Fed. 264.

"The capital stock of a corporation is the money contributed by the corporators to the capital." *Consolidated Coal Co. of St. Louis v. Miller*, 236 Ill. 149, 86 N. E. 205.

"Strictly, the capital stock of a corporation is the money contributed by the corporators to the capital, and is usually represented by shares issued to subscribers to the stock on the initiation of the corporate enter-

prise." *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648.

It is "that money or property which is put in a single corporate fund by those who by subscription therefor become members of a corporate body." *Burrall v. Bushwick R. Co.*, 75 N. Y. 211, quoted with approval in *People v. Morgan*, 178 N. Y. 433, 67 L. R. A. 960, 70 N. E. 967; *Williams v. Western U. Tel. Co.*, 93 N. Y. 162, 188.

"It is the aggregate amount of the funds of the corporators, which are combined together under a charter, for the attainment of some common object of public convenience or private utility." *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. (N. Y.) 280, quoted with approval in *Hightower v. Thornton*, 8 Ga. 486, 499, 52 Am. Dec. 412.

"'Capital stock' means the aggregate of the interests of the stockholders in the property of the company after its debts are paid." *John W. Cooney Co. v. Arlington Hotel Co.* (Del. Ch.), 101 Atl. 879.

The capital stock of a corporation is "the money advanced by the corporators or members as capital." *State v. Cheraw & C. R. Co.*, 16 S. C. 524.

The capital stock of a corporation is the fund forming the basis of its business transactions. *Hobgood v. Ehlen*, 141 N. C. 344, 53 S. E. 857.

"The capital stock of a bank is the sum on which it is authorized to do business and the permanent basis of its credit." *State v. Clement Nat. Bank*, 84 Vt. 167, 181, Ann. Cas. 1912 D 22, 78 Atl. 944.

"The capital stock of a corporation is the fund which has accumulated in its coffers from the contributions of its members. It may be practically identified in the money, notes, bonds, securities, or even land-titles, wherein the contributions have been invested.

required by its charter.”² It has been said that “the capital stock of a corporation is like that of a co-partnership or joint stock company, the amount which the partners or associates put in as their stake in the concern.”³ In this sense it is to be distinguished from the amount or value of the corporate property or assets.⁴ The amount of the capital stock is fixed by the charter or statute by or under which the corporation is created, or by the articles or certificate of association or incorporation, and always remains the same, unless it is increased or reduced by or under legislative authority,⁵ however much

It includes all claims against shareholders for their unpaid subscriptions.” Bent v. Hart, 10 Mo. App. 143, aff’d 73 Mo. 641.

“The fund subscribed and paid in to carry out the purposes of the organization remains the capital stock of the company as fully * * * after it has been converted into property necessary for its business operations, and for which it was subscribed, as before.” Jones v. Davis, 35 Ohio St. 474.

² Williams v. Western U. Tel. Co., 93 N. Y. 162, 188, quoted with approval in People v. Miller, 90 N. Y. App. Div. 588, 86 N. Y. Supp. 420, rev’d on other grounds 179 N. Y. 49, 71 N. E. 463. And see, to the same effect, Reid v. Eatonton Mfg. Co., 40 Ga. 98, 2 Am. Rep. 563; Penrose v. Chaffraix, 106 La. 250, 30 So. 718; State v. Board of Assessors, 48 La. Ann. 35, 18 So. 753.

³ Barry v. Merchants’ Exch. Co., 1 Sandf. Ch. (N. Y.) 280, quoted with approval in Williams v. Western U. Tel. Co., 93 N. Y. 162, 188. And see, to the same effect, Hightower v. Thornton, 8 Ga. 486, 52 Am. Dec. 412.

⁴ Alabama. Commercial Fire Ins. Co. v. Board Revenue Montgomery Co., 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

Indiana. Markle v. Burgess, 176 Ind. 25, 95 N. E. 308.

Kentucky. Henderson Bridge Co. v. Com., 99 Ky. 623, 29 L. R. A. 73, 31

S. W. 486, aff’d 166 U. S. 150, 41 L. Ed. 953.

Louisiana. Penrose v. Chaffraix, 106 La. 250, 30 So. 718; State v. Board of Assessors, 48 La. Ann. 35, 18 So. 753.

New Jersey. Canfield v. Morristown Fire Ass’n, 23 N. J. L. 195.

New York. Barry v. Merchants’ Exch. Co., 1 Sandf. Ch. 280.

Tennessee. Tradesman Pub. Co. v. Knoxville Car Wheel Co., 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

The corporation may have “a surplus, consisting of some accumulated and reserved fund, or of undivided profits, or both, but that surplus is no part of the company’s capital stock, and therefore, is not itself capital stock.” People v. Coleman, 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818, quoted with approval in People v. Wemple, 150 N. Y. 46, 44 N. E. 787.

The deposits of a bank are not capital stock though they increase its capacity for doing business. Society for Savings v. Coite, 6 Wall. (U. S.) 594, 18 L. Ed. 897; State v. Clement Nat. Bank, 84 Vt. 167, 181, Ann. Cas. 1912 D 22, 78 Atl. 944.

A railroad land grant is not part of the capital stock of a corporation within the meaning of a statute exempting its “capital stock” from taxation. St. Louis, I. M. & S. R. Co. v. Loftin, 30 Ark. 693, aff’d 98 U. S. 559, 25 L. Ed. 222.

⁵ See § 3457 et seq., *infra*.

the assets or capital of the corporation may be increased by accumulation of profits or enhancement in the value of property or reduced by losses or decrease of values.⁶

The term capital stock is sometimes used in the sense of "capital," however, as meaning the actual property or estate of the corporation, particularly in statutes relating to taxation,⁷ and the term "capital"

6 United States. *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558.

Alabama. *Commercial Fire Ins. Co. v. Board Revenue Montgomery Co.*, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

Georgia. *Hightower v. Thornton*, 8 Ga. 486, 52 Am. Dec. 412.

Indiana. *Markle v. Burgess*, 176 Ind. 25, 95 N. E. 308.

New Jersey. *State v. Morristown Fire Ass'n*, 23 N. J. L. 195.

New York. *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648; *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. 280.

Tennessee. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

Wisconsin. *Estate of Wells*, 156 Wis. 294, 144 N. W. 174; *Wells v. Green Bay & M. Canal Co.*, 90 Wis. 442, 452, 64 N. W. 69.

In *Canfield v. Morristown Fire Ass'n*, 23 N. J. L. 195, it was said: "The phrase 'capital stock,' as employed in acts of incorporation, is never that I am aware, used to indicate the value of the property of the company. It is very generally, if not universally, used to designate the amount of capital to be contributed by the stockholders for purposes of the corporation. The amount thus contributed constitutes the 'capital stock' of the company. The value of the stock may be greatly increased by surplus profits or be diminished by losses, but the amount of the capital stock remains the same. The funds of the company may fluctuate. Its capital stock remains invariable,

save by legislative enactment."

"By loss or misfortune, or misconduct of the managing officers of a corporation, its capital stock may be reduced below the amount limited by its charter; but whatever property it has up to that limit must be regarded as its capital stock." *Williams v. Western U. Tel. Co.*, 93 N. Y. 162, 188.

7 Illinois. *Ohio & M. R. Co. v. Weber*, 96 Ill. 443.

Kentucky. *Henderson Bridge Co. v. Com.*, 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486, aff'd 166 U. S. 150, 41 L. Ed. 953.

Missouri. *Hannibal & St. J. R. Co. v. Shacklett*, 30 Mo. 550.

New Jersey. *State v. Tunis*, 23 N. J. L. 546.

New York. *People v. Morgan*, 178 N. Y. 433, 67 L. R. A. 960, 70 N. E. 967; *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648. See also *Barry v. Merchants' Exch. Co.*, 1 Sandf. Ch. 280.

South Carolina. *State v. Cheraw & C. R. Co.*, 16 S. C. 524.

It is used in the Connecticut taxing law as meaning "all the substantial property, real and personal, owned and possessed by the corporation." *Security Co. v. Town of Hartford*, 61 Conn. 89, 23 Atl. 699. See also *Town of New Haven v. City Bank*, 31 Conn. 106.

In *Henderson Bridge Co. v. Com.*, 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486, aff'd 166 U. S. 150, 41 L. Ed. 953, it was held to have been used in this sense in a statute relative to the valuation of corporate franchises for the purpose of taxation.

In *People v. Commissioners of Taxes*

is also sometimes used in the sense of capital stock, although technically there is a clear distinction between the meaning of the two terms.⁸

It has been said that "there is no such thing as capital stock, until it is issued and owned by the subscribers or purchasers."⁹ Capital stock is not in esse and is not property until it is subscribed for. Before that time it is a mere legal fiction. In this connection in speaking of the stock of a railroad company it has been said: "As well might the route for the road designated be called a railroad, as to call the corporate means of creating the stock, stock. * * * Stock can be created only by contract, whether it be in the simple form of a subscription or in any other mode. There must be an agreement to take the stock, and nothing short of this can create it. This imparts to the stock the quality of property, which before it did not possess. It is called capital stock in the charter, because the corporate capacity to create it is given. The term stock, as used in the charter, before it is taken by subscription, means nothing more than a power in the directors to receive subscriptions for stock."¹⁰

§ 3414. Capital. The term "capital," as applied to corporations, is used with widely varying significations.¹¹ Sometimes it is used synonymously with the term "capital stock,"¹² as meaning the amount subscribed and paid in by the shareholders, or secured to be paid in,

& Assessments for City & County of New York, 23 N. Y. 192, 222, it was held that the terms "capital" and "capital stock" were used in a statute relative to taxation in the sense of capital.

The term "capital stock," as used in the California statute providing that there may be "a division and distribution of the capital stock of any corporation which remains after the payment of all its debts upon its dissolution or the expiration of its term of existence," is used in the sense of capital, "and means the money and property with which the company carries on its corporate business." *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 22 Pac. 689, 20 Pac. 401, followed in *Tapscott v. Mexican Colorado River Land Co.*, 153 Cal. 664, 96 Pac. 271.

"Capital stock," as used in a statute making it a misdemeanor to divide,

withdraw or pay to the stockholders any part of the capital stock of the corporation, means "the capital of the corporation on which it transacts business, whether such capital consists of money, property, or other valuable commodities." *Martin v. Zellerbach*, 38 Cal. 300, 99 Am. Dec. 365, quoted with approval in *Cooper v. Utah Light & Railroad Co.*, 35 Utah 570, 136 Am. St. Rep. 1075, 102 Pac. 202.

As to the meaning of the term capital, see § 3414, *infra*.

⁸ See § 3414, *infra*.

⁹ *Continental Varnish & Paint Co. v. Secretary of State*, 128 Mich. 621, 87 N. W. 901.

¹⁰ *Sturges v. Stetson*, 1 Biss. 246, Fed. Cas. No. 13,568.

¹¹ *Smith v. Dana*, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep. 51, 60 Atl. 117.

¹² *United States v. Wright v. Georgia*

and upon which the corporation is to conduct its operations.¹³

The term "capital," however, properly means, not the capital stock, in this sense,¹⁴ but the actual property or estate of the corporation, whether in money or property.¹⁵ As was said in a New York case, "it is the aggregate of the sum subscribed and paid in, or secured to be paid in, by the shareholders, with the addition of all gains or

Railroad & Banking Co., 216 U. S. 420, 54 L. Ed. 544; *Bailey v. Clark*, 21 Wall. 284, 22 L. Ed. 651.

Connecticut. See *State v. Norwich & W. R. Co.*, 30 Conn. 290.

New York. *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648.

Ohio. *Iron R. Co. v. Lawrence Furnace Co.*, 49 Ohio St. 102, 30 N. E. 616.

South Carolina. *State v. Cheraw & C. R. Co.*, 16 S. C. 524.

Tennessee. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

Virginia. *Com. v. Charlottesville Perpetual Building & Loan Co.*, 90 Va. 790, 44 Am. St. Rep. 950, 20 S. E. 364.

Wisconsin. *Estate of Wells*, 156 Wis. 294, 144 N. W. 174; *State v. Lewis*, 118 Wis. 432, 95 N. W. 388.

¹³ "Capital means capital stock, the amount of capital designated by the charter, and not the value of the property of the corporation." *Penrose v. Chaffraix*, 106 La. 250, 30 So. 718; *State v. Board of Assessors*, 48 La. Ann. 35, 18 So. 753.

In *Smith v. Dana*, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep. 51, 60 Atl. 117, this is said to be the strict sense of the term.

"The capital of the corporation is the money [actually] furnished by subscribers or promoters of the corporation to be used by it in its business or undertaking." *American Life Ins. Co. v. Ferguson*, 66 Ore. 417, 134 Pac. 1029.

"The word 'capital' * * * primarily signifies the aggregate of the sums subscribed for, and either paid in

or agreed to be paid in by the stockholders." *Wetherbee v. Baker*, 35 N. J. Eq. 501.

As to the meaning of the term "capital stock," see § 3413, *supra*.

¹⁴ Though "capital" and "capital stock" are often used synonymously, there is a distinction between them. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097; *Estate of Wells*, 156 Wis. 294, 144 N. W. 174; *Wells v. Green Bay & M. Canal Co.*, 90 Wis. 442, 452, 64 N. W. 69.

Strictly speaking capital stock is quite different from capital, the one referring to the tangible property and the other to rights in property evidenced by certificates of stock. *State v. Lewis*, 118 Wis. 432, 95 N. W. 388.

¹⁵ **Connecticut.** *Smith v. Dana*, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep. 51, 60 Atl. 117; *Batterson's Appeal*, 72 Conn. 374, 44 Atl. 546; *Batterson v. Hartford*, 50 Conn. 558.

Delaware. *Bryan v. Aiken*, — Del. —, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817.

New Jersey. *Wetherbee v. Baker*, 35 N. J. Eq. 501.

New York. *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648; *People v. Commissioners of Taxes & Assessments for City & County of New York*, 23 N. Y. 192, 219.

South Carolina. *State v. Cheraw & C. R. Co.*, 16 S. C. 524.

Tennessee. *Tradesman Pub. Co. v. Knoxville Car Wheel Co.*, 95 Tenn. 634, 31 L. R. A. 593, 49 Am. St. Rep. 943, 32 S. W. 1097.

Virginia. See *Com. v. Charlottesville*

profits realized in the use and investment of those sums, or, if losses have been incurred, then it is the residue after deducting such losses.”¹⁶ It follows that a corporation’s capital may be many times greater than its capital stock, and it is this which makes the shares of stock of a corporation worth more on the market than their par value. Or a corporation with a large capital stock may have lost all its property, and may therefore have no capital, so that its shares will have no market value at all.¹⁷ It is in this sense it may vary in amount,¹⁸ while the capital stock is fixed in amount, subject to the right to increase or diminish it in the manner prescribed by law.¹⁹ But it has been held by a number of courts that property in excess of the limit fixed by the charter is surplus, and that, while in a general sense it may be regarded as a portion of the corporation’s capital, in a strictly legal sense it is not so.²⁰

ville Perpetual Building & Loan Co., 90 Va. 790, 44 Am. St. Rep. 950, 20 S. E. 364.

Wisconsin. Estate of Wells, 156 Wis. 294, 144 N. W. 174; Wells v. Green Bay & M. Canal Co., 90 Wis. 442, 452, 64 N. W. 69.

“‘Capital’ means property.” John W. Cooney Co. v. Arlington Hotel Co., — Del. Ch. —, 101 Atl. 879.

“The capital of a corporation is the property or means which the corporation owns.” Wells v. Green Bay & M. Canal Co., 90 Wis. 442, 452, 64 N. W. 69, quoted with approval in Estate of Wells, 156 Wis. 294, 144 N. W. 174.

“Frequently the term is employed * * * as descriptive of all the assets, gross or net, of a corporation, whatever their source, investment or employment.” Smith v. Dana, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep. 51, 60 Atl. 117.

“The capital of a corporation consists of its funds, securities, credits and property of whatever kind which it possesses.” Christensen v. Eno, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648.

In Iron R. Co. v. Lawrence Furnace Co., 49 Ohio St. 102, 30 N. E. 616, it is said that “the word ‘capital’ is sometimes used in the sense of corporate property.”

With reference to taxation, it has been held that where a corporation acquires and holds land for the purpose of complying with certain definite liabilities, whether the liabilities arose out of action of the corporation or through requirements of the statutes, the land can be deemed capital or surplus to such extent only as its value exceeds the liabilities. Appeal of Cutler, 74 Conn. 35, 49 Atl. 338.

The term capital does not embrace temporary loans, though the money borrowed is directly appropriated in the business or undertakings of the corporation. Bailey v. Clark, 21 Wall. (U. S.) 284, 22 L. Ed. 651.

¹⁶ People v. Commissioners of Taxes & Assessments for City & County of New York, 23 N. Y. 192, 219, quoted with approval in Wetherbee v. Baker, 35 N. J. Eq. 501.

¹⁷ People v. Coleman, 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818.

¹⁸ John W. Cooney Co. v. Arlington Hotel Co., — Del. Ch. —, 101 Atl. 879; Estate of Wells, 156 Wis. 294, 144 N. W. 174; Wells v. Green Bay & M. Canal Co., 90 Wis. 442, 452, 64 N. W. 69.

¹⁹ See § 3413, supra.

²⁰ Smith v. Dana, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep. 51, 60

“Capital” is also sometimes used to designate “that portion of the assets of a corporation, regardless of their service, which is utilized for the conduct of the corporate business and for the purpose of deriving therefrom gains and profits.”²¹

The capital is the property of the company,²² and the owner of a share of stock owns no part of it.²³ “The corporation owns the property—its capital; the stockholder owns the stock—his capital. The word means one thing in connection with the company and a different thing in connection with the stockholder.”²⁴

§ 3415. Stock. The term “stock” is sometimes used in the same sense as “capital stock” or “capital,”²⁵ and it has been said that

Atl. 117; *People v. Coleman*, 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818; *Williams v. Western U. Tel. Co.*, 93 N. Y. 162, 188.

The surplus belonging to a bank is distinct from the capital stock in the hands of the corporation. *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850; *Bank of Commerce v. Tennessee*, 161 U. S. 134, 40 L. Ed. 645.

See also *Reid v. Eatonton Mfg. Co.*, 40 Ga. 98, 2 Am. Rep. 563, and *Hightower v. Thornton*, 8 Ga. 486, 500, 52 Am. Dec. 412, where it is said that profits do not constitute capital.

²¹ *Smith v. Dana*, 77 Conn. 543, 69 L. R. A. 76, 107 Am. St. Rep. 51, 60 Atl. 117.

²² *People v. The Commissioners*, 4 Wall. (U. S.) 244, 18 L. Ed. 344; *Van Allen v. The Assessors*, 3 Wall. (U. S.) 573, 18 L. Ed. 229; *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Com. v. Charlottesville Perpetual Building & Loan Co.*, 90 Va. 790, 44 Am. St. Rep. 950, 20 S. E. 364.

²³ *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547.

²⁴ *Bryan v. Aiken*, — Del. —, 86 Atl. 674, rev'g — Del. Ch. —, 82 Atl. 817.

²⁵ See *Markle v. Burgess*, 176 Ind. 25, 95 N. E. 308; *Henderson Bridge Co. v. Com.*, 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486, aff'd 166 U. S. 150, 41 L. Ed. 953; *People v. Commissioners*

of Taxes & Assessments for City & County of New York, 23 N. Y. 192, 220; *Burr v. Wilcox*, 22 N. Y. 551, 556.

The Century Dictionary defines stock as “the share capital of a corporation or commercial company; the fund employed in carrying on some business or enterprise, divided into shares of equal amount, and owned by individuals who jointly form a corporation.” Quoted in *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945.

The stock of a corporation consists of its franchise and such other property as it may own. *Spring Valley Water Works v. Schottler*, 62 Cal. 69, 113, aff'd 110 U. S. 347, 28 L. Ed. 173; *People v. Badlam*, 57 Cal. 594.

In *Georgia Railroad & Banking Co. v. Wright*, 132 Fed. 912, a provision exempting the “stock” of a corporation from taxation was held to refer to stock in the aggregate in the hands of the company, that is, its capital stock, and not to stock in the hands of the shareholders.

“Stock in its general acceptance, when applied to business, * * * means money invested in business. Capital stock and capital are synonymous terms, hence capital stock. In this general sense it is money invested in business operations, whether that business be conducted by a single individual, a partnership, a corporation,

"its primary meaning is capital, in whatever form it may be invested."²⁶ But it is often used to designate, not the capital stock in the hands of the corporation, but the shares of the capital stock in the hands of the individual shareholders or stockholders,²⁷ or the certificates issued by the corporation to them.²⁸ In this sense stock is an interest in the property of the corporation,²⁹ and belongs to the individual stockholders and not to the corporation.³⁰

§ 3416. Authorized and actual capital or capital stock. The term capital stock may mean either the sum mentioned in the articles of

or government; and it makes no difference how the money is obtained, whether by labor, by borrowing, or otherwise. * * * But when it is used in connection with a chartered or joint stock company, made up of individuals, it has a somewhat more limited signification. It means then the money advanced by the corporations or members as the capital." In this latter sense, money borrowed is not stock. "Our opinion is, that when the term 'stock' is used with reference to railroad or other corporations, especially when it is used in connection with the privilege to 'subscribe' thereto, it means capital stock." *State v. Cheraw & C. R. Co.*, 16 S. C. 524.

As to the meaning of the term capital stock, see § 3413, *supra*.

As to the meaning of the term capital, see § 3414, *supra*.

²⁶ *Wright v. Georgia Railroad & Banking Co.*, 216 U. S. 420, 54 L. Ed. 544.

²⁷ **United States.** *Wright v. Georgia Railroad & Banking Co.*, 216 U. S. 420, 54 L. Ed. 544. See also *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. Ed. 830.

Connecticut. *Lockwood v. Town of Weston*, 61 Conn. 211, 23 Atl. 9.

Indiana. *Markle v. Burgess*, 176 Ind. 25, 95 N. E. 308.

Kentucky. *Henderson Bridge Co. v. Com.*, 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486, *aff'd* 166 U. S. 150, 41 L. Ed. 953.

New York. *People v. Commissioners of Taxes & Assessments for City & County of New York*, 23 N. Y. 192, 220.

Texas. *Harrison v. Vines*, 46 Tex. 15.

Wisconsin. *State v. Lewis*, 118 Wis. 432, 95 N. W. 388.

"Stock in a corporation is only evidence of the right of the holder or owner to share in the proceeds of the corporation's property." *Hall & Farley v. Alabama Terminal & Improvement Co.*, 173 Ala. 398, 414, 56 So. 235.

"Whenever it means anything different from the capital of a corporation, it can refer to nothing else than the interests of the shareholders or individuals. Such interests are called 'stock,' and the sum total of them is appropriately enough called the 'stock,' of a corporation." *People v. Commissioners of Taxes & Assessments for City & County of New York*, 23 N. Y. 192, 220.

²⁸ *Wright v. Georgia Railroad & Banking Co.*, 216 U. S. 420, 54 L. Ed. 544; *Commercial Fire Ins. Co. v. Board Revenue Montgomery Co.*, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

²⁹ *Morrill v. Bentley*, 150 Iowa 677, 130 N. W. 734; *Bridgman v. Keokuk*, 72 Iowa 42, 33 N. W. 355.

That a share of stock represents an interest in the property of the corporation, see § 3417, *infra*.

³⁰ *People v. Commissioners of Taxes & Assessments for City & County of*

incorporation as the amount of the capital stock, or in other words the share capital, or nominal capital, which does not necessarily represent a corresponding amount of actual capital,³¹ or it may mean the actual amount contributed by the shareholders of the nominal capital, or in other words the amount of the nominal capital actually paid in.³²

New York, 23 N. Y. 192, 220; *Southern Gum Co. v. Laylin*, 66 Ohio St. 578, 64 N. E. 564; *Motter v. Kennett Tp. Elec. Co.*, 212 Pa. 613, 62 Atl. 104.

That shares of stock belong to the individual shareholders, see § 3418, *infra*.

³¹ *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44; *Hightower v. Thornton*, 8 Ga. 486, 498, 52 Am. Dec. 412; *American Life Ins. Co. v. Ferguson*, 66 Ore. 417, 134 Pac. 1029.

It may mean the authorized capital. *Philadelphia v. Ridge Ave. Passenger Ry. Co.*, 102 Pa. St. 190.

"It may mean the capital subscribed (the share capital)." *Goodnow v. American Writing Paper Co.*, 73 N. J. Eq. 692, 69 Atl. 1014, aff'g 72 N. J. Eq. 645, 66 Atl. 607. In this case it was held that it was used in the sense of "the share capital subscribed, or the authorized capital," in a statute forbidding the reduction of capital stock.

"The charter of the corporation * * * fixes the maximum amount of stock that may be issued, and this may properly be spoken of as the proposed or authorized capital of the company." *Com. v. Lehigh Ave. Ry. Co.*, 129 Pa. St. 405, 414, 5 L. R. A. 367, 18 Atl. 414.

The amount of the shares subscribed constitutes the capital stock of the company rather than the amount actually paid in. *Ward v. Griswoldville Mfg. Co.*, 16 Conn. 593.

³² *Tapscott v. Mexican Colorado River Land Co.*, 153 Cal. 664, 96 Pac. 271; *Excelsior Water & Mining Co. v. Pierce*, 90 Cal. 131, 27 Pac. 44.

"It may mean * * * the capi-

tal paid in, the actual assets with which the company does business." *Goodnow v. American Writing Paper Co.*, 73 N. J. Eq. 692, 69 Atl. 1014, aff'g 72 N. J. Eq. 645, 66 Atl. 607. In the above case it was held to have been used in this sense in a statutory provision prohibiting "the dividing, withdrawing or paying to the stockholders any part of the capital stock."

"When an organization is effected, subscriptions are made to the stock, by which the subscribers agree to take and pay for certain sums or shares each. The total amount of stock thus taken constitutes the subscribed capital of the company. Some of these subscriptions may not be paid and may be uncollectible, but when the amount subscribed, or called for upon subscriptions, has been collected, so far as collection is practicable, the amount so gathered into the treasury constitutes the actual capital on which the business is undertaken." *Com. v. Lehigh Ave. Ry. Co.*, 129 Pa. St. 405, 414, 5 L. R. A. 367, 18 Atl. 414.

It has been held to mean the amount paid in, as used in a statute providing for the payment of a tax upon so much of any dividend declared "which may exceed six per centum upon the capital stock." *Philadelphia v. Ridge Ave. Passenger Ry. Co.*, 102 Pa. St. 190; *Philadelphia v. Gray's Ferry Passenger R. Co.*, 52 Pa. St. 177; *Second & T. St. Passenger Ry. Co. v. Philadelphia*, 51 Pa. St. 465; *Citizens' Passenger Ry. Co. v. Philadelphia*, 49 Pa. St. 251. See also *Com. v. Lehigh Ave. Ry. Co.*, 129 Pa. St. 405, 5 L. R. A. 367, 18 Atl. 414. And see Chap. 59, *infra*.

"There is a wide distinction between the authorized capital stock of a corporation and its actual capital stock. Its authorized capital may never become actual capital in consequence of never receiving any contributors. Its actual capital stock is the amount of its authorized capital that has been bona fide subscribed for and paid in."³³ In this connection it has been said that the capital stock "is the authorized amount of the capital to be subscribed by the stockholders and to be contributed for the purposes of the corporation, the capital is the amount contributed, and the stock subscription represents the amount agreed to be contributed. The subscribed capital stock represents the capital, and stands as a guaranty to the public" of the ability of the corporation to meet its obligation.³⁴

§ 3417. Shares of stock. A share of the capital stock of a corporation may be defined as the interest or right which the owner, who is called the "shareholder" or "stockholder," has in the management of the corporation, and in its surplus profits, and, on a dissolution, in all of its assets remaining after the payment of its debts.³⁵ It was said in a New York case that "the right which a shareholder in a corporation has by reason of his ownership of shares, is a right to partici-

It has also been held to mean the amount paid in as used in an act of incorporation giving the company the right to borrow money in any sum not exceeding in amount "one half of the par value of the capital stock."

Com. v. Lehigh Ave. Ry. Co., 129 Pa. St. 405, 5 L. R. A. 367, 18 Atl. 414.
³³ *Stemple v. Bruin*, 57 Fla. 173, 49 So. 151.

³⁴ *American Life Ins. Co. v. Ferguson*, 66 Ore. 417, 134 Pac. 1029.

³⁵ *United States*. *Gibbons v. Mahon*, 136 U. S. 549, 34 L. Ed. 525; *In re Feckheimer Fishel Co.*, 212 Fed. 357; *Storrow v. Texas Consol. Compress & Manufacturing Ass'n*, 87 Fed. 612; *Forbes v. Memphis, E. P. & P. R. Co.*, 2 Woods 323, Fed. Cas. No. 4,926.

Alabama. *Marbury Lumber Co. v. Hunter*, 169 Ala. 503, 53 So. 1028; *Commercial Fire Ins. Co. v. Board Revenue Montgomery Co.*, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

Arizona. *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

Illinois. *Cummings v. People*, 211 Ill. 392, 71 N. E. 1031; *Union Nat. Bank of Chicago v. Byram*, 131 Ill. 92, 22 N. E. 842; *Colton v. Williams*, 65 Ill. App. 466.

Indiana. *Markle v. Burgess*, 176 Ind. 25, 95 N. E. 308.

Iowa. *Morrow v. Gould*, 145 Iowa 1, 25 L. R. A. (N. S.) 384, 123 N. W. 743.

Massachusetts. *Field v. Pierce*, 102 Mass. 253; *Fisher v. Essex Bank*, 5 Gray 373. See also *Bellows Falls Power Co. v. Com.*, 222 Mass. 51, Ann. Cas. 1916 C 834, 109 N. E. 891.

Missouri. *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690.

Nebraska. *Mann v. German-American Inv. Co.*, 70 Neb. 454, 97 N. W. 600.

New Hampshire. *Jones v. Concord & M. R. R.*, 67 N. H. 234, 68 Am. St. Rep. 650, 30 Atl. 614.

New Jersey. *American Pig Iron Storage Co. v. State Board of Assessors*, 56 N. J. L. 389, 29 Atl. 160.

pate according to the amount of his stock in the surplus profits of the corporation on a division, and ultimately on its dissolution, in the assets remaining after payment of its debts," and this definition has been followed in the later cases in that state,³⁶ and has been quoted or

New York. *Plimpton v. Bigelow*, 93 N. Y. 592; *Burrall v. Bushwick R. Co.*, 75 N. Y. 211.

North Carolina. *Evans v. Monot*, 57 N. C. 227.

Ohio. *Jones v. Davis*, 35 Ohio St. 474.

Oklahoma. *People's Nat. Bank v. Board Com'rs Kingfisher Co.*, 24 Okla. 145, 104 Pac. 55, 103 Pac. 682.

Pennsylvania. *Neiler v. Kelley*, 69 Pa. St. 403.

Tennessee. *Brightwell v. Mallory*, 10 Yerg. 196.

Virginia. *Carnegie Trust Co. v. Security Life Ins. Co. of America*, 111 Va. 1, 31 L. R. A. (N. S.) 1186, 21 Ann. Cas. 1287, 68 S. E. 412; *Barksdale v. Finney*, 14 Gratt. 338.

Washington. *Gamble v. Dawson*, 67 Wash. 72, Ann. Cas. 1913 D 501, 120 Pac. 1060.

West Virginia. *Lipsecomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

Wisconsin. *Button v. Hoffman*, 61 Wis. 20, 50 Am. Rep. 131, 20 N. W. 667.

England. *Oakbank Oil Co. v. Crum*, 8 App. Cas. 65.

It is "a right which its owner has in the management, profits and ultimate assets of the corporation." *Storow v. Texas Consol. Compress & Manufacturing Ass'n*, 87 Fed. 612.

"The right is, strictly speaking, a right to participate, in a certain proportion, in the immunities and benefits of the corporation; to vote in the choice of their officers, and the management of their concerns; to share in the dividends of profits, and to receive an aliquot part of the proceeds of the capital, on winding up and terminating the active existence and

operations of the corporation." *Fisher v. Essex Bank*, 5 Gray (Mass.) 373.

The stock is "the interest or right that the stockholder has in the corporate entity." *Dean Rapid Tel. Co. v. Howell*, 162 Mo. App. 100, 144 S. W. 135.

A share of stock is merely an undivided interest in the corporate privileges, rights and property and in no respect differs from any other share. *Smith v. Becker*, 129 Wis. 396, 109 N. W. 131.

In *Mann v. German-American Inv. Co.*, 70 Neb. 454, 97 N. W. 600, it was held that a contract for the purchase of a diamond from a tontine company did not make the purchaser a stockholder in the company.

³⁶*Plimpton v. Bigelow*, 93 N. Y. 592, quoted with approval in *In re Osborne*, 153 N. Y. App. Div. 312, 138 N. Y. Supp. 18. And see, to the same effect, *Lockwood v. United States Steel Corporation*, 209 N. Y. 375, L. R. A. 1915 C 471, 103 N. E. 697, rev'g 153 N. Y. App. Div. 655, 138 N. Y. Supp. 725; *In re Bronson*, 150 N. Y. 1, 34 L. R. A. 238, 55 Am. St. Rep. 632, 44 N. E. 707, modifying on other grounds 1 N. Y. App. Div. 546, 37 N. Y. Supp. 476; *Jermain v. Lake Shore & M. S. R. Co.*, 91 N. Y. 483; *Cass v. Realty Securities Co.*, 148 N. Y. App. Div. 96, 132 N. Y. Supp. 1074, aff'd 206 N. Y. 649, 99 N. E. 1105.

"A share of corporate stock is the right which the shareholder has to participate according to the number of shares in the surplus profits of the corporation on a division, and in the assets or corporate stock remaining after payment of its debts on its dissolution or the termination of its

adopted in decisions by the courts of some of the other states.³⁷

A share of stock "is created by the joint action of the corporation and the shareholder,"³⁸ and represents "a contribution of capital to a corporate business equal to the amount of its face value, either in money or property."³⁹ The equitable interest of the shareholder in

active existence and operation." *United States Radiator Corporation v. State*, 208 N. Y. 144, 46 L. R. A. (N. S.) 585, 101 N. E. 783, aff'g 151 N. Y. App. Div. 367, 135 N. Y. Supp. 981.

"The capital stock is that money, or property, which is put into a single corporate fund, by those, who by subscription therefor, become members of the corporate body. That fund becomes the property of the aggregate body only. A share of the capital stock, is the right to partake, according to the amount put into the fund, of the surplus profits of the corporation; and ultimately on the dissolution of it, of so much of the fund thus created, as remains unimpaired, and is not liable for the debts of the corporation." *Burrall v. Bushwick R. Co.*, 75 N. Y. 211.

³⁷ *Alabama*. *Hall & Farley v. Henderson*, 126 Ala. 449, 61 L. R. A. 621, 65 Am. St. Rep. 53, 28 So. 531; *Commercial Fire Ins. Co. v. Board Revenue Montgomery Co.*, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

Arizona. *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

California. *People v. Badlam*, 57 Cal. 594.

Massachusetts. *Kennedy v. Hodges*, 215 Mass. 112, 102 N. E. 432; *Field v. Pierce*, 102 Mass. 253.

Missouri. *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690.

Tennessee. *Cornick v. Richards*, 3 Lea 1.

"The interest of a stockholder in a corporation is an immediate right to receive his share of the dividends as they are declared, and the remote right to his share of the effects on

hand at the dissolution of the corporation." *State v. Mitchell*, 104 Tenn. 336, 58 S. W. 365.

"The ownership of a share of stock, so far as the property of the corporation is concerned, is but the ownership of the right to participate, from time to time, in the net profits of the business, and upon the dissolution of the corporation to a portion of the assets after the payment of the corporate debts." *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547.

"Shares in an incorporated company are the aliquot parts of the capital stock, and merely give to the owner a right to his share of the profits of the corporation while it is a going concern and to a share of the proceeds of its assets when sold for distribution in case of its dissolution and winding up." *Presnall v. Stockyards Nat. Bank*, — Tex. Civ. App. —, 151 S. W. 873.

"The shares simply represent the proportion to which the respective shareholders, who may be such at the date of distribution, are severally entitled in the distribution of profits arising from the corporate business, which may be made from time to time, and in the final distribution of the estate of the corporation, when from any cause it shall cease to exist, and its estate shall have been fully administered." *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 22 Pac. 689, 20 Pac. 401.

³⁸ *United States Radiator Corporation v. State*, 208 N. Y. 144, 46 L. R. A. (N. S.) 585, 101 N. E. 783, aff'g 151 N. Y. App. Div. 367, 135 N. Y. Supp. 981.

³⁹ *People v. Miller*, 180 N. Y. 16, 72

the property of the corporation "is represented by the term 'stock,' and the extent of his interest is described by the term 'shares.' The expression 'shares of stock,' when qualified by words indicating number and ownership, expresses the extent of the owner's interest in the corporation property."⁴⁰ "It is the payment, or the obligation to pay for shares of stock, accepted by the corporation, that creates both the shares and their ownership." "When a corporation has agreed that a person shall be entitled to a certain number of shares for a consideration permitted by law and executed by the person, those shares come into existence and are owned by him." "The statement in the certificate of incorporation or charter of the corporation that the capital stock is a designated amount divided into a certain number of shares, each of a named value, creates neither shares nor capital stock. It expresses the power of the corporation to acquire a capital stock. It creates potential shares which, transferred into actual shares by the acquisition of members and their payments, produce the money or property which, put into a single corporate fund, is the actual capital or capital stock on which the corporate business is undertaken and in which are the shares. It also fixes the sum of the payment necessary to create a share."⁴¹

While, as we shall see in a subsequent section, a share of stock is property,⁴² it has been said that it also creates a personal relation analogous otherwise than technically, to a partnership.⁴³

The shares of stock are the property of the stockholders,⁴⁴ and in this respect are to be distinguished from the "capital,"⁴⁵ and the

N. E. 525, aff'g 94 N. Y. App. Div. 564, 88 N. Y. Supp. 197. See also *Holmes v. Camp*, 219 N. Y. 359, 114 N. E. 841, rev'g 173 N. Y. App. Div. 971, 159 N. Y. Supp. 1119.

"Shares are the mere certificates which represent a subscriber's contribution to the capital stock, and measure his interest." *Wright v. Georgia Railroad & Banking Co.*, 216 U. S. 420, 54 L. Ed. 544.

"It imports a contribution to the capital stock made by the shareholder and accepted by the corporation." *United States Radiator Corporation v. State*, 208 N. Y. 144, 46 L. R. A. (N. S.) 585, 101 N. E. 783, aff'g 151 N. Y. App. Div. 367, 135 N. Y. Supp. 981.

⁴⁰ *Bridgman v. Keokuk*, 72 Iowa 42, 33 N. W. 355, quoted with approval

in *Morrill v. Bentley*, 150 Iowa 677, 130 N. W. 734.

A "share" is defined by the Century Dictionary as "one of the whole number of equal parts into which the stock of a trading company is or may be divided." Quoted in *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945.

⁴¹ *United States Radiator Corporation v. State*, 208 N. Y. 144, 46 L. R. A. (N. S.) 585, 101 N. E. 783, aff'g 151 N. Y. App. Div. 367, 135 N. Y. Supp. 981.

⁴² See § 3429, *infra*.

⁴³ *Longyear v. Hardman*, 219 Mass. 405, Ann. Cas. 1916 D 1170, 106 N. E. 1012; *Barrett v. King*, 181 Mass. 476, 63 N. E. 934.

⁴⁴ See § 3418, *infra*.

⁴⁵ See § 3414, *supra*.

“capital stock,”⁴⁶ which are the property of the corporation, and also from its tangible property, which of course belongs to it.⁴⁷

§ 3418. Distinction between capital stock and shares of stock.

There is a clear distinction between the capital stock of a corporation and the shares of stock of such corporation,⁴⁸ and the two are separate

⁴⁶ See § 3413, *supra*.

⁴⁷ *Hawley v. Malden*, 232 U. S. 1, Ann. Cas. 1916 C 842, 58 L. Ed. 477, aff'g 204 Mass. 138, 90 N. E. 415; *Bellows Falls Power Co. v. Com.*, 222 Mass. 51, Ann. Cas. 1916 C 834, 109 N. E. 891; *Williams v. Lowe*, 4 Neb. 282, aff'd 94 U. S. 650, 24 L. Ed. 216; *Cornick v. Richards*, 3 Lea (Tenn.) 1.

There is an obvious distinction between the property of the corporation and the shares of capital stock in the hands of its stockholders. *Town of New Haven v. City Bank*, 31 Conn. 106.

“The tangible property of a corporation, and the shares of stock therein, are separate and distinct kinds of property and belong to different owners, the first being the property of the artificial person,—the corporation,—the latter the property of the individual owner thereof.” *Greenleaf v. Board Review Morgan Co.*, 184 Ill. 226, 75 Am. St. Rep. 168, 56 N. E. 295.

“Shares of stock may be within a state and the property of the corporation outside it.” *Kidd v. Alabama*, 188 U. S. 730, 47 L. Ed. 669, quoted with approval in *People v. Reardon*, 184 N. Y. 431, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628, 6 Ann. Cas. 515, 77 N. E. 970; *People v. Grifenhagen*, 167 N. Y. App. Div. 572, 152 N. Y. Supp. 679.

⁴⁸ *United States*. *Hawley v. Malden*, 232 U. S. 1, Ann. Cas. 1916 C 842, 58 L. Ed. 477, aff'g 204 Mass. 138, 90 N. E. 415; *Wright v. Georgia Railroad & Banking Co.*, 216 U. S. 420, 54 L. Ed. 544; *Powers v. Detroit, G. H. & M. R. Co.*, 201 U. S. 543, 50 L.

Ed. 860, aff'g 138 Fed. 264; *Cleveland Trust Co. v. Lander*, 184 U. S. 111, 46 L. Ed. 456; *Owensboro Nat. Bank v. Owensboro*, 173 U. S. 664, 43 L. Ed. 850; *New Orleans v. Citizens' Bank*, 167 U. S. 371, 42 L. Ed. 202; *Shelby County v. Union & Planters' Bank*, 161 U. S. 149, 40 L. Ed. 650; *Bank of Commerce v. Tennessee*, *Shelby County*, 161 U. S. 134, 40 L. Ed. 645; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. Ed. 830; *Farrington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558.

Alabama. *Commercial Fire Ins. Co. v. Board Revenue Montgomery Co.*, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

California. *Canfield v. Los Angeles County*, 157 Cal. 617, 108 Pac. 705; *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 22 Pac. 689, 20 Pac. 401.

Connecticut. *State v. Norwich & W. R. Co.*, 30 Conn. 290.

Kentucky. *Henderson Bridge Co. v. Com.*, 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486, aff'd 166 U. S. 150, 41 L. Ed. 953.

Massachusetts. *Bellows Falls Power Co. v. Com.*, 222 Mass. 51, Ann. Cas. 1916 C 834, 109 N. E. 891; *Hawley v. Malden*, 204 Mass. 138, 90 N. E. 415, aff'd 232 U. S. 1, 58 L. Ed. 477.

New York. *In re Jones*, 172 N. Y. 575, 60 L. R. A. 476, 65 N. E. 570.

Ohio. *Iron R. Co. v. Lawrence Furnace Co.*, 49 Ohio St. 102, 30 N. E. 616.

Pennsylvania. *Wilkes-Barre Deposit & Savings Bank v. Wilkes-Barre*, 148 Pa. St. 601, 24 Atl. 111; *Lycoming v. Gamble*, 47 Pa. St. 106.

Tennessee. *Cornick v. Richards*, 3 Lea 1.

Virginia. *Com. v. Charlottesville*

and distinct pieces of property.⁴⁹ The capital stock, as we have seen, is the amount paid in or secured to be paid in by the stockholders upon which it is to conduct its operations,⁵⁰ and is the property of the corporation itself.⁵¹ A share of stock, on the other hand, is the interest or right which the owner has in the management of the corporation, and in its surplus profits, and, on a dissolution, in all of its assets

Perpetual Building & Loan Co., 90 Va. 790, 44 Am. St. Rep. 950, 20 S. E. 364.

"There is a clear distinction between the capital stock of a corporation and the shares of stock of such corporation in the hands of its individual shareholders." *Shelby County v. Union & Planters' Bank*, 161 U. S. 149, 40 L. Ed. 650.

The company's capital stock and the shareholder's capital stock are essentially different in every material respect. "They differ in their character, in their elements, in their ownership and in their values." *People v. Coleman*, 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818.

There is a distinction between capital stock and share stock. The term "capital stock," as used in the tax law of New York has reference to the actual money or property paid into the corporation and which it possesses. It does not mean share stock. *People v. Coleman*, 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818; *People v. Feitner*, 92 N. Y. App. Div. 518, 87 N. Y. Supp. 304.

But a statute exempting the "capital" of a corporation from taxation was held to exempt the shares of the individual stockholders in *Penrose v. Chaffraix*, 106 La. 250, 30 So. 718, on the ground that such was the intention of the legislature.

⁴⁹ *United States*. *Hawley v. Malden*, 332 U. S. 1, Ann. Cas. 1916 C 842, 58 L. Ed. 477, aff'g 204 Mass. 138, 90 N. E. 415; *Bank of Commerce v. Tennessee*, *Shelby County*, 161 U. S. 134, 46, 40 L. Ed. 645; *New Orleans v. Houston*, 119 U. S. 265, 30 L. Ed. 411;

West v. Empire Life Ins. Co., 242 Fed. 605.

California. *Canfield v. Los Angeles County*, 157 Cal. 617, 108 Pac. 705.

Massachusetts. *Bellows Falls Power Co. v. Com.*, 222 Mass. 51, Ann. Cas. 1916 C 834, 109 N. E. 891; *Hawley v. Malden*, 204 Mass. 138, 90 N. E. 415, aff'd 232 U. S. 1, 58 L. Ed. 477.

Ohio. *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547.

Tennessee. *Cornick v. Richards*, 3 Lea 1.

⁵⁰ See § 3413, supra.

⁵¹ *United States*. *Cleveland Trust Co. v. Lander*, 184 U. S. 111, 46 L. Ed. 456; *Tennessee v. Whitworth*, 117 U. S. 129, 29 L. Ed. 830. See also *Farlington v. Tennessee*, 95 U. S. 679, 24 L. Ed. 558; *Wood v. Dummer*, 3 Mason 308, Fed. Cas. No. 17,944.

Alabama. *Commercial Fire Ins. Co. v. Board Revenue Montgomery Co.*, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

California. *Kohl v. Lilienthal*, 81 Cal. 378, 6 L. R. A. 520, 22 Pac. 689, 20 Pac. 401.

Illinois. *Consolidated Coal Co. of St. Louis v. Miller*, 236 Ill. 149, 86 N. E. 205.

Indiana. *Markle v. Burgess*, 176 Ind. 25, 95 N. E. 308.

Kentucky. *Henderson Bridge Co. v. Com.*, 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486, aff'd 166 U. S. 150, 41 L. Ed. 953.

Missouri. *Bent v. Hart*, 10 Mo. App. 143, aff'd 73 Mo. 641.

New Jersey. *Wetherbee v. Baker*, 35 N. J. Eq. 501.

Ohio. *Jones v. Davis*, 35 Ohio St. 474.

remaining after the payment of its debts,⁵² and the shares of stock belong to the individual stockholders, and not to the company.⁵³

§ 3419. Common stock. Common stock has been defined to be stock which entitles the owners of it to an equal pro rata division of profits, if there are any, no stockholder or class of stockholders having any preference or advantage in that respect over any other stockholder or class of stockholders.⁵⁴ It has been said that its name indicates its nature, and that it is so called because it is the common

Pennsylvania. Wilkes-Barre Deposit & Savings Bank v. Wilkes-Barre, 148 Pa. St. 601, 24 Atl. 111.

Virginia. Com. v. Charlottesville Perpetual Building & Loan Co., 90 Va. 790, 44 Am. St. Rep. 950, 20 S. E. 364.

⁵² See § 3417, *supra*.

⁵³ **United States.** Cleveland Trust Co. v. Lauder, 184 U. S. 111, 46 L. Ed. 456; Tennessee v. Whitworth, 117 U. S. 129, 29 L. Ed. 830; Van Allen v. The Assessors, 3 Wall. 573, 18 L. Ed. 229. See also Farrington v. Tennessee, 95 U. S. 679, 24 L. Ed. 558.

Alabama. Commercial Fire Ins. Co. v. Board Revenue Montgomery Co., 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

California. Kohl v. Lilienthal, 81 Cal. 378, 6 L. R. A. 520, 22 Pac. 689, 20 Pac. 401.

Delaware. Bryan v. Aiken, 86 Atl. 674, rev'g (Del. Ch.), 82 Atl. 817.

Illinois. Consolidated Coal Co. of St. Louis v. Miller, 236 Ill. 149, 86 N. E. 205; Greenleaf v. Board Review Morgan Co., 184 Ill. 226, 75 Am. St. Rep. 168, 56 N. E. 295.

Indiana. Markle v. Burgess, 176 Ind. 25, 95 N. E. 308; Conwell v. Town of Connorsville, 15 Ind. 150.

Missouri. Bent v. Hart, 10 Mo. App. 143, aff'd 73 Mo. 641.

New Jersey. Wetherbee v. Baker, 35 N. J. Eq. 501.

New York. People v. Commissioners of Taxes & Assessments for City & County of New York, 23 N. Y. 192,

220; Bank of Attica v. Manufacturers' & Traders' Bank, 20 N. Y. 501.

Ohio. Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564; Iron R. Co. v. Lawrence Furnace Co., 49 Ohio St. 102, 30 N. E. 616; National Bank of New London v. Lake Shore & M. S. R. Co., 21 Ohio St. 221.

Pennsylvania. Motter v. Kennett Tp. Elec. Co., 212 Pa. 613, 62 Atl. 104; Wilkes-Barre Deposit & Savings Bank v. Wilkes-Barre, 148 Pa. St. 601, 24 Atl. 111.

Tennessee. Cornick v. Richards, 3 Lea 1.

Virginia. Com. v., Charlottesville Perpetual Building & Loan Co., 90 Va. 790, 44 Am. St. Rep. 950, 20 S. E. 364.

Wisconsin. Estate of Wells, 156 Wis. 294, 144 N. W. 174; Wells v. Green Bay & M. Canal Co., 90 Wis. 442, 452, 64 N. W. 69.

"The stock of a corporation is not its property and is not owned by it, but by the several stockholders. It owes and not owns the stock. The stock is a liability of the corporation and not an asset." Southern Gum Co. v. Laylin, 66 Ohio St. 578, 64 N. E. 564.

⁵⁴ Cook on Stockholders, § 12, p. 62; General Inv. Co. v. Bethlehem Steel Corporation, — N. J. Eq. —, 100 Atl. 347. In this case it is said: "It is almost impossible to get a definition of 'common stock' or a statement of what classes of stock may be issued, and the necessary rights and privileges of the classes, that is satisfactory."

stock, or the stock which private corporations generally issue.⁵⁵ Its essential elements "are that the holders have an opportunity to make profit if there is any and participate in the assets after all other claims are paid, and bear the loss if there be such."⁵⁶

Usually it carries with it the right to vote, and frequently an exclusive right to do so.⁵⁷ But the privilege of voting is not necessarily incidental to common stock⁵⁸ and it is sometimes divided into classes having different voting powers.⁵⁹

§ 3420. Preferred stock. Preferred stock is stock which gives the holder a preference over the holders of common stock with respect to the payment of dividends, and also, in some instances, with respect to distributions of capital. The nature of such stock, and the rights of preferred stockholders will be considered at length in subsequent sections.⁶⁰

§ 3421. Treasury stock. Treasury stock is stock reserved at the time of organization as assets of the corporation and the stockholders to be used in furtherance of corporate purposes.⁶¹ In respect to mining stock it has been held to mean "such stock as is set aside for the actual development of the property."⁶²

Stock which has been issued as full paid to certain stockholders and has by them been subsequently donated to the corporation to be used by it in the furtherance of its purposes is often spoken of as treasury

⁵⁵ Thompson on Corporations, § 3426; General Inv. Co. v. Bethlehem Steel Corporation, — N. J. Eq. —, 100 Atl. 347.

⁵⁶ General Inv. Co. v. Bethlehem Steel Corporation, — N. J. Eq. —, 100 Atl. 347.

⁵⁷ As to the right to vote generally, see § 1657 et seq., supra.

As to the right of preferred stockholders to vote, see § 3638, infra.

⁵⁸ General Inv. Co. v. Bethlehem Steel Corporation, — N. J. Eq. —, 100 Atl. 347.

In New Jersey a corporation may issue common stock without the voting privilege. Nor is an issue of such stock vitiated because its purpose is to perpetuate the existing control of the corporation, nor because some of

the directors who vote in favor of issuing it will profit by the plan.

⁵⁹ General Inv. Co. v. Bethlehem Steel Corporation, — N. J. Eq. —, 100 Atl. 347.

⁶⁰ See § 3632 et seq., infra.

⁶¹ Mackey v. Burns, 16 Colo. App. 6, 64 Pac. 485. See also Grant v. Walsh, 41 Wash. 542, 83 Pac. 1113.

⁶² State v. Manhattan Verde Co., 32 Nev. 474, 109 Pac. 442.

"In other words, 'treasury stock,' to the investors in mining stock, means, and would indicate, that the proceeds from the sale of the stock so purchased will be used in the actual development of the mining ground of the mining company selling the stock." State v. Manhattan Verde Co., 32 Nev. 474, 109 Pac. 442.

stock.⁶³ Strictly speaking, it is not treasury stock, however, but occupies rather the status of any other property that it may own and which it may sell or barter at any time as it would sell or barter other personal property.⁶⁴

Stock to be held by the corporation as unsubscribed for and unissued is not treasury stock.⁶⁵

Treasury stock issued to trustees whose duty it is, under the terms of the trust, to immediately cover it back into the treasury remains treasury stock.⁶⁶

The sale of treasury stock by the corporation is governed by the ordinary rules relative to the sale of stock or other personal property.⁶⁷ Its right to sell such stock below par is considered in subsequent sections.⁶⁸

§ 3422. Promotion stock. "Promotion stock" of a mining company "is such stock as is issued to those who may originally own the mining ground or valuable rights connected therewith, in consideration of their deeding the same to the mining company when the company is incorporated, or it may mean such stock as is issued to promoters, or those in some way interested in the company, for incorporating the company, or for services rendered in launching or promoting the welfare of the company, such as advancing the fees for incorporating, attorney's fees, surveying, advertising, etc."⁶⁹

§ 3423. Shareholders and stockholders. A shareholder has been defined to be "one who holds or owns a share or shares in a joint-stock or incorporated company;"⁷⁰ and a stockholder as "one owning

⁶³ Enright v. Heckscher, 240 Fed. 863; Mackey v. Burns, 16 Colo. App. 6, 64 Pac. 485; Davies v. Ball, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

"Treasury stock is stock which is returned by the person to whom it is issued to the corporation as a gift to sell the same and put the proceeds in the corporate treasury as working capital." Newmann v. Sexton, 156 Ill. App. 517.

"Stock may be turned in to a company by the original subscribers to be held and sold by the company as treasury stock." Sherman v. Shaugh-

nessy, 148 Mo. App. 679, 129 S. W. 245.

⁶⁴ Mackey v. Burns, 16 Colo. App. 6, 64 Pac. 485.

⁶⁵ Bivens v. Hull, 58 Colo. 338, 145 Pac. 694.

⁶⁶ Camden Land Co. v. Lewis, 101 Me. 78, 63 Atl. 523.

⁶⁷ See subd. XVIII et seq., *infra*, this chapter.

⁶⁸ See § 3594, *infra*.

⁶⁹ State v. Manhattan Verde Co., 32 Nev. 474, 109 Pac. 442.

As to the right to issue stock to promoters for their services, see § 164 and § 3519 et seq.

⁷⁰ Century Dictionary. Quoted in

stock" of the corporation,⁷¹ or one who has agreed to pay in a certain amount as his contribution to the capital stock.⁷² And it has been said that, "as stock in a corporation is a share or shares in the corporation and represents and entitles the holder thereof to a part or share of the fund put into and employed in carrying on the business, a stockholder or one owning stock is necessarily a shareholder."⁷³ "A bona fide holder of stock of record in a corporation is a shareholder therein."⁷⁴

Generally the term stockholders is used in connection with corporations having a capital stock,⁷⁵ but it may be used in reference to mutual companies as meaning those who have agreed to become members of the association and to pay assessments.⁷⁶

While, as we shall see in a subsequent section, the record of ownership of shares on the corporate books may be evidence of the fact of ownership as against the company or third persons,⁷⁷ the record owner may nevertheless have actually sold his shares and so ceased to be in fact a shareholder and stockholder.⁷⁸

Continental Securities Co. v. Interborough Rapid Transit Co., 165 Fed. 945.

⁷¹ *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945; *Mills v. Stewart*, 41 N. Y. 384.

Mont. Civ. Code 1895, § 408, provides: "The owners of shares in a corporation which has a capital stock are called stockholders." *Smith v. Iron Mountain Tunnel Co.*, 46 Mont. 13, Ann. Cas. 1914 B 551, 125 Pac. 649.

⁷² *Sugg v. Farmers' Mut. Ins. Ass'n* (Tenn. Ch.), 63 S. W. 226.

⁷³ *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945.

⁷⁴ *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945.

⁷⁵ "When we use this term we usually have in contemplation a stock subscription list, whereby certain sums are agreed to be paid as contributions to a fund intended to supply a capital stock for the company." *Sugg v. Farmers' Mut. Ins. Ass'n* (Tenn. Ch.), 63 S. W. 226.

Mont. Civ. Code 1895, § 408, provides: "The owners of shares in a

corporation which has a capital stock are called stockholders. If a corporation has no capital stock, the corporators and their successors are called members." *Smith v. Iron Mountain Tunnel Co.*, 46 Mont. 13, Ann. Cas. 1914 B 551, 125 Pac. 649.

⁷⁶ "In a proper sense, those who agree to be answerable for assessments are really stockholders in the company whose operating fund is thus secured." *Sugg v. Farmers' Mut. Ins. Ass'n* (Tenn. Ch.), 63 S. W. 226. In this case the word was held to have been so used in a statute relating to mutual insurance companies.

Where there is no charter provision to the contrary, as respects rights and remedies, holders of policies in a mutual insurance are as much stockholders as are shareholders in a stock company. *Huber v. Martin*, 127 Wis. 412, 3 L. R. A. (N. S.) 653, 115 Am. St. Rep. 1023, 7 Ann. Cas. 400, 105 N. W. 1031.

⁷⁷ See subd. XXI, *infra*, this chapter.

⁷⁸ *Continental Securities Co. v. Interborough Rapid Transit Co.*, 165 Fed. 945.

II. CERTIFICATES OF STOCK

§ 3424. Definition and nature. A stock certificate has been defined to be "a written acknowledgment by the corporation of the interest of a shareholder in the corporate property and franchises."⁷⁹ "It expresses the contract between the shareholder and the corporation and his co-shareholders."⁸⁰

It is the nature of a chose in action, or, rather, of an instrument evidencing a chose in action, but, properly speaking, it is not a chose in action. Nor is it a credit, or money or a security,⁸¹ nor an evidence of debt,⁸² nor a promise to pay,⁸³ nor an order for the payment of money.⁸⁴ Nor is it analogous to or in the nature of a general letter of credit.⁸⁵

§ 3425. Certificate is not the stock itself. It is well settled that a certificate of stock in a corporation is not the stock itself. It is the mere evidence of the holder's ownership of the stock and of his rights as a stockholder to the extent specified therein, just as a promissory note is merely the evidence of the debt secured thereby, and as title

That a transfer on the corporate books is not necessary to pass the title to stock sold, see subd. XXI, *infra*, this chapter.

⁷⁹ 1 Cook on Corporations, § 13; Nelson v. Owen, 113 Ala. 372, 21 So. 75; Markle v. Burgess, 176 Ind. 25, 95 N. E. 308; Astoria & S. C. R. Co. v. Hill, 20 Ore. 177, 25 Pac. 379; Cattlemen's Trust Co. of Ft. Worth v. Turner, — Tex. Civ. App. —, 182 S. W. 438.

"A certificate of stock is the written evidence of the right of a party to a pro rata share of the net profits of a corporation when declared, or to a like share of all its property, after the payment of its debts, in case of a dissolution of the artificial being." Beckwith v. Galice Mines Co., 50 Ore. 542, 16 L. R. A. (N. S.) 723, 93 Pac. 453.

"Certificates of stock, in the hands of their holder, represent the number of shares which the corporation acknowledges that he is entitled to." In re Bronson, 150 N. Y. 1, 34 L. R. A. 238, 55 Am. St. Rep. 632, 44 N. E. 707, modifying on other grounds 1 N. Y.

App. Div. 546, 37 N. Y. Supp. 476.

⁸⁰ United States Radiator Corporation v. State, 208 N. Y. 144, 46 L. R. A. (N. S.) 585, 101 N. E. 783, aff'g 151 N. Y. App. Div. 367, 135 N. Y. Supp. 981.

⁸¹ See § 3431, *infra*.

⁸² Nelson v. Owen, 113 Ala. 372, 21 So. 75; Sinnott v. Hibernia Nat. Bank, 105 La. 705, 30 So. 233.

That shares of stock are not a debt, see § 3431, *infra*.

⁸³ Nelson v. Owen, 113 Ala. 372, 21 So. 75; Clark v. American Coal Co., 86 Iowa 436, 17 L. R. A. 557, 53 N. W. 291.

⁸⁴ Nelson v. Owen, 113 Ala. 372, 21 So. 75; Clark v. American Coal Co., 86 Iowa 436, 17 L. R. A. 557, 53 N. W. 291.

It is not an order of its owner on the owners of the corporation to pay money. Sinnott v. Hibernia Nat. Bank, 105 La. 705, 30 So. 233.

⁸⁵ Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599.

deeds are merely the evidence of the ownership of land.⁸⁶ "A share

86 United States. Richardson v. Shaw, 209 U. S. 365, 52 L. Ed. 835, 14 Ann. Cas. 981; Citizens' Savings & Trust Co. v. Illinois Cent. R. Co., 205 U. S. 46, 51 L. Ed. 703; Pacific Nat. Bank v. Eaton, 141 U. S. 227, 35 L. Ed. 702; Cecil Nat. Bank v. Watsonstown Bank, 105 U. S. 217, 26 L. Ed. 1039; McAllister v. Kuhn, 96 U. S. 87, 24 L. Ed. 615; Geiger-Jones Co. v. Turner, 230 Fed. 233, judgment rev'd 242 U. S. 539, 61 L. Ed. 480, L. R. A. 1917 F 514, Ann. Cas. 1917 C 643; Shaw v. Goebel Brewing Co., 202 Fed. 408, 45 L. R. A. (N. S.) 1090; Jessup v. Chicago & N. W. Ry. Co., 188 Fed. 931; Citizens' Savings & Trust Co. v. Illinois Cent. R. Co., 182 Fed. 607, rev'g 173 Fed. 556; Continental Securities Co. v. Interborough Rapid Transit Co., 165 Fed. 945; McKane v. Burke, 132 Fed. 688; Allen-West Commission Co. v. Grumbles, 129 Fed. 287.

Alabama. Jefferson County Sav. Bank v. Compton, 192 Ala. 16, 68 So. 261; Nelson v. Owen, 113 Ala. 372, 21 So. 75; Commercial Fire Ins. Co. v. Board Revenue Montgomery Co., 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490; Campbell v. Woodstock Iron Co., 83 Ala. 351, 3 So. 369.

Arizona. Hook v. Hoffman, 16 Ariz. 140, 147 Pac. 722.

California. Perkins v. Cowles, 157 Cal. 625, 30 L. R. A. (N. S.) 283, 137 Am. St. Rep. 158, 108 Pac. 711; O'Dea v. Hollywood Cemetery Ass'n, 154 Cal. 53, 97 Pac. 1; Williams v. Ashurst Oil, Land & Development Co., 144 Cal. 619, 78 Pac. 28; California Southern Hotel Co. v. Callender, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110; Majors v. Girdner, 31 Cal. App. 47, 159 Pac. 826.

Colorado. Mountair Water Works Const. Co. v. Holme, 49 Colo. 412, 113

Pac. 501; Ellis v. Gibbons, 26 Colo. App. 454, 145 Pac. 285.

Connecticut. Winslow v. Fletcher, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250.

Georgia. Oliver v. Oliver, 118 Ga. 362, 45 S. E. 232; People's Nat. Bank v. Cleveland, 117 Ga. 908, 44 S. E. 20.

Illinois. Wuller v. Chuse Grocery Co., 241 Ill. 398, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522, 89 N. E. 796; Wemple v. St. Louis, J. & S. R. Co., 120 Ill. 196, 11 N. E. 906; Shirley Farmers' Grain & Coal Co. v. Douglas, 130 Ill. App. 285; Colton v. Williams, 65 Ill. App. 466.

Indiana. Markle v. Burgess, 176 Ind. 25, 95 N. E. 308; Hill v. Kerstetter, 43 Ind. App. 1, 86 N. E. 858; Smith v. Downey, 8 Ind. App. 179, 52 Am. St. Rep. 467, 35 N. E. 568, 34 N. E. 823.

Iowa. Morrow v. Gould, 145 Iowa 1, 25 L. R. A. (N. S.) 384, 123 N. W. 743.

Kansas. Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273.

Kentucky. Com. v. Peebles, 134 Ky. 121, 28 L. R. A. (N. S.) 1130, 20 Ann. Cas. 724, 119 S. W. 774.

Louisiana. Sinnott v. Hibernia Nat. Bank, 105 La. 705, 30 So. 233.

Maine. Barron v. Burrill, 86 Me. 66, 29 Atl. 939; Chaffin v. Cummings, 37 Me. 76.

Maryland. Webb v. Baltimore & E. S. R. Co., 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113.

Massachusetts. Bellows Falls Power Co. v. Com., 222 Mass. 51, Ann. Cas. 1916 C 834, 109 N. E. 891; Kennedy v. Hodges, 215 Mass. 112, 102 N. E. 432; Baker v. Davie, 211 Mass. 429, 37 L. R. A. (N. S.) 944, 97 N. E. 1094; Field v. Pierce, 102 Mass. 253.

Minnesota. Galbraith v. McDonald, 123 Minn. 208, L. R. A. 1915 A 464, Ann. Cas. 1915 A 420, 143 N. W. 353; Randall Printing Co. v. Sanitas Min-

of stock in a corporation consists of a set of rights and duties between the corporation and the owner of the share. These rights and duties are in fact and law quite distinguishable from the certificates and the

eral Water Co., 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606; Holland v. Duluth Iron Mining & Development Co., 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50; Guilford v. Western U. Tel. Co., 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324.

Mississippi. Mulvihill v. Vicksburg Railroad, Power & Manufacturing Co., 88 Miss. 689, 40 So. 647.

Missouri. De La Vergne v. Richardson, 198 Mo. 189, 95 S. W. 898; Richardson v. Busch, 198 Mo. 174, 115 Am. St. Rep. 472, 95 S. W. 894; Armour Bros. Banking Co. v. St. Louis Nat. Bank, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690; Foster v. Potter, 37 Mo. 525; Dean Rapid Tel. Co. v. Howell, 162 Mo. App. 100, 144 S. W. 135; Cafery v. Choctaw Coal & Mining Co., 95 Mo. App. 174, 68 S. W. 1049; Withers v. Lafayette County Bank, 67 Mo. App. 115.

Montana. Cotter v. Butte & R. Val. Smelting Co., 31 Mont. 129, 77 Pac. 509.

Nebraska. Herrick v. Humphrey Hardware Co., 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685.

New Jersey. Cord v. Newlin, 71 N. J. L. 438, 59 Atl. 22; Clevenger v. Moore, 71 N. J. L. 148, 58 Atl. 88; Morris v. Hussong Dyeing Mach. Co., 81 N. J. Eq. 256, 86 Atl. 1026; Bijur v. Standard Distilling & Distributing Co., 74 N. J. Eq. 546, 70 Atl. 934, aff'd 78 N. J. Eq. 582, 81 Atl. 1132; New York & E. Telegraph & Telephone Co. v. Great Eastern Tel. Co., 74 N. J. Eq. 221, 69 Atl. 528, aff'd 75 N. J. Eq. 297, 298, 72 Atl. 1119.

New York. Holmes v. Camp, 219 N. Y. 359, 114 N. E. 841, rev'g 173 App. Div. 971, 159 N. Y. Supp. 1119; United

States Radiator Corporation v. State, 208 N. Y. 144, 46 L. R. A. (N. S.) 585, 101 N. E. 783, aff'g 151 App. Div. 367, 135 N. Y. Supp. 981; Burr v. Wilcox, 22 N. Y. 551; In re King, 122 App. Div. 354, 106 N. Y. Supp. 1073; O'Dwyer v. Verdon, 115 App. Div. 37, 100 N. Y. Supp. 588, aff'd 190 N. Y. 505, 83 N. E. 1128; Flour City Nat. Bank v. Shire, 88 App. Div. 401, 84 N. Y. Supp. 810, aff'd 179 N. Y. 587, 72 N. E. 1141; Buker v. Steele, 43 N. Y. Supp. 346.

North Carolina. Meisenheimer v. Alexander, 162 N. C. 226, 78 S. E. 101; Weaver Power Co. v. Elk Mountain Mill Co., 154 N. C. 76, 69 S. E. 747; Powell Bros. v. McMullan Lumber Co., 153 N. C. 52, 68 S. E. 926.

Ohio. Ball v. Towle Mfg. Co., 67 Ohio St. 306, 93 Am. St. Rep. 682, 65 N. E. 1015.

Oregon. Beekwith v. Galice Mines Co., 50 Ore. 542, 16 L. R. A. (N. S.) 723, 93 Pac. 453; Astoria & S. C. R. Co. v. Hill, 20 Ore. 177, 25 Pac. 379.

Pennsylvania. Com. v. Crompton, 137 Pa. St. 138, 20 Atl. 417; Christmas v. Biddle, 13 Pa. St. 223; Keystone Wrapping Mach. Co. v. Bromeier, 42 Pa. Super. Ct. 384.

Rhode Island. Talbot v. Talbot, 32 R. I. 72, 96, Ann. Cas. 1912 C 1221, 78 Atl. 535.

Tennessee. Cates v. Baxter, 97 Tenn. 443, 37 S. W. 219; Cartwright v. Dickinson, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030; Young v. South Tredegar Iron Co., 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202.

Texas. Yeaman v. Galveston City Co., 106 Tex. 389, 167 S. W. 710; Strange v. Houston & T. C. R. Co., 53 Tex. 162; Cattlemen's Trust Co. of Ft.

power to transfer those rights and duties. The certificate is evidence that the person therein named possesses those rights and is subject to those duties, but is not in law the equivalent of those rights and duties.

Worth v. Turner, — Tex. Civ. App. —, 182 S. W. 438; **Presnall v. Stockyards Nat. Bank**, — Tex. Civ. App. —, 151 S. W. 873.

Utah. See **Coray v. Perry Irrigation Co.**, 166 Pac. 672.

Virginia. **Com. v. Williams' Ex'r**, 102 Va. 778, 1 Ann. Cas. 434, 47 S. E. 867.

Washington. **Gamble v. Dawson**, 67 Wash. 72, Ann. Cas. 1913 D 501, 120 Pac. 1060.

West Virginia. **Lipscomb's Adm'r v. Condon**, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

Wisconsin. **O. L. Packard Mach. Co. v. Laev**, 100 Wis. 644, 76 N. W. 596.

"The certificate, as the term implies, but certifies the ownership of the property and rights in the corporation represented by the number of shares named." **Richardson v. Shaw**, 209 U. S. 365, 52 L. Ed. 835, 14 Ann. Cas. 981.

"A share certificate is merely the written evidence of the existence of shares and the ownership of them." **Presnall v. Stockyards Nat. Bank**, — Tex. Civ. App. —, 151 S. W. 873.

"A certificate is authentic evidence of title to stock; but it is not the stock itself, nor is it necessary to the existence of the stock. It certifies to a fact which exists independently of itself." **Pacific Nat. Bank v. Eaton**, 141 U. S. 227, 35 L. Ed. 702, quoted in part with approval in **Kennedy v. Hodges**, 215 Mass. 112, 102 N. E. 432.

It "is a mere voucher—a mere receipt establishing, when regularly issued, a prima facie title in the holder to the shares of stock named therein." **Lakewood Gas Co. v. Smith**, 62 N. J. Eq. 677, 51 Atl. 152.

It is a mere admission by the cor-

poration that the party named therein is interested in the corporation to the extent named. **Sinnott v. Hibernia Nat. Bank**, 105 La. 705, 30 So. 233.

"Certificates, like titles to property, furnish the evidence of ownership of the shares of stock." **Commercial Fire Ins. Co. v. Board Revenue Montgomery Co.**, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

"A stockholder has an indivisible interest in the property and assets of a corporation subject to the discharge of its obligations. This individual interest generally speaking is represented by certificates of stock and is transferred by their transfer." **Poltz v. Gould**; 202 N. Y. 11, 38 L. R. A. (N. S.) 988, Ann. Cas. 1912 D 1098, 94 N. E. 1088, aff'g 142 N. Y. App. Div. 939, 127 N. Y. Supp. 1112, quoted in **Clark v. Bankers' Trust Co.**, 99 N. Y. Misc. 300, 163 N. Y. Supp. 748.

"On its face a certificate of stock is an evidence of the title of the person named in it to a certain number of shares, with an assurance to all persons that it will be transferred on the books of the company to any one purchasing it, on surrendering the certificate." **Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank**, 56 Ohio St. 351, 383, 43 L. R. A. 777, 47 N. E. 249, quoted with approval in **National Bank of Webb City v. Newell-Morse Royalty Co.**, 259 Mo. 637, 168 S. W. 699.

"Corporate stock is property, but the certificate of such stock is not the stock. It is much like a title deed or a bill of sale, which is not the property itself, but simply the evidence of title to property." **O. L. Packard Machinery Co. v. Laev**, 100 Wis. 644, 76 N. W. 596.

Speaking with reference to "the dis-

They are muniments of title, but not the title itself; much less the real property.”⁸⁷ “The fact that certificates of stock are handled in everyday commerce and treated as stock itself does not alter the fact that it is merely the representative of the stock and the evidence of ownership. There may possibly be a value in the certificate itself apart from the value of the stock which it represents, on the same theory that there may be a value in the title papers to other kinds of property apart from the value of the property itself to which they relate. But that value is only estimated in the light of the convenience of such papers as evidence. If a party wrongfully obtains or retains possession of such papers, the owner of the property might have his action to recover their possession or damages for their detention; but such damages, if recovered, are no part of the value of the property to which the title papers relate. And no one could maintain such a suit, except the owner of the property. Ownership of the title papers is incident only to ownership in the property.”⁸⁸

“The right of stock may exist entirely separately and independently of the certificates.”⁸⁹ And it follows that the issue of certificates is

inction between a stock certificate and a certificate of deposit issued by a trust company payable to the depositor and assigns, which was made assignable on the books of the company only, the court, stating that the two instruments were entirely different in character said: “A stock certificate is merely a muniment or representative of title. The stock which it represents exists apart from the certificate, and its existence is contemplated to endure so long as the corporation continues. The owner, as he appears on the books of the company, is entitled to the dividends or profits, and it is only when he seeks to transfer his title to another that a surrender of the outstanding certificate is required as a condition precedent to the issue of a new one. But an instrument for the payment of money contemplates payment at some time, either at a date fixed or on demand. The condition that the certificate be surrendered at the time of its payment is no more than the

law would require without a provision to that effect.” *Zander v. New York Security & Trust Co.*, 178 N. Y. 208, 102 Am. St. Rep. 492, 70 N. E. 449, aff’g 81 N. Y. App. Div. 635, 81 N. Y. Supp. 1151.

⁸⁷ *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250, quoted in part with approval in *Herriek v. Humphrey Hardware Co.*, 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685.

⁸⁸ *Richardson v. Busch*, 198 Mo. 174, 115 Am. St. Rep. 472, 95 S. W. 894.

⁸⁹ *Culp v. Mulvane*, 66 Kan. 143, 71 Pac. 273.

“The certificate is clearly only evidence of title which exists without it and independently of it.” *Lipsecomb’s Adm’r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

The certificates “only constitute proof of property which may exist without them.” *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110.

not necessary either to the existence of a corporation or to make one a stockholder therein.⁹⁰

§ 3426. Certificate of stock as property. A certificate of stock, that is, the certificate itself, as distinguished from the stock which it represents, is undoubtedly property,⁹¹ and has a pecuniary value separate and distinct from the value of the shares it represents.⁹² Such a certificate is the subject of larceny,⁹³ and may be taxed.⁹⁴ And if it is wrongfully detained from the true owner, or wrongfully converted by another, it may be recovered in an action of detinue⁹⁵ or replevin,⁹⁶ or its value may be recovered by bringing an action of tro-

⁹⁰ See § 3427, *infra*.

⁹¹ **United States.** *Geiger-Jones Co. v. Turner*, 230 Fed. 233, judgment rev'd 242 U. S. 539, 61 L. Ed. 480, L. R. A. 1917 F 514, Ann. Cas. 1917 C 643; *Merritt v. American Steel-Barge Co.*, 79 Fed. 228.

Arizona. *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

Massachusetts. *Bellows Falls Power Co. v. Com.*, 222 Mass. 51, Ann. Cas. 1916 C 834, 109 N. E. 891.

Michigan. *Daggett v. Davis*, 53 Mich. 35, 51 Am. Rep. 91, 18 N. W. 548.

Minnesota. *Puget Sound Nat. Bank of Everett v. Mather*, 60 Minn. 362, 62 N. W. 396.

Missouri. See *Richardson v. Busch*, 198 Mo. 174, 115 Am. St. Rep. 472, 95 S. W. 894.

New York. *People v. Reardon*, 184 N. Y. 431, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628, 6 Ann. Cas. 515, 77 N. E. 970; *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 55 L. R. A. 796, 58 N. E. 896, aff'd 47 App. Div. 17, 61 N. Y. Supp. 1033; *In re Whiting*, 150 N. Y. 27, 34 L. R. A. 232, 55 Am. St. Rep. 640, 44 N. E. 715; *People v. Grifenhagen*, 167 App. Div. 572, 152 N. Y. Supp. 679.

Pennsylvania. *Neiler & Warren v. Kelley*, 69 Pa. St. 403.

⁹² *Coray v. Perry Irrigation Co.*, — Utah —, 166 Pac. 672.

⁹³ See *Bellows Falls Power Co. v. Com.*, 222 Mass. 51, Ann. Cas. 1916 C 834, 109 N. E. 891; *O'Herron v. Gray*, 168 Mass. 573, 40 L. R. A. 498, 60 Am. St. Rep. 411, 47 N. E. 429; *People v. Reardon*, 184 N. Y. 431, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628, 6 Ann. Cas. 515, 77 N. E. 970; *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 55 L. R. A. 796, 58 N. E. 896, aff'g 47 N. Y. App. Div. 17, 61 N. Y. Supp. 1033; *In re Whiting*, 150 N. Y. 27, 34 L. R. A. 232, 55 Am. St. Rep. 640, 44 N. E. 715; *People v. Grifenhagen*, 167 N. Y. App. Div. 572, 152 N. Y. Supp. 679. See also § 3489 and subd. xix, *infra*, this chapter.

⁹⁴ See the chapter on Taxation, *infra*.

⁹⁵ *Small v. Wilson*, — Ga. App. —, 93 S. E. 518; *Williams v. Archer*, 5 C. B. 318; *Williams v. Reel River Land & Mineral Co.*, 55 L. T. (N. S.) 689.

In Georgia bail trover, which partakes of the nature of detinue, will lie. *Small v. Wilson*, — Ga. App. —, 93 S. E. 518.

⁹⁶ *Smith v. Meeker*, 153 Iowa 655, 133 N. W. 1058; *Brown v. Vancleave*, 13 Ky. L. Rep. 462 (abstract); *Brown v. Arbogast & Bastian Co.*, 162 N. Y. App. Div. 603, 147 N. Y. Supp. 998. See also *Merritt v. American Steel-Barge Co.*, 79 Fed. 228; *Miller v. Doran*, 151 Ill. App. 527, aff'd 245 Ill.

ver.⁹⁷ And it is also subject to seizure under a writ of sequestration.⁹³

The right to the possession of the certificate is incident to the ownership of the stock, and it follows that only the owner of the stock can maintain a suit to recover possession of it, or to recover damages for its detention.⁹⁹ The corporation is not a necessary party to such an action.¹

§ 3427. Necessity for issue of certificates. From the fact that a certificate of stock is not the stock itself, but merely evidence of the stockholder's rights, it follows that, in the absence of provision to the contrary, the issue of certificates of stock is not at all necessary, either to the existence of a joint-stock corporation, or to make one a stockholder in such a corporation, for one may be a stockholder without the formal written evidence of his rights. In the absence of provision or agreement to the contrary, therefore, a subscriber for stock in a corporation, or, except as hereafter stated, a purchaser of stock, becomes a stockholder as soon as his subscription is accepted by the corporation, and statutory or charter conditions are performed or fulfilled, or as soon as the purchase is completed, as the case may be, whether . . .

200, 91 N. E. 1039; Puget Sound Nat. Bank of Everett v. Mather, 60 Minn. 362, 62 N. W. 396.

Where the defendant's possession is wrongful, no proof of demand is necessary to sustain the action. Smith v. Meeker, 153 Iowa 655, 133 N. W. 1058.

⁹⁷ **United States.** See Merritt v. American Steel-Barge Co., 79 Fed. 228.

Georgia. Small v. Wilson, — Ga. App. —, 93 S. E. 518.

Massachusetts. Bellows Falls Power Co. v. Com., 222 Mass. 51, Ann. Cas. 1916 C 834, 109 N. E. 891.

Michigan. Daggett v. Davis, 53 Mich. 35, 51 Am. Rep. 91, 18 N. W. 548.

Minnesota. See Puget Sound Nat. Bank of Everett v. Mather, 60 Minn. 362, 62 N. W. 396.

New York. Brown v. Arbogast & Bastian Co., 162 App. Div. 603, 147 N. Y. Supp. 998.

Pennsylvania. Neiler & Warren v. Kelley, 69 Pa. St. 403.

South Carolina. Connor v. Hillier, 11 Rich. L. 193, 73 Am. Dec. 105.

Utah. Kuhn v. McAllister, 1 Utah 273, aff'd 96 U. S. 87, 24 L. Ed. 615.

Trover will lie for the conversion of the certificate as distinguished from the shares. Daggett v. Davis, 53 Mich. 35, 51 Am. Rep. 91, 18 N. W. 548.

It is not necessary to show a conversion of the stock in order to make out a conversion of the certificate. Daggett v. Davis, 53 Mich. 35, 51 Am. Rep. 91, 18 N. W. 548.

As to the measure of damages in such an action, see § 3449, *infra*.

As to conversion of stock, see § 3445 et seq., *infra*.

⁹⁸ **Ansley v. Stuart** (La.), 43 So. 892.

⁹⁹ **Richardson v. Busch**, 198 Mo. 174, 115 Am. St. Rep. 472, 95 S. W. 894.

¹ **Brown v. Arbogast & Bastian Co.**, 162 N. Y. App. Div. 603, 147 N. Y. Supp. 998.

any certificate of stock is issued to him or not; and as soon as he thus becomes a stockholder, although he may have no certificate, he is entitled to all the rights of a stockholder, including the right to dividends and the right to vote, etc., and is subject to all the liabilities of a stockholder, including liability to an action on his subscription, and liability to creditors in case of the corporation's insolvency.² It can

2 United States. South Dakota v. North Carolina, 192 U. S. 286; 48 L. Ed. 448; Pacific Nat. Bank v. Eaton, 141 U. S. 227, 35 L. Ed. 702; Jessup v. Chicago & N. W. Ry. Co., 188 Fed. 931; McKane v. Burke, 132 Fed. 688; Pendery v. Carleton, 87 Fed. 41.

Alabama. Frenkel v. Hudson, 82 Ala. 158, 60 Am. Rep. 736, 2 So. 756.

Arkansas. Biscoe v. Tucker, 11 Ark. 145.

California. McGue v. Rommel, 148 Cal. 539, 83 Pac. 1000; Pacific Fruit Co. v. Coon, 107 Cal. 447, 40 Pac. 542; San Joaquin Land & Water Co. v. Beecher, 101 Cal. 70, 35 Pac. 349; California Southern Hotel Co. v. Calender, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; Mitchell v. Beckman, 64 Cal. 117, 28 Pac. 110; Majors v. Girdner, 31 Cal. App. 47, 159 Pac. 826; Hughes Manufacturing & Lumber Co. v. Wilcox, 13 Cal. App. 22, 108 Pac. 871; San Francisco Commercial Agency v. Miller, 4 Cal. App. 291, 87 Pac. 630.

Colorado. Mountain Water Works Const. Co. v. Holme, 49 Colo. 412, 113 Pac. 501.

Georgia. South Georgia & F. R. Co. v. Ayres, 56 Ga. 230; Fulgam v. Macon & B. R. Co., 44 Ga. 597.

Illinois. Sherwood v. Illinois Trust & Savings Bank, 195 Ill. 112, 88 Am. St. Rep. 183, 62 N. E. 835; Wemple v. St. Louis, J. & S. R. Co., 120 Ill. 196, 11 N. E. 906; Chandler v. Northern Cross R. Co., 18 Ill. 190; Kelly v. Killian, 133 Ill. App. 102; Colton v. Williams, 65 Ill. App. 466. See also Kimmel v. Gray, 196 Ill. App. 406.

Indiana. Butler University v. Schoonover, 114 Ind. 381, 5 Am. St.

Rep. 627, 16 N. E. 642; Miller v. Wild Cat Gravel Road Co., 52 Ind. 51; Beckett v. Houston, 32 Ind. 393; Heaston v. Cincinnati & Ft. W. R. Co., 16 Ind. 275, 79 Am. Dec. 430; New Albany & S. R. Co. v. McCormick, 10 Ind. 499, 71 Am. Dec. 337.

Iowa. Waukon & M. R. Co. v. Dwyer, 49 Iowa 121.

Louisiana. Fairfax v. Bloch, 130 La. 761, 58 So. 563.

Maine. Barron v. Burrill, 86 Me. 66, 29 Atl. 939; Chaffin v. Cummings, 37 Me. 76.

Maryland. Webb v. Baltimore & E. S. R. Co., 77 Md. 92, 39 Am. St. Rep. 396, 26 Atl. 113.

Massachusetts. Auld v. Caunt, 216 Mass. 381, 103 N. E. 933; Kennedy v. Hodges, 215 Mass. 112, 102 N. E. 432; Old Dominion Copper Mining & Smelting Co. v. Bigelow, 203 Mass. 159, 198, 40 L. R. A. (N. S.) 314, 89 N. E. 193; Field v. Pierce, 102 Mass. 253; Chester Glass Co. v. Dewey, 16 Mass. 94, 8 Am. Dec. 128.

Minnesota. Galbraith v. McDonald, 123 Minn. 208, L. R. A. 1915 A 464; Ann. Cas. 1915 A 420, 143 N. W. 353; Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606; Walter A. Wood Harvester Co. v. Jefferson, 71 Minn. 367, 74 N. W. 149; Holland v. Duluth Iron Mining & Development Co., 65 Minn. 324, 60 Am. St. Rep. 480, 68 N. W. 50; Walter A. Woods Harvester Co. v. Robbins, 56 Minn. 48, 57 N. W. 317; Marson v. Deither, 49 Minn. 423, 52 N. W. 38; Columbia Elec. Co. v. Dixon, 46 Minn. 463, 49 N. W. 244.

Mississippi. Mulvihill v. Vicksburg

make no difference in this respect that the charter of the corporation, or the general law under which it is formed, expressly declares that

Railroad, Power & Manufacturing Co., 88 Miss. 689, 40 So. 647.

Missouri. *Richardson v. Busch*, 198 Mo. 174, 115 Am. St. Rep. 472, 95 S. W. 894; *Schaeffer v. Missouri Home Ins. Co.*, 46 Mo. 248.

Montana. *Cotter v. Butte & R. Val. Smelting Co.*, 31 Mont. 129, 77 Pac. 509.

Nebraska. *Nebraska Exposition Ass'n v. Townley*, 46 Neb. 893, 65 N. W. 1062.

New Hampshire. *Manchester St. Ry. v. Williams*, 71 N. H. 312, 52 Atl. 461.

New Jersey. *American Pig Iron Storage Co. v. State Board of Assessors*, 56 N. J. L. 389, 29 Atl. 160; *Bijur v. Standard Distilling & Distributing Co.*, 74 N. J. Eq. 546, 70 Atl. 934, aff'd 78 N. J. Eq. 582, 81 Atl. 1132.

New York. *United States Radiator Corporation v. State*, 208 N. Y. 144, 46 L. R. A. (N. S.) 585, 101 N. E. 783, aff'g 151 App. Div. 367, 135 N. Y. Supp. 981; *McComb v. Barcelona Apartment Ass'n*, 134 N. Y. 598, 31 N. E. 613, aff'g 56 Hun 644, 10 N. Y. Supp. 546; *Wheeler v. Millar*, 90 N. Y. 353; *Rutter v. Kilpatrick*, 63 N. Y. 604; *Burr v. Wilcox*, 22 N. Y. 551; *In re King*, 122 App. Div. 354, 106 N. Y. Supp. 1073; *Flour City Nat. Bank v. Shire*, 88 App. Div. 401, 84 N. Y. Supp. 810, aff'd 179 N. Y. 587, 72 N. E. 1141; *Kohlmetz v. Calkins*, 16 App. Div. 518, 44 N. Y. Supp. 1031; *Buker v. Steele*, 43 N. Y. Supp. 346; *Spear v. Crawford*, 14 Wend. 20, 28 Am. Dec. 513.

North Carolina. *Powell Bros. v. McMullan Lumber Co.*, 153 N. C. 52, 68 S. E. 926.

Ohio. *Ball v. Towle Mfg. Co.*, 67 Ohio St. 306, 93 Am. St. Rep. 682, 65 N. E. 1015.

Oregon. *Astoria & S. C. Ry. Co. v. Hill*, 20 Ore. 177, 25 Pac. 379.

Pennsylvania. *Keystone Wrapping Mach. Co. v. Bromeier*, 42 Pa. Super. Ct. 384.

South Carolina. *Glenn v. Rosborough*, 48 S. C. 272; *Kerchner v. Gettys*, 18 S. C. 521.

Tennessee. *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030; *Paducah & M. R. Co. v. Parks*, 86 Tenn. 554, 8 S. W. 842.

Texas. *Yeaman v. Galveston City Co.*, 106 Tex. 389, 167 S. W. 710; *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50, 17 S. W. 1043.

West Virginia. *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392, *Crumlish v. Shenandoah Valley R. Co.*, 40 W. Va. 627, 22 S. E. 90.

The issuance of certificates is not necessary to the existence of a corporation. *Harton v. Johnston*, 166 Ala. 317, 51 So. 992; *Powell Bros. v. McMullan Lumber Co.*, 153 N. C. 52, 68 S. E. 926.

In West Virginia no certificate is required to be issued unless demanded by some person appearing on the books of the company to be the owner of the shares. *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

The fact of ownership may be inferred from other facts, in the absence of a certificate. *Mountain Water Works Const. Co. v. Holme*, 49 Colo. 412, 113 Pac. 501.

An interest in the stock of a corporation is a right in property and may be sold though no certificate has ever been issued. *McGue v. Rommel*, 148 Cal. 539, 83 Pac. 1000.

"It is the shares, not the certifi-

the stock shall be divided into shares, and that certificates shall be issued to shareholders, for it is not intended by such a provision to make the certificates necessary.³ Of course, if a subscription for stock expressly requires that a certificate shall be issued as a condition precedent to liability, this is one of the terms or conditions of the subscriber's contract, and its issue or tender is necessary before the corporation can maintain an action on the subscription, unless the condition is waived.⁴

This rule does not apply where a person or corporation sells shares of stock. In such a case, so long as the contract remains executory, the issue or tender of a certificate as evidence of the stock is a condition precedent to the right to maintain an action for the price.⁵ But where an actual sale has been made and the title to the stock has passed there is no distinction in this respect between a sale and a subscription, and under such circumstances the purchaser is a stock-

holder, in which the property exists and which are transferred," and hence a pledgor may assign his interest in pledged stock although the certificates are in the possession of the pledgee. *Brown v. Hotel Ass'n*, 63 Neb. 181, 88 N. W. 175.

Money sent to the company in payment of a stock subscription does not cease to be a payment and become a loan because no certificate is issued to the subscriber. *Cooper v. Jennings Refining Co.*, 118 La. 181, 42 So. 766.

One who executes notes in payment for stock is a stockholder, although no certificate of stock is issued. *Glenn v. Rosborough*, 48 S. C. 272, 26 S. E. 611.

When land is conveyed to a corporation by a stockholder in payment of his subscription, the company is a purchaser for valuable consideration, whether certificates of stock are issued to him or not. *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736, 2 So. 758.

An agreement to give stock in a proposed corporation, upon its organization, in exchange for property, is sufficiently complied with by enter-

ing the stock on the books of the corporation in the name of the person with whom the agreement is made, without giving him a certificate of stock. *Field v. Pierce*, 102 Mass. 253.

That the issue or tender of a certificate is not a condition precedent to the right of a corporation to levy assessments or maintain an action on a subscription for stock unless it is expressly required by the contract of subscription, see § 593 et seq., supra.

³ *Chester Glass Co. v. Dewey*, 16 Mass. 94, 8 Am. Dec. 128.

⁴ See § 595, supra.

⁵ *Clark v. Continental Improvement Co.*, 57 Ind. 135; *Summers v. Sleeth*, 45 Ind. 598; *Galbraith v. McDonald*, 123 Minn. 208, L. R. A. 1915 A 464, Ann. Cas. 1915 A 420, 143 N. W. 353; *Walter A. Wood Harvester Co. v. Jefferson*, 71 Minn. 367, 74 N. W. 149; *Marson v. Deither*, 49 Minn. 423, 52 N. W. 38; *St. Paul, S. & F. R. Co. v. Robbins*, 23 Minn. 439; *Kohlmetz v. Calkins*, 16 N. Y. App. Div. 518, 44 N. Y. Supp. 1031; *Considerant v. Brisbane*, 14 How. Pr. (N. Y.) 487.

See § 594, supra, and subd. xxv, infra, this chapter.

holder though no certificate has been issued to him.⁶ Nor is it a defense to an action on a note given for the price of the stock that no certificate has been issued, especially where no demand for its issuance is shown.⁷

§ 3428. Matters elsewhere considered. The power of a corporation to issue certificates,⁸ and their form,⁹ the right of stockholders to a certificate, and their remedies on refusal of the corporation to issue the same,¹⁰ how far a certificate is to be regarded as a negotiable instrument,¹¹ the rights and liabilities growing out of forged certificates, and certificates issued illegally or by mistake, or by officers or agents fraudulently or without authority,¹² and the rights and remedies of stockholders who have lost their certificates,¹³ will be considered in subsequent sections.

III. SHARES OF STOCK AS PROPERTY

§ 3429. General rule. Shares of stock are property,¹⁴ having the

⁶ *Galbraith v. McDonald*, 123 Minn. 208, L. R. A. 1915 A 464, Ann. Cas. 1915 A 420, 143 N. W. 353.

⁷ *Galbraith v. McDonald*, 123 Minn. 208, L. R. A. 1915 A 464, Ann. Cas. 1915 A 420, 143 N. W. 353.

⁸ See § 3480, *infra*.

⁹ See § 3482, *infra*.

¹⁰ See §§ 3483, 3484, *infra*.

¹¹ See subd. xx, *infra*, this chapter.

¹² See § 3486 et seq., *infra*.

¹³ See § 3498 et seq., *infra*.

¹⁴ **United States.** *People v. The Commissioners*, 4 Wall. 244, 18 L. Ed. 344; *Van Allen v. The Assessors*, 3 Wall. 573, 18 L. Ed. 229; *Joseph Bancroft & Sons Co. v. Bloede*, 106 Fed. 396, 52 L. R. A. 734, certiorari denied 181 U. S. 620, 45 L. Ed. 1031 (mem. dec.).

Arizona. *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

Colorado. *Central Sav. Bank v. Smith*, 43 Colo. 90, 95 Pac. 307.

Connecticut. *Patterson v. Farmington St. Ry. Co.*, 76 Conn. 628, 57 Atl. 853.

Louisiana. *New Orleans Nat. Banking Ass'n v. P. S. Wiltz & Co.*, 10 Fed. 330.

Massachusetts. *Bellows Falls Power Co. v. Com.*, 222 Mass. 51, Ann. Cas. 1916 C 834, 109 N. E. 891.

Missouri. *Addis v. Swofford*, 180 S. W. 548; *Smith v. Pilot Min. Co.*, 47 Mo. App. 409.

New York. *Holmes v. Camp*, 219 N. Y. 359, 114 N. E. 841, rev'g judgment 173 App. Div. 971, 159 N. Y. Supp. 1119; *People v. Reardon*, 184 N. Y. 431, 451, 8 L. R. A. (N. S.) 314, 112 Am. St. Rep. 628, 6 Ann. Cas. 515, 77 N. E. 970; *In re Bronson*, 150 N. Y. 1, 34 L. R. A. 238, 55 Am. St. Rep. 632, 44 N. E. 707, modifying on other grounds 1 App. Div. 546, 37 N. Y. Supp. 476.

Texas. *Anderson v. First Nat. Bank of LaGrange*, — Tex. Civ. App. —, 191 S. W. 836.

Wisconsin. *In re Klaus*, 67 Wis. 401, 29 N. W. 582.

An interest in stock constitutes a right in property. *McGue v. Rommel*, 148 Cal. 539, 83 Pac. 1000.

Though the stock is a liability of the corporation issuing it, it is an asset of the owner. *Barrie v. United Rys. Co. of St. Louis*, 138 Mo. App. 557, 662, 119 S. W. 1020.

same characteristics as any other property,¹⁵ and may be bought, sold,¹⁶ mortgaged or pledged,¹⁷ taxed,¹⁸ made the subject of a gift,¹⁹ and bequeathed and distributed,²⁰ as any other property may be.

Shares of stock are personal property.²¹ And it is now well settled

The California Constitution expressly declares shares of stock to be property for purposes of taxation. *Chesebrough v. City & County of San Francisco*, 153 Cal. 559, 96 Pac. 288.

See also the cases cited in the notes, *infra*.

¹⁵ *Central Sav. Bank v. Smith*, 43 Colo. 90, 95 Pac. 307; *Herring v. Ruskin Co-operative Ass'n (Tenn.)*, 52 S. W. 327.

¹⁶ See subd. XVIII, *infra*, this chapter.

¹⁷ See subd. XXVI, *infra*, this chapter.

¹⁸ See chapter on Taxation, *infra*.

¹⁹ See subd. XXVII, *infra*, this chapter.

²⁰ *Joseph Bancroft & Sons Co. v. Bloede*, 106 Fed. 396, certiorari denied 181 U. S. 620, 45 L. Ed. 1031. See also *Cabble v. Cabble*, 111 N. Y. App. Div. 426, 97 N. Y. Supp. 773.

²¹ *United States. Hawley v. Malden*, 232 U. S. 1, 58 L. Ed. 477, Ann. Cas. 1916 C 842, aff'g 204 Mass. 138, 90 N. E. 415; *Morgan v. Struthers*, 131 U. S. 246, 33 L. Ed. 132; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. Ed. 189; *Shaw v. Goebel Brewing Co.*, 202 Fed. 408, 45 L. R. A. (N. S.) 1090; *Bernier v. Griscom-Spencer Co.*, 161 Fed. 438; *McKane v. Burke*, 132 Fed. 688.

Alabama. *Hall & Farley v. Alabama Terminal & Improvement Co.*, 173 Ala. 398, 421, 56 So. 235; *Nelson v. Owen*, 113 Ala. 372.

Arkansas. *Bankers' Trust Co. v. McCloy*, 109 Ark. 160, 47 L. R. A. (N. S.) 333, 159 S. W. 205.

California. *Wait v. Kern River Mining, Milling & Developing Co.*, 157 Cal. 16, 106 Pac. 98; *Chesebrough v.*

City & County of San Francisco, 153 Cal. 559, 96 Pac. 288; *Browne v. San Gabriel River Rock Co.*, 22 Cal. App. 682, 136 Pac. 542, 544; *People v. California Safe Deposit & Trust Co.*, 18 Cal. App. 732, 124 Pac. 558.

Colorado. *Mountain Water Works Const. Co. v. Holme*, 49 Colo. 412, 113 Pac. 501; *Ellis v. Gibbons*, 26 Colo. App. 454, 145 Pac. 285; *Talcott v. Mastin*, 20 Colo. App. 488, 79 Pac. 973; *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483, 70 Pac. 546.

Connecticut. *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323; *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161.

Georgia. *Hamil v. Flowers*, 133 Ga. 216, 65 S. E. 961; *Hightower v. Ansley*, 126 Ga. 8, 7 Ann. Cas. 927, 54 S. E. 939; *People's Nat. Bank v. Cleveland*, 117 Ga. 908, 44 S. E. 20; *Small v. Wilson*, — Ga. App. —, 93 S. E. 518.

Idaho. *Watson v. Molden*, 10 Idaho 570, 79 Pac. 503.

Illinois. *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522, 89 N. E. 796; *Pease v. Chicago Crayon Co.*, 235 Ill. 391, 18 L. R. A. (N. S.) 1158, 14 Ann. Cas. 263, 85 N. E. 619, aff'g 138 Ill. App. 513; *Cummings v. People*, 211 Ill. 392, 71 N. E. 1031; *Greenleaf v. Board Review Morgan Co.*, 184 Ill. 226, 75 Am. St. Rep. 168, 56 N. E. 295; *Union Nat. Bank of Chicago v. Byram*, 131 Ill. 92, 22 N. E. 842; *Cooper v. Corbin*, 105 Ill. 224; *Fahrig v. Milwaukee & Chicago Breweries, Ltd.*, 113 Ill. App. 525.

Indiana. *Boone v. Van Gorder*, 164 Ind. 499, 108 Am. St. Rep. 314, 74 N. E. 4; *Citizens' St. R. Co. v. Robbins*,

that this is true even where the property of the corporation consists

128 Ind. 449, 12 L. R. A. 498, 25 Am. St. Rep. 445, 26 N. E. 116; Weyer v. Second Nat. Bank, 57 Ind. 198.

Iowa. Morrow v. Gould, 145 Iowa 1, 25 L. R. A. (N. S.) 384, 123 N. W. 743; Allen v. Pegram, 16 Iowa 163.

Kansas. Culp v. Mulvane, 66 Kan. 143, 71 Pac. 273.

Kentucky. Chappell v. Chappell, 124 Ky. 691, 99 S. W. 959; Thurber v. Crump, 86 Ky. 408, 6 S. W. 145; Elkhorn Land & Improvement Co. v. Childers, 30 Ky. L. Rep. 1124, 100 S. W. 222.

Louisiana. State v. Board of Assessors, 48 La. Ann. 35, 18 So. 753.

Maine. Hagar v. Union Nat. Bank, 63 Me. 509.

Maryland. Baltimore v. Allegany County Com'rs, 99 Md. 1, 57 Atl. 632; Lowndes v. Cooch, 87 Md. 478, 40 L. R. A. 380, 39 Atl. 1045.

Massachusetts. Bellows Falls Power Co. v. Com., 222 Mass. 51, Ann. Cas. 1916 C 834, 109 N. E. 891; Herbert v. Simson, 220 Mass. 480, L. R. A. 1915 D 733, 108 N. E. 65; Baker v. Davie, 211 Mass. 429, 37 L. R. A. (N. S.) 944, 97 N. E. 1094.

Michigan. Jellenik v. Huron Copper Min. Co., 177 U. S. 1, 44 L. Ed. 647, rev'g on other grounds 82 Fed. 778.

Missouri. Addis v. Swofford, 180 S. W. 548; Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co., 118 Mo. 447, 24 S. W. 129; Bank of Atchison County v. Durfee, 118 Mo. 431, 40 Am. St. Rep. 396, 24 S. W. 133; Armour Bros. Banking Co. v. St. Louis Nat. Bank, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690; Chandler v. Blanke Tea & Coffee Co., 183 Mo. App. 91, 165 S. W. 819; Banta v. Hubbell, 167 Mo. App. 38, 150 S. W. 1089; Carthage Nat. Bank v. Poole, 160 Mo. App. 133, 141 S. W. 729; Crenshaw v. Columbian Min. Co., 110 Mo. App. 355, 86 S. W. 260; Caffery v. Choctaw Coal

& Mining Co., 95 Mo. App. 174, 68 S. W. 1049; Withers v. Lafayette County Bank, 67 Mo. App. 115.

Nebraska. Williams v. Lowe, 4 Neb. 282, aff'd 94 U. S. 650, 24 L. Ed. 216.

New Hampshire. Champollion v. Corbin, 71 N. H. 78, 51 Atl. 674.

New Jersey. Morris v. Hussong Dyeing Mach. Co., 81 N. J. Eq. 256, 86 Atl. 1026; Broadway Bank v. McElrath, 13 N. J. Eq. 24.

New York. In re Jones, 172 N. Y. 575, 60 L. R. A. 476, 65 N. E. 570; People v. Grifenhagen, 167 App. Div. 572, 152 N. Y. Supp. 679; In re Osborne, 153 App. Div. 312, 138 N. Y. Supp. 18; Lane v. Albertson, 78 App. Div. 607, 79 N. Y. Supp. 947.

North Carolina. Evans v. Monot, 57 N. C. 227.

Oklahoma. Litchfield v. Henson Oil Co., 157 Pac. 137; Haynes v. Brown, 18 Okla. 389, 89 Pac. 1124; First Nat. Bank of Sulphur Springs v. Stribling, 16 Okla. 41, 86 Pac. 512.

Oregon. Ankeny v. Blakley, 44 Ore. 78, 74 Pac. 485; Slemmons v. Thompson, 23 Ore. 215, 31 Pac. 514.

Pennsylvania. Wilkes-Barre Deposit & Savings Bank v. Wilkes-Barre, 148 Pa. St. 601, 24 Atl. 111.

Tennessee. Herring v. Ruskin Co-operative Ass'n, 52 S. W. 327; Nashville Trust Co. v. Weaver, 102 Tenn. 66, 50 S. W. 763; Cates v. Baxter, 97 Tenn. 443, 37 S. W. 219; Memphis Appeal Pub. Co. v. Pike, 9 Heisk. 697.

Utah. Coray v. Perry Irrigation Co., 166 Pac. 672.

Virginia. Com. v. Williams' Ex'r, 102 Va. 778, 1 Ann. Cas. 434, 47 S. E. 867.

Washington. Whitfield v. Nonpareil Consol. Copper Co., 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078; Gamble v. Dawson, 67 Wash. 72, Ann. Cas. 1913 D 501, 120 Pac. 1060.

West Virginia. Lipscomb's Adm'r

wholly or chiefly of real estate,²² although there were some early deci-

v. Condon, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

Wisconsin. *Farmers' Mercantile & Supply Co. v. Laun*, 146 Wis. 252, 131 N. W. 366; *In re Klaus*, 67 Wis. 401, 29 N. W. 582.

Shares of stock will pass under a conveyance, or devise and bequest, of all the grantor's or testator's "property, real and personal." *Feckheimer v. National Exch. Bank*, 79 Va. 80.

"Statutes may, and not infrequently do, declare them personal property; but if a larger legislative intent is not apparent, such statutes are construed as merely declaratory of the known rule of the common law." *Nelson v. Owen*, 113 Ala. 372, 21 So. 75.

²² **United States.** *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 44 L. Ed. 647, rev'g on other grounds 82 Fed. 778; *McKane v. Burke*, 132 Fed. 688.

Alabama. *Nelson v. Owen*, 113 Ala. 372, 21 So. 75.

California. *Mattingly v. Roach*, 84 Cal. 207, 23 Pac. 1117; *Tregear v. Etiwanda Water Co.*, 76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. 658. See also *Wait v. Kern River Mining, Milling & Developing Co.*, 157 Cal. 16, 106 Pac. 98.

Colorado. *Struby-Estabrook Mercantile Co. v. Davis*, 18 Colo. 93, 36 Am. St. Rep. 266, 31 Pac. 495; *Talcott v. Mastin*, 20 Colo. App. 488, 79 Pac. 973; *Richardson v. Longmont Supply Ditch Co.*, 19 Colo. App. 483, 76 Pac. 546.

Connecticut. *North v. Forest*, 15 Conn. 400.

Georgia. *Southwestern R. Co. v. Thomason*, 40 Ga. 408.

Idaho. *Watson v. Molden*, 10 Idaho 570, 79 Pac. 503.

Illinois. *Cummings v. People*, 211 Ill. 392, 71 N. E. 1031; *Saup v. J. S. Morgan & Co.*, 108 Ill. 326; *Cooper v. Corbin*, 105 Ill. 224.

Indiana. *Seward v. Rising Sun*, 79 Ind. 351; *Manns v. Brookville Nat. Bank*, 73 Ind. 243; *Weyer v. Second Nat. Bank*, 57 Ind. 198.

Iowa. *Allen v. Pegram*, 16 Iowa 163.

Kentucky. *Elkhorn Land & Improvement Co. v. Childers*, 30 Ky. L. Rep. 1121, 100 S. W. 222.

Massachusetts. *Herbert v. Simson*, 220 Mass. 480, L. R. A. 1915 D 733, 108 N. E. 65; *Tippets v. Walker*, 4 Mass. 595; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90, 19 Am. Dec. 306.

Minnesota. *Baldwin v. Canfield*, 26 Minn. 62, 1 N. W. 585.

Nebraska. *York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834, 58 N. W. 440.

New Hampshire. *Champollion v. Corbin*, 71 N. H. 78, 51 Atl. 674.

New York. *In re Jones*, 172 N. Y. 575, 60 L. R. A. 476, 65 N. E. 570; *Bank of Attica v. Manufacturers' & Traders' Bank*, 20 N. Y. 501.

Ohio. *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547; *Johns v. Johns*, 1 Ohio St. 350.

Pennsylvania. *McKeen v. County of Northampton*, 49 Pa. St. 519, 88 Am. Dec. 515.

Rhode Island. *Dyer v. Osborne*, 11 R. I. 321, 23 Am. Rep. 460; *Arnold v. Ruggles*, 1 R. I. 165.

South Carolina. *Blake v. Jones*, *Bailey Eq.* 141, 21 Am. Dec. 530.

Tennessee. *Herring v. Ruskin Co-operative Ass'n*, 52 S. W. 327; *Cates v. Baxter*, 97 Tenn. 443, 37 S. W. 219.

England. *Humble v. Mitchell*, 11 A. & E. 205; *Russell v. Temple*, 3 Dane Abr. 108; *Bradley v. Holdsworth*, 3 M. & W. 422; *Bligh v. Brent*, 2 Y. & Coll. 268.

"A share of stock certainly is not real estate, and hence it must fall within the definition of personal property; and still it may represent an interest in either real or personal prop-

sions to the contrary.²³ This necessarily follows from the fact that the property of a corporation does not belong, in law, to the stockholders, but to the corporation as a distinct legal entity or artificial person,²⁴ and the right of the stockholder is merely the right to participate in the management of the corporation, in any dividends which may be declared from profits, and ultimately in the distribution of what remains of its assets, on dissolution, after payment of its debts.²⁵ By statute in at least one state, however, shares of stock in manufacturing corporations are declared to be realty.²⁶

In accordance with the doctrine that shares of stock are personal property, it has been held that shares of stock, although the property of the corporation consists of land, are personal property for the purpose of determining their situs for the purposes of taxation,²⁷ and a tax thereon is a personal tax.²⁸ For some purposes, however, the situs

erty." *Morrow v. Gould*, 145 Iowa 1, 25 L. R. A. (N. S.) 384, 123 N. W. 743.

The Georgia code expressly provides that shares of stock in a corporation "holding lands, or a franchise in or over lands, are personalty." *Hamil v. Flowers*, 133 Ga. 216, 65 S. E. 961; *People's Nat. Bank v. Cleveland*, 117 Ga. 908, 44 S. E. 20.

²³ *Welles v. Cowles*, 2 Conn. 567; *Copeland v. Copeland*, 7 Bush (Ky.) 349; *Price v. Price's Heirs*, 6 Dana (Ky.) 107; *Coombs v. Jordan*, 3 Bland (Md.) 284, 22 Am. Dec. 236. And see *Meason's Estate*, 4 Watts (Pa.) 341; *Tomlinson v. Tomlinson*, 9 Beav. 459.

There have been instances in which the charter of a corporation, or some other statute, has, for the purposes of inheritance, declared its shares to be real property. See *Cooper v. Swamp Canal Co.*, 2 Murph. (N. C.) 195.

²⁴ See § 25, *supra*, and § 3433, *infra*.

²⁵ See § 3417, *supra*.

²⁶ *South Carolina Civ. Code* 1912, § 2805; 1 *Code of Laws* 1912, p. 769, provides that stocks representing shares in manufacturing corporations shall be deemed realty, but that the same may be transferred in the same manner as shares in any other cor-

poration, and that they shall not be subject to any claim of dower, shall be subject to debts in execution, or upon attachment in the same manner as stocks in other corporations and to the laws of distribution of deceased intestate's estate, as if the same were personal property. Shares of stock in other corporations except railroad and banking corporations, are declared to be personal property by *Id.* § 2784(D).

²⁷ *Chesebrough v. City & County of San Francisco*, 153 Cal. 559, 96 Pac. 288; *Greenleaf v. Board Review Morgan Co.*, 184 Ill. 226, 75 Am. St. Rep. 168, 56 N. E. 295; *McKean v. County of Northampton*, 49 Pa. St. 519, 88 Am. Dec. 515; *Dyer v. Osborne*, 11 R. I. 321, 23 Am. Rep. 460. See also *In re Newcomb's Estate*, 71 N. Y. App. Div. 606, 76 N. Y. Supp. 222, *aff'd* 172 N. Y. 608, 64 N. E. 1123. And see the chapter on Taxation, *infra*.

²⁸ *Saup v. J. S. Morgan & Co.*, 108 Ill. 326; *Cooper v. Corbin*, 105 Ill. 224.

They are to be regarded as personality for the purposes of the transfer tax on the death of the owner. *In re Jones*, 172 N. Y. 575, 60 L. R. A. 476, 65 N. E. 570.

of shares of stock is at the domicile of the corporation, and not at the domicile of the stockholder, as in the case of personal property generally.²⁹ It has also been held that shares of stock are personal property for the purposes of sale³⁰ or mortgage;³¹ that they are personalty within the rule permitting an infant to avoid his contracts concerning personal property;³² that they are not land, nor an interest in land, within the clause of the statute of frauds requiring a memorandum in writing in the case of contracts for the sale of land or an interest therein;³³ that, on the death of the owner, they go, at common law, to his executor or administrator, as personalty, and not to his heirs as realty, and will pass as personalty under the statutes of descent and distribution;³⁴ that a will disposing of shares in a corporation

They are within a statute providing that personal property shall be assessed at its true cash value. *Ankeny v. Blakley*, 44 Ore. 78, 74 Pac. 485.

They are within a constitutional provision that personal property shall be subject to taxation in the county or city where the owner resides, and not elsewhere. *Baltimore v. Allegany County Com'rs*, 99 Md. 1, 57 Atl. 632.

See also the chapter on Taxation, *infra*.

²⁹ See § 3434, *infra*.

³⁰ *Mattingly v. Roach*, 84 Cal. 207, 23 Pac. 1117; *Mountain Water Works Const. Co. v. Holme*, 49 Colo. 412, 113 Pac. 501; *Allen v. Pegram*, 16 Iowa 163.

Shares of stock are personal property within the meaning of a statutory provision that authority to sell personal property includes authority to warrant the title of the principal and the quality and quantity of the property. *Browne v. San Gabriel River Rock Co.*, 22 Cal. App. 682, 136 Pac. 542, 544.

Common stock comes within the rules of equity governing agreements to sell and deliver specific personal property, including those as to specific performance. *Bernier v. Griscom-Spencer Co.*, 161 Fed. 438.

That they may be sold and trans-

ferred as other personal property, see subd. xviii, *infra*, this chapter.

³¹ *Manns v. Brookville Nat. Bank*, 73 Ind. 243.

As to mortgages of shares of stock, see subd. xxvi, *infra*, this chapter.

³² *Wuller v. Chuse Grocery Co.*, 241 Ill. 398, 28 L. R. A. (N. S.) 128, 132 Am. St. Rep. 216, 16 Ann. Cas. 522, 89 N. E. 796.

³³ *Watson v. Molden*, 10 Idaho 570, 79 Pac. 503; *Humble v. Mitchell*, 11 A. & E. 205; *Bradley v. Holdsworth*, 3 M. & W. 422.

See also subd. xxv, *infra*, this chapter.

³⁴ *United States*. London, P. & A. Bank v. Aronstein, 117 Fed. 601.

Indiana. *Weyer v. Second Nat. Bank*, 57 Ind. 198.

Kentucky. *Com. v. Peebles*, 134 Ky. 121, 23 L. R. A. (N. S.) 1130, 20 Ann. Cas. 724, 119 S. W. 774; *Chappell v. Chappell*, 124 Ky. 691, 99 S. W. 959; *Elkhorn Land & Improvement Co. v. Childers*, 30 Ky. L. Rep. 1121, 100 S. W. 222.

New Hampshire. *Champollion v. Corbin*, 71 N. H. 78, 51 Atl. 674.

New York. See *Lockwood v. United States Steel Corporation*, 209 N. Y. 375, 1 L. R. A. 1915 C 471, 103 N. E. 697, rev'g 153 App. Div. 655, 138 N. Y. Supp. 725; *In re Jones*, 172 N. Y. 575, 60 L. R. A. 476, 65 N. E. 570;

owning land need not be executed in accordance with the provisions of the statute of frauds relating to wills devising land;³⁵ that the construction and effect of a will bequeathing stock is governed by the law of the testator's domicile, as is the case in respect to wills of personalty generally;³⁶ that a prohibition against loans by a corporation on real estate security does not prohibit loans on the security of stock in a corporation owning land;³⁷ that a mortgage or deed of trust of shares of stock is governed by the law relating to mortgages of personal property;³⁸ and that an action on a subscription to stock is not an action upon a contract for the sale of real estate, within a statute relating to the jurisdiction of courts.³⁹

§ 3430. Are incorporeal and intangible property. Though shares of stock are property,⁴⁰ they are intangible and incorporeal property,⁴¹

Lane v. Albertson, 78 App. Div. 607, 79 N. Y. Supp. 947.

North Carolina. *Evans v. Monot*, 57 N. C. 227.

Ohio. *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547.

Pennsylvania. *Catherwood v. Guarantee & Safe Deposit Co.*, 252 Pa. 466, 97 Atl. 703; *In re Wood's Appeal*, 92 Pa. St. 379, 37 Am. Rep. 694; *Bohlen's Estate*, 75 Pa. St. 304.

Utah. *Coray v. Perry Irrigation Co.*, 166 Pac. 672.

Virginia. *Com. v. Williams' Ex'r*, 102 Va. 778, 1 Ann. Cas. 434, 47 S. E. 867.

England. *Russell v. Temple*, 3 Dane Abr. 108.

The administrator is entitled to take possession of them, and may maintain an action for damages for their conversion. *Coray v. Perry Irrigation Co.*, — *Utah* —, 166 Pac. 672.

³⁵ *Bridgman v. Keokuk*, 72 Iowa 42, 33 N. W. 355; *Bligh v. Brehm*, 2 Y. & Coll. 268. *Contra*, *Welles v. Cowles*, 2 Conn. 567.

³⁶ *Lowndes v. Cooch*, 87 Md. 478, 40 L. R. A. 380, 39 Atl. 1045.

³⁷ *Baldwin v. Canfield*, 26 Minn. 62, 1 N. W. 585.

³⁸ *Tregear v. Etiwanda Water Co.*,

76 Cal. 537, 9 Am. St. Rep. 245, 18 Pac. 658; *Cates v. Baxter*, 97 Tenn. 443, 37 S. W. 219. Compare *Williamson v. New Jersey Southern R. Co.*, 26 N. J. Eq. 398.

In *Spalding v. Paine's Adm'r*, 81 Ky. 416, 5 Ky. L. Rep. 391, it was held that a mortgage of stock was not a mortgage of personal property within the meaning of the recording acts.

³⁹ *York Park Bldg. Ass'n v. Barnes*, 39 Neb. 834, 58 N. W. 440.

⁴⁰ See § 3429, *supra*.

⁴¹ **United States.** *Hawley v. Malden*, 232 U. S. 1, 58 L. Ed. 477, Ann. Cas. 1916 C 842, *aff'g* 204 Mass. 138, 90 N. E. 415; *Tappan v. Merchants' Nat. Bank*, 19 Wall. 490, 22 L. Ed. 189.

Alabama. *Nabring v. Bank of Mobile*, 58 Ala. 204.

Arkansas. *Deutschman v. Byrne*, 64 Ark. 111, 40 S. W. 780.

California. *Bell v. Bank of California*, 153 Cal. 234, 94 Pac. 889; *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80.

Connecticut. *Barber v. Morgan*, 84 Conn. 618, Ann. Cas. 1912 D 951, 80 Atl. 791.

Delaware. *Fowler v. Dickson*, 1 Boyce 113, 74 Atl. 601.

Georgia. *Hightower v. Ansley*, 126

existing only in abstract legal contemplation.⁴² Therefore they are incapable of actual manual delivery,⁴³ or of being taken into actual

Ga. 8, 7 Ann. Cas. 927, 54 S. E. 939; *Small v. Wilson*, — Ga. App. —, 93 S. E. 518.

Iowa. *Allen v. Pegram*, 16 Iowa 163.

Louisiana. *Sinnott v. Hibernia Nat. Bank*, 105 La. 705, 30 So. 233.

Massachusetts. *Bellows Falls Power Co. v. Com.*, 222 Mass. 51, Ann. Cas. 1916 C 834, 109 N. E. 891.

Michigan. *Van Norman v. Jackson Circuit Judge*, 45 Mich. 204, 7 N. W. 796.

Missouri. *Foster v. Potter*, 37 Mo. 525; *Dean Rapid Tel. Co. v. Howell*, 162 Mo. App. 100, 144 S. W. 135.

Montana. See *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775.

New Hampshire. *Scripture v. Franctown Soapstone Co.*, 50 N. H. 571.

New Jersey. *Princeton Bank v. Crozer & Moore*, 22 N. J. L. 383, 53 Am. Dec. 254.

New York. *Plimpton v. Bigelow*, 93 N. Y. 592; *Burrall v. Bushwick R. Co.*, 75 N. Y. 211; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307.

North Carolina. *Evans v. Monot*, 57 N. C. 227.

South Dakota. *State Banking & Trust Co. v. Taylor*, 25 S. D. 577, 29 L. R. A. (N. S.) 523, 127 N. W. 590.

Texas. *Presnall v. Stockyards Nat. Bank*, — Tex. Civ. App. —, 151 S. W. 873.

Utah. See *Coray v. Perry Irrigation Co.*, 166 Pac. 672.

Virginia. *First Nat. Bank v. Holland*, 99 Va. 495, 55 L. R. A. 155, 86 Am. St. Rep. 898, 39 S. E. 126.

West Virginia. *Lipsecomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

A share of stock is an "incorporeal intangible thing."

Alabama. *Commercial Fire Ins. Co. v. Board Revenue Montgomery Co.*, 99 Ala. 1, 42 Am. St. Rep. 17, 14 So. 490.

Arizona. *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

California. *Ashton v. Heydenfeldt*, 124 Cal. 14, 56 Pac. 624.

Missouri. *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690; *Caffery v. Choctaw Coal & Mining Co.*, 95 Mo. App. 174, 68 S. W. 1049.

Nebraska. *Mann v. German-American Inv. Co.*, 70 Neb. 454, 97 N. W. 600.

New York. *In re Osborne*, 153 App. Div. 312, 138 N. Y. Supp. 18.

Pennsylvania. *Neiler & Warren v. Kelley*, 69 Pa. St. 403, 407.

"In many respects stock is treated as tangible personal property, but still it is, after all, a peculiar species of property sui generis." *Cates v. Baxter*, 97 Tenn. 443, 37 S. W. 219.

"A share of bank stock may be in itself intangible, but it represents that which is tangible. It represents money or property invested in the capital stock of the bank." *Tappan v. Merchants' Nat. Bank*, 19 Wall. (U. S.) 490, 22 L. Ed. 189.

⁴² *Burrall v. Bushwick R. Co.*, 75 N. Y. 211.

At common law "they were considered incorporeal, intangible things which existed in idea." *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80.

⁴³ **United States.** *McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615.

Alabama. *Nabring v. Bank of Mobile*, 58 Ala. 204.

New York. *Burrall v. Bushwick R. Co.*, 75 N. Y. 211; *Wilson v. Little*, 2 N. Y. 443, 51 Am. Dec. 307.

North Carolina. *Evans v. Monot*, 57 N. C. 227.

possession.⁴⁴ And it follows neither replevin⁴⁵ nor detinue⁴⁶ will lie for the recovery of shares of stock as distinguished from the certificates representing the same, since they are incapable of identification or seizure under the writ. For the same reason, while a person may be the owner of shares of the stock of a corporation, and he may compel the corporation to deliver to him evidence of his right in the form of stock certificates,⁴⁷ he cannot compel it to deliver to him the shares; and therefore an action cannot be maintained for its refusal to do so.⁴⁸

§ 3431. Shares of stock as "choses in action," "credits," "debts," "money," or "securities." Shares of stock in corporations are sometimes spoken of as "choses in action,"⁴⁹ or as being in the nature

Texas. Presnall v. Stockyards Nat. Bank, — Tex. Civ. App. —, 151 S. W. 873.

West Virginia. Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

⁴⁴**Alabama.** Nabring v. Bank of Mobile, 58 Ala. 204.

Arkansas. Deutschman v. Byrne, 64 Ark. 111, 40 S. W. 780.

California. Payne v. Elliot, 54 Cal. 339, 35 Am. Rep. 80.

Connecticut. Barber v. Morgan, 84 Conn. 618, Ann. Cas. 1912 D 951, 80 Atl. 791.

Delaware. Fowler v. Dickson, 1 Boyce 113, 74 Atl. 601.

Michigan. Van Norman v. Jackson Circuit Judge, 45 Mich. 204, 7 N. W. 796.

Missouri. Foster v. Potter, 37 Mo. 525; Dean Rapid Tel. Co. v. Howell, 162 Mo. App. 100, 144 S. W. 135; Caffery v. Choctaw Coal & Mining Co., 95 Mo. App. 174, 68 S. W. 1049.

New York. Plimpton v. Bigelow, 93 N. Y. 592.

West Virginia. Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

⁴⁵**Bell v. Bank of California**, 153 Cal. 234, 94 Pac. 889; **Ashton v. Heydenfeldt**, 124 Cal. 14, 56 Pac. 624.

But replevin will lie to recover a certificate of stock. See § 3426, supra.

⁴⁶**Small v. Wilson**, — Ga. App. —, 93 S. E. 518.

⁴⁷See § 3483, infra.

⁴⁸**Burrall v. Bushwick R. Co.**, 75 N. Y. 211.

⁴⁹**United States.** **Tucker v. Curtin**, 148 Fed. 929; **Allen-West Commission Co. v. Grumbles**, 129 Fed. 287; **Church v. Citizens' St. R. Co.**, 78 Fed. 526.

Alabama. **Nelson v. Owen**, 113 Ala. 372, 21 So. 75; **Nabring v. Bank of Mobile**, 58 Ala. 204.

Delaware. **Allen v. Stewart**, 7 Del. Ch. 287, 44 Atl. 786.

District of Columbia. **Keyser v. Hitz**, 2 Mackey 473.

Georgia. **Owens v. Atlanta Trust & Banking Co.**, 122 Ga. 521, 50 S. E. 379.

Illinois. **First Nat. Bank v. Smith**, 65 Ill. 44. See **Miller v. Doran**, 151 Ill. App. 527, aff'd 245 Ill. 200, 91 N. E. 1039.

Iowa. **Warren v. Davenport Fire Ins. Co.**, 31 Iowa 464.

Kentucky. **Spalding v. Paine's Adm'r**, 81 Ky. 416, 5 Ky. L. Rep. 391.

Massachusetts. **Bellows Falls Power Co. v. Com.**, 222 Mass. 51, Ann. Cas. 1916 C 834, 109 N. E. 891; **Stanwood v. Stanwood**, 17 Mass. 57; **Fisher v. Essex Bank**, 5 Gray 373.

Missouri. **Foster v. Potter**, 37 Mo. 525; **Caffery v. Choctaw Coal & Min-**

of choses in action,⁵⁰ and they have been held to be within a provision of the statute of frauds relative to the sale of choses in action.⁵¹ But there is authority to the effect that they are not choses in action.⁵²

A share of stock is not a credit,⁵³ nor a debt owing by the corpora-

ing Co., 95 Mo. App. 174, 68 S. W. 1049; *Vanstone v. Goodwin*, 42 Mo. App. 39.

Montana. See *Leyson v. Davis*, 17 Mont. 220, 31 L. R. A. 429, 42 Pac. 775, writ of error dismissed 170 U. S. 36, 42 L. Ed. 939.

New York. *Denton v. Livingston*, 9 Johns. 96, 6 Am. Dec. 264.

Pennsylvania. *Com. v. Crompton*, 137 Pa. St. 138, 20 Atl. 417; *People's Bank of Philadelphia v. Kurtz*, 99 Pa. St. 344, 44 Am. Rep. 112; *Slaymaker v. Bank of Gettysburg*, 10 Pa. St. 373.

Rhode Island. *Arnold v. Ruggles*, 1 R. I. 165.

Tennessee. *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202; *Union Bank of Tennessee v. State*, 9 Yerg. 490.

Virginia. *First Nat. Bank v. Holland*, 99 Va. 495, 55 L. R. A. 155, 86 Am. St. Rep. 898, 39 S. E. 126.

West Virginia. *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

England. *Wildman v. Wildman*, 9 Ves. 174.

⁵⁰ **United States.** *Hawley v. Malden*, 232 U. S. 1, Ann. Cas. 1916 C 842, 58 L. Ed. 477, aff'g 204 Mass. 138, 90 N. E. 415; *Gundry v. Reakirt*, 173 Fed. 167.

Arizona. *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

Delaware. *Fowler v. Dickson*, 1 Boyce 113, 74 Atl. 601.

Georgia. *Small v. Wilson*, — Ga. App. —, 93 S. E. 518.

Illinois. *Magerstadt v. Schaefer*, 213 Ill. 351, 72 N. E. 1063, aff'g 110 Ill. App. 166; *Otis v. Gardner*, 105 Ill. 436; *Kellogg v. Stockwell*, 75 Ill. 68; *Rhea v. Powell*, 24 Ill. App. 77.

Iowa. *Morrow v. Gould*, 145 Iowa

1, 25 L. R. A. (N. S.) 384, 123 N. W. 743.

Kentucky. *Com. v. Peebles*, 134 Ky. 121, 23 L. R. A. (N. S.) 1130, 20 Ann. Cas. 724, 119 S. W. 774.

Massachusetts. *Herbert v. Simson*, 220 Mass. 480, L. R. A. 1915 D 733, 108 N. E. 65; *Howe v. Starkweather*, 17 Mass. 240; *Hutchins v. State Bank*, 12 Mete. 421.

Missouri. *Dean Rapid Tel. Co. v. Howell*, 162 Mo. App. 100, 144 S. W. 135.

New Hampshire. *Champollion v. Corbin*, 71 N. H. 78, 51 Atl. 674.

Rhode Island. *Talbot v. Talbot*, 32 R. I. 72, 96, Ann. Cas. 1912 C 1221, 78 Atl. 535.

"There is * * * no inconsistency in saying that shares of stock are in the nature of a chose in action, and in also holding that they represent an interest in the property of the corporation." *Morrow v. Gould*, 145 Iowa 1, 25 L. R. A. (N. S.) 384, 123 N. W. 743.

⁵¹ *De Nunzio v. De Nunzio*, 90 Conn. 342, 97 Atl. 323.

⁵² *Continental Nat. Bank v. Eliot Nat. Bank*, 7 Fed. 369.

They are not simply and purely choses in action in the sense that open accounts are held to be. *Cates v. Baxter*, 97 Tenn. 443, 37 S. W. 219.

At common law a share of stock was not a chose in action. *Norton v. Norton*, 43 Ohio St. 509, 3 N. E. 348. See also *Ashley v. Quintard*, 90 Fed. 84.

⁵³ *Smith v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 30 La. Ann. 1378; *Thayer v. Wathen*, 17 Tex. Civ. App. 382, 44 S. W. 906.

In Louisiana stock is property and not a credit. *New Orleans Nat. Bank-*

tion to the stockholder⁵⁴ in the sense in which the term is generally used.

ing Ass'n v. P. L. Wiltz & Co., 10 Fed. 330.

Shares are not credits within the meaning of a statute allowing the deduction of debts from moneys and credits for the purposes of taxation. *Morrill v. Bentley*, 150 Iowa 677, 130 N. W. 734; *Bridgman v. Keokuk*, 72 Iowa 42, 33 N. W. 355.

"Stock in corporations ordinarily * * * is not a credit, it is not an indebtedness to its owner, but, on the contrary, is an interest in the property of the corporation. Its owner holds an equitable interest in the property of the corporation, which is represented by the term 'stock,' and the extent of his interest is described by the term 'shares.' The expression 'shares of stock,' when qualified by words indicating number and ownership, expresses the extent of the owner's interest in the corporation property. The interest is equitable, and does not give him the right of ownership to specific property of the corporation. But he does own the specific stock held in his name, and, under the rules of law, the property of the corporation is held by the corporation in trust for the stockholders. It will be readily seen that a share of stock is a thing owned by the stockholder. It is in no sense a debt owing to the stockholder. It is not, therefore, a credit." *Bridgman v. Keokuk*, 72 Iowa 42, 33 N. W. 355, quoted with approval in *Morrill v. Bentley*, 150 Iowa 677, 130 N. W. 734.

The stockholders are not creditors of the corporation. *Ashley v. Quintard*, 90 Fed. 84; *Sinnott v. Hibernia Nat. Bank*, 105 La. 705, 30 So. 233; *Willoughby v. Barrett*, 60 Pa. Super. Ct. 242.

⁵⁴*United States. Gundry v. Reakirt*, 173 Fed. 167; *Ashley v. Quintard*, 90 Fed. 84.

Alabama. *Nelson v. Owen*, 113 Ala. 372, 21 So. 75; *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558.

Delaware. *Fowler v. Dickson*, 1 Boyce 113, 74 Atl. 601.

Illinois. *Pease v. Chicago Crayon Co.*, 235 Ill. 391, 18 L. E. A. (N. S.) 1158, 14 Ann. Cas. 263, 85 N. E. 619, aff'g 138 Ill. App. 513.

Iowa. *Morrill v. Bentley*, 150 Iowa 677, 130 N. W. 734; *Bridgman v. Keokuk*, 72 Iowa 42, 33 N. W. 355.

Louisiana. *Sinnott v. Hibernia Nat. Bank*, 105 La. 705, 30 So. 233; *Smith v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 30 La. Ann. 1378.

Missouri. *Foster v. Potter*, 37 Mo. 525; *Caffery v. Choctaw Coal & Mining Co.*, 95 Mo. App. 174, 68 S. W. 1049.

New Jersey. *National Fire Ins. Co. v. Chambers*, 53 N. J. Eq. 468, 32 Atl. 663.

New York. *Plimpton v. Bigelow*, 93 N. Y. 592.

North Carolina. *Evans v. Monot*, 57 N. C. 227.

Pennsylvania. *Willoughby v. Barrett*, 60 Pa. Super. Ct. 242.

"It is only in a very qualified and somewhat metaphysical sense that a corporation is a debtor to its shareholders for their shares." *Ashley v. Quintard*, 90 Fed. 84.

"The corporators in the aggregate own the stock, according to their respective shares and portions; and it can no more be said that the shares of a corporator constitute a credit, a debt due to him by the corporation, than it could be said that the joint owners of a house or a ship are the debtors of each for his share." *Smith v. Crescent City Live-Stock Landing & Slaughter-House Co.*, 30 La. Ann. 1378.

Shares of stock are clearly not "money." Nor are they "securities," or "securities for money."⁵⁵

§ 3432. Shares of stock as "chattels" or as "goods, wares and merchandise." According to the weight of authority shares of stock are not chattels,⁵⁶ although there is not wanting some authority to the

55 California. *Barstow v. Savage* Min. Co., 64 Cal. 388, 49 Am. Rep. 705, 1 Pac. 349; *Atkins v. Gamble*, 42 Cal. 86.

New Jersey. *Graydon's Ex'rs v. Graydon*, 23 N. J. Eq. 229, rev'd 25 N. J. Eq. 561.

New York. *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599, 627; *In re King*, 122 App. Div. 354, 106 N. Y. Supp. 1073.

Texas. *Thayer v. Wathen*, 17 Tex. Civ. App. 382, 44 S. W. 906.

England. *Jones v. Brinley*, 1 East 1; *Gosden v. Dotterill*, 1 Myl. & K. 56. "Shares of stock are not representations of money." *Willoughby v. Barrett*, 60 Pa. Super. Ct. 242.

"Certificates of stock are frequently spoken of as securities, but they are not such, in the proper signification of the term." *Culp v. Mulvane*, 66 Kan. 143, 71 Pac. 273, quoted with approval in *Barnhouse v. Dewey*, 83 Kan. 12, 29 L. R. A. (N. S.) 166, 109 Pac. 1081.

They are generally held not to be securities in the legal sense of the term, though they are largely so used. *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

The term "securities," in its broadest sense, includes certificates of stock. Whether it does so in a contract must be determined by the contract. *Thayer v. Wathen*, 17 Tex. Civ. App. 382, 44 S. W. 906. In this case it was held not to.

They have been said to be non-negotiable securities. *Maxwell v. Foster*, 67 S. C. 377, 45 S. E. 927; *Hampton & B. Railroad & Lumber*

Co. v. Bank of Charleston, 48 S. C. 120, 26 S. E. 238.

The receipt of stock is not the receipt of money, within the meaning of a contract to pay a certain percentage on the receipt of any "money." *Jones v. Brinley*, 1 East 1.

An action for money had and received will not lie unless money has been received, and it will not lie, therefore, for stock received by the defendant. *Nightingal v. Devisme*, 5 Burrows 2589.

Shares of stock will not pass under a will bequeathing "money" (*Gosden v. Dotterill*, 1 Mylne & K. 56; *Hotbam v. Sutton*, 15 Ves. 319; *Ogle v. Knipe*, L. R. 8 Eq. 434, 38 L. J. Ch. 692; *Collins v. Collins*, L. R. 12 Eq. 455; *Graydon's Ex'rs v. Graydon*, 23 N. J. Eq. 229); nor under a will bequeathing all "securities for money" (*Ogle v. Knipe*, L. R. 8 Eq. 434, 38 L. J. Ch. 692); nor under a will bequeathing all estate "in money or securities" (*Graydon's Ex'rs v. Graydon*, 23 N. J. Eq. 229); nor under a will bequeathing all property "invested in bonds or securities" (*Hudleston v. Gouldsbury*, 10 Beav. 547).

An exception in a will of "estate in money or securities" does not include shares of stock. *Graydon's Ex'rs v. Graydon*, 23 N. J. Eq. 229, rev'd 25 N. J. Eq. 561.

That shares of stock are not within a statute permitting the seizure and sale on execution of "moneys and effects," see *Price v. Brady*, 21 Tex. 614.

56 Alabama. *Nelson v. Owen*, 113 Ala. 372, 21 So. 75.

contrary.⁵⁷ It has also been held that they are not "goods and chattels."⁵⁸

In England it is held that they are not "goods, wares, or merchandises," within the meaning of the seventeenth section of the statute of frauds, and there are some holdings to the same effect in this country, although the weight of authority is to the contrary.⁵⁹

§ 3433. Shares of stock as an interest in corporate property. It follows from the nature of a share of stock that, while it represents an interest in the property of the corporation,⁶⁰ and an aliquot part of

California. *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80.

Georgia. *Small v. Wilson*, — Ga. App. —, 93 S. E. 518.

Illinois. *Rhea v. Powell*, 24 Ill. App. 77.

Massachusetts. *Howe v. Starkweather*, 17 Mass. 240.

England. *Rex v. Copper*, 5 Price 217, 262.

At common law a share of stock was not a chattel. *Norton v. Norton*, 43 Ohio St. 509, 3 N. E. 348. See also *Ashley v. Quintard*, 90 Fed. 84.

A share of stock is not a specific chattel. *Foster v. Potter*, 37 Mo. 525; *Caffery v. Choctaw Coal & Mining Co.* 95 Mo. App. 174, 68 S. W. 1049.

⁵⁷ *McGowin v. Dickson*, 182 Ala. 161, 62 So. 685.

⁵⁸ They are not "goods or chattels" within the meaning of a statute governing gifts of goods and chattels. *First Nat. Bank v. Holland*, 99 Va. 495, 55 L. R. A. 155, 86 Am. St. Rep. 898, 39 S. E. 126.

Nor within the meaning of a statute regulating the mortgaging of goods and chattels, and requiring the filing of such a mortgage. *Williamson v. New Jersey Southern R. Co.*, 26 N. J. Eq. 398.

⁵⁹ See subd. xxv, *infra*, this chapter.

⁶⁰ **California.** *People v. Badlam*, 57 Cal. 594.

Georgia. *Oliver v. Oliver*, 118 Ga. 362, 45 S. E. 232.

Iowa. *Morrill v. Bentley*, 150 Iowa

677, 130 N. W. 734; *Bridgman v. Keokuk*, 72 Iowa 42, 33 N. W. 355.

Missouri. *Addis v. Swofford*, 180 S. W. 548.

New Jersey. *Wetherbee v. Baker*, 35 N. J. Eq. 501.

New York. *In re Bronson*, 150 N. Y. 1, 34 L. R. A. 238, 55 Am. St. Rep. 632, 44 N. E. 707, modifying on other grounds 1 App. Div. 546, 37 N. Y. Supp. 476; *In re James*, 144 N. Y. 6, 38 N. E. 961; *Clark v. Bankers' Trust Co.*, 99 Misc. 300, 163 N. Y. Supp. 748.

Pennsylvania. *Wilkes-Barre Deposit & Savings Bank v. Wilkes-Barre*, 148 Pa. St. 601, 24 Atl. 111.

Washington. *Gamble v. Dawson*, 67 Wash. 72, Ann. Cas. 1913 D 501, 120 Pac. 1060.

"A stockholder's interest in a corporation and in all of its property and rights is represented by his stock." *Farmers' & Merchants' Nat. Bank v. Mosher*, 68 Neb. 713, 100 N. W. 133, 94 N. W. 1003.

"The shares have no value independently of the interest they represent in the franchise and property of the corporation." *Consolidated Coal Co. of St. Louis v. Miller*, 236 Ill. 149, 86 N. E. 205.

"Shares of stock represent the value of all the assets of the corporation," and "represent no value independent of the corporate property." *Chesebrough v. City & County of San Francisco*, 153 Cal. 559, 96 Pac. 288.

the capital stock,⁶¹ the owner thereof owns no part of the capital of the corporation,⁶² and is not the owner nor entitled to the possession of any definite portion of its property or assets.⁶³ Hence a purchaser of

"The stock of each shareholder in a California corporation simply represents his proportional interest in the concern; it fixes the amount which he has paid or must pay as his contribution to the corporate assets." In re Putman, 193 Fed. 464.

"A share of stock only typifies an aliquot part of the corporation's property, or the right to share in its proceeds, to that extent, when distributed according to law and equity." Hall & Farley v. Alabama Terminal & Improvement Co., 173 Ala. 398, 414, 56 So. 235.

"Shares" of stock are but representatives of value. They are but paper evidences of the ownership of the capital stock of the corporation, and that ownership is precisely such as the share itself declares it to be." Film Producers v. Jordan, 171 Cal. 664, 154 Pac. 605.

Stock represents the value of all the assets of the corporation. People v. National Bank of D. O. Mills & Co., 123 Cal. 53, 45 L. R. A. 747, 69 Am. St. Rep. 32, 55 Pac. 685.

"The property of every company may consist of three separate and distinct things, which are its capital stock, its surplus and its franchise. But these three things, several in the ownership of the company, are united in the stock of the shareholder." People v. Coleman, 126 N. Y. 433, 12 L. R. A. 762, 27 N. E. 818, quoted with approval in People v. Wemple, 150 N. Y. 46, 44 N. E. 787, quoted with approval in Henderson Bridge Co. v. Com., 99 Ky. 623, 29 L. R. A. 73, 31 S. W. 486 (judgment affirmed 166 U. S. 150, 41 L. Ed. 953) where it is further said: "The share of stock covers, embraces and represents all three in their totality, for it is a business

photograph of all the corporate possessions and possibilities."

A paid up share gives the holder a right equal in value to a corresponding share in the assets and good-will of the company after its debts are paid. Merchants' Nat. Bank v. Wehrmann, 202 U. S. 295, 50 L. Ed. 1036.

A sale of stock by the corporation is a sale of a fractional interest in the corporation. Southwestern State Co. v. Stephens, 139 Wis. 616, 29 L. R. A. (N. S.) 92, 131 Am. St. Rep. 1074, 120 N. W. 408.

⁶¹ Farrington v. Tennessee, 95 U. S. 679, 24 L. Ed. 558; Presnall v. Stockyards Nat. Bank, — Tex. Civ. App. —, 151 S. W. 873.

⁶² Bradley v. Bander, 36 Ohio St. 28, 38 Am. Rep. 547.

⁶³ United States. Gottfried v. Miller, 104 U. S. 521, 26 L. Ed. 851; Farrington v. Tennessee, 95 U. S. 679, 24 L. Ed. 558; Van Allen v. The Assessors, 3 Wall. 573, 584, 18 L. Ed. 229.

California. Kohl v. Lilienthal, 81 Cal. 378, 6 L. R. A. 520, 22 Pac. 689, 20 Pac. 401.

Delaware. Bryan v. Aiken, 86 Atl. 674, rev'g (Del. Ch.), 82 Atl. 817.

Illinois. Cummings v. People, 211 Ill. 392, 71 N. E. 1031; People v. Goss & Phillips Mfg. Co., 99 Ill. 355, rev'g on other grounds 4 Ill. App. 510.

Louisiana. Sinnott v. Hibernia Nat. Bank, 105 La. 705, 30 So. 233; Williamson v. Smoot, 7 Mart. 31, 12 Am. Dec. 494.

Maryland. Cotten v. Tyson, 121 Md. 597, 89 Atl. 113; United States Exp. Co. v. Hurlock, 120 Md. 107, Ann. Cas. 1915 A 566, 87 Atl. 834.

New York. Plimpton v. Bigelow, 93 N. Y. 592; Burrall v. Bushwick R. Co., 75 N. Y. 211.

stock in a corporation does not purchase any portion of the corporate assets,⁶⁴ and a sale of his stock by a stockholder works no change or modification in the title to the corporate property.⁶⁵ Nor is a sale of all of the stock of a corporation, or of a controlling interest, a sale of the physical properties of the corporation,⁶⁶ nor does it pass the title to the corporate assets to the purchaser.⁶⁷ For the same reason, an attachment of the stock of a stockholder does not incumber the property of the corporation or prevent its sale.⁶⁸ Nor can its property be seized for the stockholder's debt.⁶⁹

§ 3434. Situs of shares of stock. As a general rule, the situs of corporate stock is deemed to be in the state where the corporation has its domicile, which is ordinarily the state under whose laws the corporation was created, and any question relating to it may be determined there, even though the certificates are without the state and are owned by nonresidents.⁷⁰ So suits to determine the ownership of

Oklahoma. *People's Nat. Bank v. Board Com'rs Kingfisher Co.*, 24 Okla. 145, 104 Pac. 55, 103 Pac. 682.

Tennessee. *Tubb v. Fowler*, 118 Tenn. 325, 99 S. W. 988; *State v. Mitchell*, 104 Tenn. 336, 58 S. W. 365.

Texas. *Presnall v. Stockyards Nat. Bank*, — Tex. Civ. App. —, 151 S. W. 873.

"While each share of stock represents an interest in all the property and activities of the corporation equal to the proportion its par value bears to the entire capital stock, yet it confers no legal title to the property, all of which is in the corporation." *Addis v. Swofford* (Mo.), 180 S. W. 548.

The right or interest of a stockholder "does not enable him to withdraw any portion of the capital stock of the corporation from its control, nor to exercise any authority over it, further than to participate, to the extent of his stock in the election of a board of managers, charged with the conduct of the business for which the corporation was created." *Jones v. Davis*, 35 Ohio St. 474.

The shareholders are not tenants in common of the corporate property.

Harton v. Johnston, 166 Ala. 317, 51 So. 992. See also § 25, *supra*.

⁶⁴ *People's Nat. Bank v. Board Com'rs Kingfisher Co.*, 24 Okla. 145, 104 Pac. 55, 103 Pac. 682.

⁶⁵ *Bradley v. Bauder*, 36 Ohio St. 28, 38 Am. Rep. 547.

⁶⁶ *Continental Trust Co. v. Brown*, — Tex. Civ. App. —, 179 S. W. 939.

⁶⁷ They remain the assets of the corporation the same as before. *People's Nat. Bank v. Board Com'rs Kingfisher Co.*, 24 Okla. 145, 104 Pac. 55, 103 Pac. 682.

A sale of all the stock of a bank except ten shares does not in any way affect the title to the property belonging to the bank at the time of the sale. *Charles Mix County Bank v. Johnson Bros. Land Co.*, 37 S. D. 613, 159 N. W. 279.

⁶⁸ *Gottfried v. Miller*, 104 U. S. 521, 26 L. Ed. 851; *Ashley v. Quintard*, 90 Fed. 84.

⁶⁹ *Ashley v. Quintard*, 90 Fed. 84; *Williamson v. Smoot*, 7 Mart. (La.) 31, 12 Am. Dec. 494.

⁷⁰ *United States. Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 44 L. Ed. 647, rev'g 82 Fed. 778.

stock, or to quiet, or remove clouds from, the title thereto, or the like may be brought in that state,⁷¹ and the defendant may be served by publication in case he is a nonresident, where the statute permits that character of service on nonresident defendants in such suits.⁷² And

Arizona. *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

Delaware. *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 80 Atl. 666.

Illinois. *Fahrig v. Milwaukee & C. Breweries, Ltd.*, 113 Ill. App. 525.

New Jersey. *Andrews v. Guayaquil & Q. R. Co.*, 69 N. J. Eq. 211, 60 Atl. 568, aff'd 71 N. J. Eq. 768, 71 Atl. 1133.

New York. *Holmes v. Camp*, 219 N. Y. 359, 114 N. E. 841, rev'g 173 App. Div. 971, 159 N. Y. Supp. 1119.

Oregon. *Baillie v. Columbia Gold Min. Co.*, 166 Pac. 965.

Washington. *Gamble v. Dawson*, 67 Wash. 72, Ann. Cas. 1913 D 501, 120 Pac. 1060.

"As the habitation or domicile of a corporation is and must be in the state that created it, the property represented by its certificates of stock may be deemed to be held by the company within the state whose creature it is." *Holmes v. Camp*, 219 N. Y. 359, 114 N. E. 841, rev'g 173 N. Y. App. Div. 971, 159 N. Y. Supp. 1119.

"The interest of a stockholder in the capital of a corporation may be regarded as property located where the corporation is organized and exists, and in that jurisdiction may be reached by appropriate proceedings." *Holmes v. Camp*, 219 N. Y. 359, 114 N. E. 841, rev'g 173 N. Y. App. Div. 971, 159 N. Y. Supp. 1119.

As to the citizenship, domicile, residence and habitation of corporations see Chap. 13, *supra*.

As to the situs of shares of stock for the purpose of execution, attachment or garnishment, see § 3141, *supra*, and § 3439, *infra*.

⁷¹ **United States.** *Jellenik v. Huron*

Copper Min. Co., 177 U. S. 1, 44 L. Ed. 647, rev'g 82 Fed. 778; *West v. Empire Life Ins. Co.*, 242 Fed. 605, 237 Fed. 303; *Shaw v. Goebel Brewing Co.*, 202 Fed. 408, 45 L. R. A. (N. S.) 1090.

Arizona. *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

California. *Wait v. Kern River Mining, Milling & Developing Co.*, 157 Cal. 16, 106 Pac. 98.

Connecticut. *Patterson v. Farmington St. R. Co.*, 76 Conn. 628, 57 Atl. 853.

Georgia. *Hamil v. Flowers*, 133 Ga. 216, 65 S. E. 961; *People's Nat. Bank v. Cleveland*, 117 Ga. 908, 44 S. E. 20.

New Jersey. *Sohege v. Singer Mfg. Co.*, 73 N. J. Eq. 567, 68 Atl. 64; *Andrews v. Guayaquil & Q. R. Co.*, 69 N. J. Eq. 211, 60 Atl. 568, aff'd 71 N. J. Eq. 768, 71 Atl. 1133.

New York. *Holmes v. Camp*, 219 N. Y. 359, 114 N. E. 841, rev'g 173 App. Div. 971, 159 N. Y. Supp. 1119.

Washington. *Gamble v. Dawson*, 67 Wash. 72, Ann. Cas. 1913 D 501, 120 Pac. 1060.

A corporation organized under the laws of Arizona for the purpose of doing business in California, and all of whose property is in California and all of whose business is transacted there, will be regarded as domiciled in California at least to the extent necessary to bring it within the rule applicable to domestic corporations as to the situs of its stock. *Wait v. Kern River Mining, Milling & Developing Co.*, 157 Cal. 16, 106 Pac. 98.

⁷² **United States.** *Jellenik v. Huron Copper Min. Co.*, 177 U. S. 1, 44 L. Ed. 647, rev'g 82 Fed. 778.

Arizona. *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

stock owned by a nonresident debtor in a domestic corporation may be attached where the statutes allow attachment of the property of non-residents, even though the certificates are not within the jurisdiction of the court.⁷³

Many courts hold that the stock can have its situs only in the state where the corporation is domiciled and that it cannot be attached or levied upon elsewhere even though the certificates are within the state of the forum. Other courts, however, have held that stock in a corporation domiciled in one state may be attached or garnished in another state by service of process on a third person in possession of the certificates in the latter state.⁷⁴ And it has also been held that while certificates of stock are technically only written evidence of interests in the corporate property, they are so far in the nature of chattels that, when certificates of stock in a corporation of one state are held in pledge or as collateral in another state, the courts of the latter state may establish a lien on the stock in a suit commenced by substituted service under a statute authorizing such service in suits to establish liens on personal property within the state.⁷⁵ It is also very generally held that if a corporation organized in one state becomes in effect a domestic corporation of another state by complying with its laws for the purpose of doing business there, its stock has a situs in the latter state, and is subject to attachment there to the same extent as the stock of domestic corporations.⁷⁶

California. *Wait v. Kern River Mining, Milling & Developing Co.*, 157 Cal. 16, 106 Pac. 98.

Connecticut. *Patterson v. Farmington St. Ry. Co.*, 76 Conn. 628, 57 Atl. 853.

Georgia. *Hamil v. Flowers*, 133 Ga. 216, 65 S. E. 961; *People's Nat. Bank v. Cleveland*, 117 Ga. 908, 44 S. E. 20.

Missouri. *Smith v. Pilot Min. Co.*, 47 Mo. App. 409.

New Jersey. *Sohege v. Singer Mfg. Co.*, 73 N. J. Eq. 567, 68 Atl. 64; *Andrews v. Guayaquil & Q. R. Co.*, 69 N. J. Eq. 211, 60 Atl. 568, *aff'd* 71 N. J. Eq. 768, 71 Atl. 1133.

New York. *Holmes v. Camp*, 219 N. Y. 359, 114 N. E. 841, *rev'g* 173 App. Div. 971, 159 N. Y. Supp. 1119.

Ohio. *National Bank of New London v. Lake Shore & M. S. Ry. Co.*, 21 Ohio St. 221.

Washington. *Gamble v. Dawson*, 67 Wash. 72, Ann. Cas. 1913 D 501, 120 Pac. 1060.

In a suit in equity in a federal court to recover certain shares of stock of a corporation of another state, non-resident defendants cannot be served by publication where it does not appear that the stock is held by persons residing within the district, since the statute only permits constructive service where the property is within the district where the suit is brought. *McKane v. Burke*, 132 Fed. 688.

⁷³ See § 3141, *supra*, and § 3439, *infra*.

⁷⁴ See § 3141, *supra*, and § 3439, *infra*.

⁷⁵ *Merritt v. American Steel-Barge Co.*, 79 Fed. 228.

⁷⁶ See § 3141, *supra*, and § 3439, *infra*.

The situs of stock for purposes of administration on the estate of its deceased owner is in the state where the latter died,⁷⁷ or the state where the corporation is domiciled,⁷⁸ and the courts of another state, which is not the domicile of the corporation, have no jurisdiction over it although the certificates are found there.⁷⁹ But it has been held that where a corporation organized in one state maintains an office for the transfer of its stock in another state, this fact constitutes the latter state its domicile in so far as the registry and transfer of shares therein are concerned, and that an ancillary administrator appointed in the latter state and having shares of stock there belonging to the decedent is entitled to have them transferred on the corporate books in that state, although the decedent did not reside there.⁸⁰

The situs of shares of stock for purposes of taxation will be considered at length in a subsequent chapter.⁸¹

§ 3435. Title to shares as between husband and wife. Shares of stock, although they are personal property, and although they cannot be regarded as choses in action in the proper sense, are so much in the nature of choses in action that they are not property in possession, when owned by a married woman, so as to vest in the husband at common law without being reduced to his possession. On the contrary, they are subject to the same rules as choses in action. If reduced to his possession by the husband in the lifetime of the wife, they belong to him, but, if not reduced to possession in the lifetime of the wife, they survive to her on the death of the husband, or pass to her administrator on her death.⁸²

⁷⁷ *De La Vergne v. Richardson*, 198 Mo. 189, 95 S. W. 898; *Richardson v. Busch*, 190 Mo. 174, 115 Am. St. Rep. 472, 95 S. W. 894.

⁷⁸ Where deceased resided in California, it was held that ancillary administrators appointed in Massachusetts should administer upon stock in Massachusetts corporations but not stock of foreign corporations although the certificates were found in Massachusetts. *Kennedy v. Hodges*, 215 Mass. 112, 102 N. E. 432.

⁷⁹ Where the owner of stock in a New York corporation dies in that state, the stock belongs to the administrator in that state, and the courts of Missouri have no jurisdiction over

it, nor has the public administrator of that state any title to it although the certificates are in Missouri at the time of the decedent's death. *Richardson v. Busch*, 198 Mo. 174, 115 Am. St. Rep. 472, 95 S. W. 894. Followed in *De La Vergne v. Richardson*, 198 Mo. 189, 95 S. W. 898.

⁸⁰ *Lockwood v. United States Steel Corporation*, 209 N. Y. 375, L. R. A. 1915C 471, 103 N. E. 697, rev'g 153 N. Y. App. Div. 655, 138 N. Y. Supp. 725.

⁸¹ See the chapter on Taxation, *infra*.

⁸² *United States*. See *Tucker v. Curtin*, 148 Fed. 929.

Connecticut. *Deming v. Williams*,

In determining whether the husband has reduced the stock to possession, the intent with which he acts in acquiring possession of it, that is whether his intent is to claim and exercise his marital right, should be considered in connection with his acts.⁸³ His act in transferring it in his own name amounts to a reduction to possession unless it is clearly shown that it was done in trust for his wife, or for some other purpose than to vest title in himself.⁸⁴ There may be a reduction to possession without a formal transfer to the husband on the corporate books.⁸⁵

IV. LIABILITY OF SHARES OF STOCK TO EXECUTION, ATTACHMENT AND GARNISHMENT

§ 3436. In the absence of statutory authority. At common law, a chose in action, being intangible and incapable of manual seizure and delivery, cannot be taken on execution; and shares of stock in a corporation, which are in the nature of choses in action, are subject to the same rule. They are not subject to execution for the debts of the holder, unless they are made so by statute.⁸⁶ Nor can they be seized

26 Conn. 226, 68 Am. Dec. 386.

Maine. Winslow v. Crocker, 17 Me. 29.

Massachusetts. Stanwood v. Stanwood, 17 Mass. 57.

New Hampshire. Wells v. Tyler, 25 N. H. 340.

New York. In re Reciprocity Bank, 22 N. Y. 9, 15.

Pennsylvania. Slaymaker v. Bank of Gettysburg, 10 Pa. 373.

Rhode Island. Wilder v. Aldrich, 2 R. I. 518; Arnold v. Ruggles, 1 R. I. 165.

South Carolina. Blake v. Jones, Bailey Eq. 141, 21 Am. Dec. 530.

Tennessee. Rice v. McReynolds, 8 Lea 36.

England. Nicholson v. Drury Buildings Estate Co., 7 Ch. Div. 48, 55; Wildman v. Wildman, 9 Ves. 174, 177.

If reduced to possession during the continuance of the marriage relation the stock belongs to him for any and all purposes. Johnson v. Hume, 138 Ala. 564, 36 So. 421.

Assent or concurrence on the part of the wife to the exercise by the hus-

band of his right to reduce the shares to possession is not necessary. Johnson v. Hume, 138 Ala. 564, 36 So. 421; Rice v. McReynolds, 8 Lea (Tenn.) 36.

See generally standard works on Husband and Wife.

⁸³ Johnson v. Hume, 138 Ala. 564, 36 So. 421.

⁸⁴ Johnson v. Hume, 138 Ala. 564, 36 So. 421; Rice v. McReynolds, 8 Lea (Tenn.) 36.

⁸⁵ Johnson v. Hume, 138 Ala. 564, 36 So. 421.

⁸⁶ **United States.** Gundry v. Reakirt, 173 Fed. 167; Ashley v. Quintard, 90 Fed. 84.

Alabama. Nabring v. Bank of Mobile, 58 Ala. 204.

Arkansas. Deutschman v. Byrne, 64 Ark. 111, 40 S. W. 780.

California. Robinson v. Spaulding Gold & Silver Min. Co., 72 Cal. 32, 13 Pac. 65.

Delaware. Fowler v. Dickson, 1 Boyce 113, 74 Atl. 601.

District of Columbia. Barnard v. Life Ins. Co., 4 Mackey 63.

Georgia. Owens v. Atlanta Trust &

under the statutes relating to attachment, unless the statute so provides in express terms or by necessary implication.⁸⁷ Nor, in the

Banking Co., 122 Ga. 521, 50 S. E. 379.

Idaho. Wells v. Price, 6 Idaho 490, 56 Pac. 266.

Illinois. Magerstadt v. Schaefer, 213 Ill. 351, 72 N. E. 1063, aff'g 110 Ill. App. 166; Rhea v. Powell, 24 Ill. App. 77; Goss & Phillips Mfg. Co. v. People, 4 Ill. App. 510, rev'd on other grounds 99 Ill. 355.

Louisiana. Williamsoff v. Smoot, 7 Mart. 31, 12 Am. Dec. 494.

Maryland. Coombs v. Jordan, 3 Bland Ch. 284, 22 Am. Dec. 236.

Massachusetts. Sibley v. Quinsigamond Nat. Bank, 133 Mass. 515; Howe v. Starkweather, 17 Mass. 240.

Michigan. Feige v. Burt, 118 Mich. 243, 74 Am. St. Rep. 390, 77 N. W. 928; Old Second Nat. Bank of Bay City v. Williams, 112 Mich. 564, 71 N. W. 150; Van Norman v. Jackson Circuit Judge, 45 Mich. 204, 7 N. W. 796; Blair v. Compton, 33 Mich. 414.

Minnesota. See Puget Sound Nat. Bank of Everett v. Mather, 60 Minn. 362, 62 N. W. 396.

Missouri. Armour Bros. Banking Co. v. St. Louis Nat. Bank, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690; Foster v. Potter, 37 Mo. 525; Dean Rapid Tel. Co. v. Howell, 162 Mo. App. 100, 144 S. W. 135.

New Jersey. National Fire Ins. Co. v. Chambers, 53 N. J. Eq. 468, 489, 32 Atl. 663.

New York. Denton v. Livingston, 9 Johns. 96, 6 Am. Dec. 264. See Donovan v. Finn, 1 Hopk. Ch. 59, 14 Am. Dec. 531.

North Carolina. Cooper v. Swamp Canal Co., 2 Murph. 195.

Ohio. Norton v. Norton, 43 Ohio St. 509, 3 N. E. 348.

Pennsylvania. Slaymaker v. Bank of Gettysburg, 10 Pa. St. 373.

Tennessee. Nashville Trust Co. v. Weaver, 102 Tenn. 66, 50 S. W. 763.

Texas. Keating v. J. Stone & Sons Live-Stock Co., 83 Tex. 467, 29 Am. St. Rep. 670, 18 S. W. 797.

Vermont. Barnes v. Hall, 55 Vt. 420.

Washington. Daniel v. Gold Hill Min. Co., 28 Wash. 411, 68 Pac. 884.

West Virginia. Lipscomb's Adm'r v. Condon, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

Compare Colt v. Ives, 31 Conn. 25, 81 Am. Dec. 161.

This is true, even though the charter of a corporation may expressly declare that its shares, for purposes of inheritance, shall be real estate. Cooper v. Swamp Canal Co., 2 Murph. (N. C.) 195. And see Coombs v. Jordan, 3 Bland (Md.) 284, 22 Am. Dec. 236.

See generally §§ 3139-3144, supra.

87 United States. Gundry v. Reakirt, 173 Fed. 167; Ashley v. Quintard, 90 Fed. 84; Sowles v. National Union Bank, 82 Fed. 696.

Alabama. Kennedy v. Mary Lee Coal & Railway Co., 93 Ala. 494, 9 So. 608.

Arkansas. Deutschman v. Byrne, 64 Ark. 111, 40 S. W. 780.

Connecticut. Barber v. Morgan, 84 Conn. 618, Ann. Cas. 1912 D 951, 80 Atl. 791.

Delaware. Fowler v. Dickson, 1 Boyce 113, 74 Atl. 601.

District of Columbia. Duncanson v. National Bank of Republic, 7 Mackey 348; Barnard v. Life Ins. Co., 4 Mackey 63.

Idaho. Wells v. Price, 6 Idaho 490, 56 Pac. 266.

Illinois. Rhea v. Powell, 24 Ill. App. 77.

Kentucky. Husband v. Linehan, 168 Ky. 304, Ann. Cas. 1917 D 954, 181 S. W. 1089.

absence of statutory provision, can they be seized and sold on a tax warrant,⁸⁸ or attachment for taxes.⁸⁹ Nor is garnishment a proper remedy by which to subject them to the satisfaction of a debt of the owner, unless it is made so by statute.⁹⁰

Maryland. *United States Exp. Co. v. Hurlock*, 120 Md. 107, Ann. Cas. 1915 A 566, 87 Atl. 834; *Morton v. Graffin*, 68 Md. 545, 15 Atl. 298, 13 Atl. 341.

Michigan. *Van Norman v. Jackson* Circuit Judge, 45 Mich. 204, 7 N. W. 796.

Minnesota. See *Puget Sound Nat. Bank of Everett v. Mather*, 60 Minn. 362, 62 N. W. 396.

Missouri. *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690; *Foster v. Potter*, 37 Mo. 525; *Dean Rapid Tel. Co. v. Howell*, 162 Mo. App. 100, 144 S. W. 135.

New York. *Plimpton v. Bigelow*, 93 N. Y. 592; *People v. Grifenhagen*, 167 App. Div. 572, 152 N. Y. Supp. 679.

Ohio. *Norton v. Norton*, 43 Ohio St. 509, 3 N. E. 348.

Texas. *Merchants' Mut. Ins. Co. v. Brower*, 38 Tex. 230.

West Virginia. *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

"Attachment being a purely statutory remedy, reaches only such property as is made subject to it by the statute." *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

⁸⁸ *Barnes v. Hall*, 55 Vt. 420.

⁸⁹ *Kennedy v. Mary Lee Coal & Railway Co.*, 93 Ala. 494, 9 So. 608.

⁹⁰ *United States. Gundry v. Reakirt*, 173 Fed. 167.

Alabama. *Planters' & Merchants' Bank v. Leavens*, 4 Ala. 753.

Delaware. *Fowler v. Dickson*, 1 Boyce 113, 74 Atl. 601.

Georgia. *Ross v. Ross*, 25 Ga. 297.

Illinois. *Pease v. Chicago Crayon Co.*, 235 Ill. 391, 18 L. R. A. (N. S.) 1158, 14 Ann. Cas. 263, 85 N. E. 619, aff'g 138 Ill. App. 513.

Iowa. *Mooar v. Walker*, 46 Iowa 164.

Missouri. *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690; *Foster v. Potter*, 37 Mo. 525.

Pennsylvania. *Willoughby v. Barrett*, 60 Pa. Super. Ct. 242.

Texas. *Presnall v. Stockyards Nat. Bank*, — Tex. Civ. App. —, 151 S. W. 873.

"The corporation cannot be said either to be indebted to the stockholder or to have in its possession property or effects belonging to him." *Pease v. Chicago Crayon Co.*, 235 Ill. 391, 18 L. R. A. (N. S.) 1158, 14 Ann. Cas. 263, 85 N. E. 619, aff'g 138 Ill. App. 513.

"The mere ownership of shares * * * does not constitute the owner a creditor of the corporation issuing them; nor from the fact that a corporation has in its possession the corporate stock book can it be inferred that the corporation has in its possession property belonging to its members." *Willoughby v. Barrett*, 60 Pa. Super. Ct. 242.

"What classes of property or indebtedness may be reached by garnishment necessarily must depend upon the statute authorizing the issuance of the writ, as the remedy by garnishment is statutory." *Presnall v. Stockyards Nat. Bank*, — Tex. Civ. App. —, 151 S. W. 873.

That stock is not a debt owing by the corporation to the stockholder, see § 3431, supra.

See generally §§ 3139-3144, supra.

§ 3437. **Statutory authority.** Although shares of stock in corporations cannot be reached and subjected to the holder's debts by execution or attachment, unless such a remedy is provided by statute, it is perfectly competent for the legislatures to enact such statutes, and they have been enacted in most jurisdictions.^{82a} And in a number of

82a Alabama. *Wetumpka Bridge Co. v. Kidd*, 124 Ala. 242, 27 So. 431; *Oldacre v. Butler*, 116 Ala. 652, 23 So. 3; *Nabring v. Bank of Mobile*, 58 Ala. 204.

Arkansas. *Scott v. Houtp*, 73 Ark. 78, 83 S. W. 1057; *Deutschman v. Byrne*, 64 Ark. 111, 40 S. W. 780.

California. *National Bank of Pacific v. Western Pac. R. Co.*, 157 Cal. 573, 27 L. R. A. (N. S.) 987, 21 Ann. Cas. 1391, 108 Pac. 676; *West Coast Safety Faucet Co. v. Wulff*, 133 Cal. 315, 85 Am. St. Rep. 871, 65 Pac. 622.

Colorado. *Weber v. Bullock*, 19 Colo. 214, 35 Pac. 183; *Struby-Estabrook Mercantile Co. v. Davis*, 18 Colo. 93, 36 Am. St. Rep. 266, 31 Pac. 495; *Ellis v. Gibbons*, 26 Colo. App. 454, 145 Pac. 285.

Connecticut. *Barber v. Morgan*, 84 Conn. 618, Ann. Cas. 1912 D 951, 80 Atl. 791; *Colt v. Ives*, 31 Conn. 25, 81 Am. Dec. 161.

Delaware. *Fowler v. Dickson*, 1 Boyce 113, 74 Atl. 601.

Florida. *Jennings v. Saunders Co.*, 62 Fla. 218, 57 So. 353.

Georgia. *Owens v. Atlanta Trust & Banking Co.*, 122 Ga. 521, 50 S. E. 379; *People's Nat. Bank v. Cleveland*, 117 Ga. 908, 44 S. E. 20.

Idaho. *Mapleton Bank v. Standrod*, 8 Idaho 740, 67 L. R. A. 656, 71 Pac. 119.

Illinois. *Pease v. Chicago Crayon Co.*, 235 Ill. 391, 18 L. R. A. (N. S.) 1158, 14 Ann. Cas. 263, 85 N. E. 619, aff'g 138 Ill. App. 513; *Magerstadt v. Schaefer*, 213 Ill. 351, 72 N. E. 1063, aff'g 110 Ill. App. 166; *Union Nat. Bank of Chicago v. Byram*, 131 Ill. 92, 22 N. E. 842; *People v. Goss &*

Phillips. Mfg. Co., 99 Ill. 355, rev'g on other grounds 4 Ill. App. 510; *Thompson v. Wells*, 57 Ill. App. 436.

Indiana. *Boone v. Van Gorder*, 164 Ind. 499, 108 Am. St. Rep. 314, 74 N. E. 4.

Iowa. *Croft v. Colfax Elec. Light & Power Co.*, 113 Iowa 455, 85 N. W. 761; *Hair v. Burnell*, 106 Fed. 280.

Kentucky. *Husband v. Linehan*, 168 Ky. 304, Ann. Cas. 1917 D 954, 181 S. W. 1089; *Johnson's Assignee v. Louisville City Nat. Bank*, 22 Ky. L. Rep. 118, 56 S. W. 710.

Maryland. *Morton v. Graffin*, 68 Md. 545, 15 Atl. 298, 13 Atl. 341.

Massachusetts. *Sibley v. Quinsigamond Nat. Bank*, 133 Mass. 515; *Howe v. Starkweather*, 17 Mass. 240; *Titcomb v. Union Marine & Fire Ins. Co.*, 8 Mass. 326; *Hussey v. Manufacturers' & Mechanics' Bank*, 10 Pick. 415. But since the repeal of Rev. Laws, c. 177, §§ 46-51, by St. 1910, c. 531, shares of stock can no longer be levied upon at law. *Parkhurst v. Almy*, 222 Mass. 27, 109 N. E. 733.

Michigan. *Feige v. Burt*, 118 Mich. 243, 74 Am. St. Rep. 390, 77 N. W. 928; *Old Second Nat. Bank v. Williams*, 112 Mich. 564, 71 N. W. 150; *Van Norman v. Jackson Circuit Judge*, 45 Mich. 204, 7 N. W. 796; *Blair v. Compton*, 33 Mich. 414.

Minnesota. *Lund v. Wheaton Roller Mill Co.*, 50 Minn. 36, 36 Am. St. Rep. 623, 52 N. W. 268; *Nicollet Nat. Bank v. City Bank*, 38 Minn. 85, 8 Am. St. Rep. 643, 35 N. W. 577.

Missouri. *Tufts v. Volkening*, 122 Mo. 631, 27 S. W. 522, aff'g 51 Mo. App. 7; *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 35

states shares of stock have also been made subject to garnishment for the purpose of satisfying debts of their owner.^{83a}

Am. St. Rep. 691, 20 S. W. 690; **Foster v. Potter**, 37 Mo. 525; **Dean Rapid Tel. Co. v. Howell**, 162 Mo. App. 100, 144 S. W. 135; **Caffery v. Choctaw Coal & Mining Co.**, 95 Mo. App. 174, 68 S. W. 1049.

Nebraska. **Everitt v. Farmers' & Merchants' Bank**, 82 Neb. 191, 20 L. R. A. (N. S.) 996, 117 N. W. 401.

New Jersey. **Cord v. Newlin**, 71 N. J. L. 438, 59 Atl. 22; **Voorhis v. Terhune**, 50 N. J. L. 147, 7 Am. St. Rep. 781, 13 Atl. 391; **Princeton Bank v. Crozer & Moore**, 22 N. J. L. 383, 53 Am. Dec. 254; **Andrews v. Guayaquil & Q. R. Co.**, 69 N. J. Eq. 211, 60 Atl. 568, aff'd 71 N. J. Eq. 768, 71 Atl. 1133; **Gundry v. Reakirt**, 173 Fed. 167.

New York. **Simpson v. Jersey City Contracting Co.**, 165 N. Y. 193, 55 L. R. A. 796, 58 N. E. 896; **Plimpton v. Bigelow**, 93 N. Y. 592; **People v. Grifenhagen**, 167 App. Div. 572, 152 N. Y. Supp. 679.

North Carolina. See **Morehead v. Western North Carolina R. Co.**, 96 N. C. 362, 2 S. E. 247.

Ohio. **Ball v. Towle Mfg. Co.**, 67 Ohio St. 306, 93 Am. St. Rep. 682, 65 N. E. 1015; **Norton v. Norton**, 43 Ohio St. 509, 3 N. E. 348; **National Bank v. Lake Shore & M. S. R. Co.**, 121 Ohio St. 221; **Ashley v. Quintard**, 90 Fed. 84, construing the Ohio statutes.

Oregon. **Slemmons v. Thompson**, 23 Ore. 215, 31 Pac. 514.

Pennsylvania. **Braden's Estate**, 165 Pa. St. 184, 30 Atl. 746; **Weaver v. Huntington & B. T. M. Railroad & Coal Co.**, 50 Pa. St. 314; **Gundry v. Reakirt**, 173 Fed. 167.

Rhode Island. **Beckwith v. Burrough**, 14 R. I. 366, 51 Am. Rep. 392, 13 R. I. 294.

South Dakota. **Gardner v. Haines**, 19 S. D. 514, 104 N. W. 244.

Tennessee. **Nashville Trust Co. v.**

Weaver, 102 Tenn. 66, 50 S. W. 763; **Young v. South Tredegar Iron Co.**, 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202; **Memphis Appeal Pub. Co. v. Pike**, 9 Heisk. 697.

Texas. **Keating v. J. Stone & Sons Live-Stock Co.**, 83 Tex. 467, 29 Am. St. Rep. 670, 18 S. W. 797; **Presnall v. Stockyards Nat. Bank**, — Tex. Civ. App. —, 151 S. W. 873.

Virginia. **Shenandoah Valley R. Co. v. Griffith**, 76 Va. 913; **Chesapeake & O. Ry. Co. v. Paine & Co.**, 29 Gratt. 502.

Washington. **Daniel v. Gold Hill Min. Co.**, 28 Wash. 411, 68 Pac. 884.

West Virginia. **Lipscomb's Adm'r v. Condon**, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

Wyoming. **Wyoming Fair Ass'n v. Talbott**, 3 Wyo. 244, 21 Pac. 700.

Under the New York attachment law, shares of stock may be reached and subjected in supplementary proceedings. **O'Brien v. Mechanics' & Traders' Fire Ins. Co.**, 56 N. Y. 52; **Barnes v. Morgan**, 3 Hun (N. Y.) 703.

See generally §§ 3139-3144, *supra*.

^{83a}**United States.** **Younkin v. Collier**, 47 Fed. 571.

California. **Edwards v. Beugnot**, 7 Cal. 162.

Colorado. **Ellis v. Gibbons**, 26 Colo. App. 454, 145 Pac. 285.

Delaware. **Fowler v. Dickson**, 1 Boyce 113, 74 Atl. 601.

Michigan. **Old Second Nat. Bank v. Williams**, 112 Mich. 564, 71 N. W. 150.

Minnesota. **Puget Sound Nat. Bank v. Mather**, 60 Minn. 362, 62 N. W. 396. And see **Banning v. Sibley**, 3 Minn. 389, 405.

Nebraska. **Farmers' & Merchants' Nat. Bank v. Mosher**, 68 Neb. 713, 724, 100 N. W. 133, 94 N. W. 1003, 63 Neb. 130, 88 N. W. 552.

It has been held that stock may be levied upon where the statute declares shares of stock to be personal property and makes all "personal property,"^{84a} or "all personal property and choses in action,"^{85a} subject to execution or attachment, or permits the attachment of "rights" and "effects,"^{86a} or of "rights and credits,"^{87a} or makes all the "estate" of the debtor subject to levy.^{88a} On the other hand there are holdings to the effect that shares of stock are not subject to attachment under statutes allowing attachment of "real and personal property,"^{89a} or of "debts,"^{90a} or of "moneys and effects,"⁹¹ or of "property and effects,"⁹² or of "the estate both real and personal" of the debtor.⁹³

The nature of a particular corporation may be such that its shares

New Jersey. *Cord v. Newlin*, 71 N. J. L. 438, 59 Atl. 22.

Ohio. *Norton v. Norton*, 43 Ohio St. 509, 3 N. E. 348; *National Bank v. Lake Shore & M. S. R. Co.*, 21 Ohio St. 221; *Ashley v. Quintard*, 90 Fed. 84, construing the Ohio statutes.

Pennsylvania. See *Willoughby v. Barrett*, 60 Pa. Super. Ct. 242; *Gundry v. Reakirt*, 173 Fed. 167.

Texas. *Keating v. J. Stone & Sons Live-Stock Co.*, 83 Tex. 467, 29 Am. St. Rep. 670, 18 S. W. 797; *Smith v. Traders' Nat. Bank*, 74 Tex. 457, 12 S. W. 113; *Harrell v. Mexico Cattle Co.*, 73 Tex. 612, 11 S. W. 863; *Presnall v. Stockyards Nat. Bank*, — Tex. Civ. App. —, 151 S. W. 873.

Virginia. *Chesapeake & O. R. Co. v. Paine & Co.*, 29 Gratt. 502.

West Virginia. *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

Wisconsin. *O. L. Packard Machinery Co. v. Laev*, 100 Wis. 644, 76 N. W. 596.

Stock is subject to garnishment in Michigan under statutes providing that stock may be taken on execution, and providing for charging a garnishee with property, money, or effects in his hands. *Old Second Nat. Bank of Bay City v. Williams*, 112 Mich. 564, 71 N. W. 150.

Stock is subject to garnishment in West Virginia under the statutes making shares of stock personal estate, and giving the plaintiff in attachment proceedings, on complying with the statutory requirements, a lien upon "the personal property, choses in action, and other securities of the defendant" in the hands of the garnishee. *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

See generally §§ 3139-3144, supra.

^{84a} See *Union Nat. Bank of Chicago v. Byram*, 131 Ill. 92, 22 N. E. 842; *Brock v. Ruttan*, 1 U. C. C. P. 218.

^{85a} *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

^{86a} *Union Nat. Bank of Chicago v. Byram*, 131 Ill. 92, 22 N. E. 842.

^{87a} *Curtis v. Steever*, 36 N. J. L. 304.

^{88a} *Chesapeake & O. Ry. Co. v. Paine & Co.*, 29 Gratt. (Va.) 502.

^{89a} *Foster v. Potter*, 37 Mo. 525.

^{90a} *Evans v. Monot*, 57 N. C. 227.

⁹¹ *Price v. Brady*, 21 Tex. 614.

⁹² *Evans v. Monot*, 57 N. C. 227. In this case it is said that a perusal of the statute will show that the sense in which these terms are there used does not include stock.

⁹³ *Haley v. Reid*, 16 Ga. 437.

do not come within the general laws allowing shares of stock to be seized and sold on execution or attachment. It has been held, for example, that stock issued by an association organized under a statute for "yachting, hunting, fishing, boating, rowing, and other lawful sporting purposes," was not subject to levy and sale under a statute authorizing sale on execution of the share or interest of a stockholder in any bank, insurance company, or any other joint-stock company, incorporated under the laws of the state.⁹⁴

It has been held that shares in a national bank may be taken under execution or attachment under a state statute to the same extent as any other shares, in the absence of any legislation by congress to the contrary.⁹⁵ But of course they cannot be attached under a state statute which in terms provides for the attachment of shares in corporations organized under the laws of the state only.⁹⁶

§ 3438. Equity jurisdiction to reach and subject shares to payment of debts. A court of equity has undoubted jurisdiction to set aside a transfer of choses in action or shares of stock fraudulently made by the owner with intent to hinder, delay and defraud creditors, and to direct a sale of the same, and apply the proceeds to the payment of his debts, unless the creditor has an adequate and complete remedy at law; or it may reach and subject to the payment of debts money or property which the debtor has fraudulently invested in choses in action or shares of stock for the purpose of putting it beyond the reach of an execution.⁹⁷ And in some jurisdictions it is held that a court

⁹⁴ *Lyon v. Denison*, 80 Mich. 371, 8 L. R. A. 358, 45 N. W. 358.

It was held that the Tennessee statute making the stock of all private corporations thereafter created by "special law" subject to execution referred to the creation of any private corporation, and applied, therefore, to building and loan associations incorporated under a general law, as required by the constitution. *Nashville Trust Co. v. Weaver*, 102 Tenn. 66, 50 S. W. 763.

⁹⁵ *Oldacre v. Butler*, 116 Ala. 652, 23 So. 3; *Hagar v. Union Nat. Bank*, 63 Me. 509; *Braden's Estate*, 165 Pa. St. 184, 30 Atl. 746.

⁹⁶ *Sowles v. National Union Bank of Swanton*, 82 Fed. 696. In the

course of its opinion in this case the court said: "The laws of the United States provide for the transfer of shares in national banks, and what the effect of the transfer shall be, and this might exclude any effect of transfer proceedings by attachment under state laws."

⁹⁷ *Delaware*. *Colbert v. Sutton*, 5 Del. Ch. 294.

Georgia. *Lathrop & Co. v. McBurney & Hollingsworth*, 71 Ga. 815.

Indiana. *Scott v. Indianapolis Wagon Works*, 48 Ind. 75.

Kentucky. *Bowman v. Breyfogle*, 145 Ky. 443, Ann. Cas. 1914B 938, 140 S. W. 694.

Maine. *Skowhegan Bank v. Cutler*, 49 Me. 315.

of equity may subject an equitable interest in stock to the payment of the holder's debts.⁹⁸ By the weight of authority, however, a court of equity has no jurisdiction to subject shares of stock to the payment of debts merely because they are not subject to execution or attachment,⁹⁹ unless it is otherwise provided by statute.¹

Maryland. *Coombs v. Jordan*, 3 Bland 284, 22 Am. Dec. 236.

Michigan. *Van Norman v. Circuit Judge for Jackson County*, 45 Mich. 204, 7 N. W. 796.

New York. *Gillett v. Bate*, 86 N. Y. 87; *State Bank v. Gill*, 23 Hun 410; *Donovan v. Finn*, 1 Hopk. Ch. 59, 14 Am. Dec. 531; *Spader v. Davis*, 5 Johns. Ch. 280, aff'd *Hadden v. Spader*, 20 Johns. 554, 562; *Bayard v. Hoffman*, 4 Johns. Ch. 450.

By statute a nonjudgment creditor may sue to subject property fraudulently conveyed. *Morton v. Graffin*, 68 Md. 545, 15 Atl. 298, 13 Atl. 341.

⁹⁸ As to the jurisdiction of equity to subject the interest of a pledgor or mortgagor of stock, see *Nabring v. Bank of Mobile*, 58 Ala. 204.

⁹⁹ **Indiana.** *Williams v. Reynolds*, 7 Ind. 622.

Maryland. See *Coombs v. Jordan*, 3 Bland Ch. 284, 22 Am. Dec. 236; *Watkins v. Dorsett*, 1 Bland Ch. 530.

New Jersey. *Disborough v. Outcalt*, 1 N. J. Eq. 298.

New York. *Donovan v. Finn*, 1 Hopk. Ch. 59, 14 Am. Dec. 531.

Tennessee. *Erwin v. Oldham*, 6 Yerg. 185, 27 Am. Dec. 458.

England. *Bank of England v. Lunn*, 15 Ves. 569; *Dundas v. Dutens*, 1 Ves. Jr. 196.

"According to our distribution of jurisdictions, suits for the recovery of ordinary debts are appropriated to the courts of common law; and, the proceedings for enforcing the judgments rendered in such suits are alike allotted to those courts. In any such case, where the subject of the suit is exclusively of legal cognizance, a court of equity has no jurisdiction to en-

force the judgment by its own methods of proceeding, or to give a better remedy than the law gives. If the remedies of the law are imperfect, equity, as has been often said in the English chancery, has no jurisdiction to give execution in aid of the infirmity of the law. When any fact giving equitable jurisdiction intervenes in the transactions between creditor and debtor, such a fact becomes a foundation of relief in this court; but in any ordinary case free from fraud or injustice, the execution of the judgment, and the methods of compelling satisfaction are confined to the courts of law. When a creditor comes to this court for relief, he must come not merely to obtain judgment or satisfaction of a judgment, but he must present facts which form a case of equitable jurisdiction. He must show that the debtor has made some fraudulent disposition of his property, or that the case stands infected with some trust, collusion, or injustice, against which it is the province of this court to give relief. In such cases this court has jurisdiction, not for the purpose of giving a species of execution which the courts of law do not afford, but for the purpose of giving relief in the particular cases allotted to its jurisdiction; and when the cause, by reason of such facts, is properly here, the court proceeds upon all the circumstances of the case to give final and equitable relief." *Donovan v. Finn*, 1 Hopk. Ch. (N. Y.) 59, 14 Am. Dec. 531.

The contrary was held in *Storm v. Waddell*, 2 Sandf. Ch. (N. Y.) 494.

¹ *Evans v. Monot*, 57 N. C. 227; *Young v. South Tredegar Iron Co.*,

In some jurisdictions stocks subject to execution are subject to attachment in equity,² and in some states the lien of a garnishment may be enforced against the garnishee by a suit in equity.³

The uniform stock transfer act provides that a creditor whose debtor is the owner of a certificate shall be entitled to such aid from courts of appropriate jurisdiction, by injunction and otherwise, in attaching such certificate, or in satisfying the claim by means thereof, as is allowed at law or in equity, in regard to property which cannot readily be attached or levied upon by ordinary legal process.⁴

§ 3439. Situs of stock. It is generally held that the situs of stock for purposes of attachment, execution or garnishment is the domicile of the corporation, that is, the state by or under the laws of which the corporation was created, and, according to the weight of authority, its situs is in that state and nowhere else.⁵ Statutes permitting

85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202; *Brightwell v. Mallory*, 10 Yerg. (Tenn.) 196.

Mass. Laws 1910, c. 531, provides that share may be attached only in equity. *Parkhurst v. Almy*, 222 Mass. 27, 109 N. E. 733.

Personal service on the defendant is not necessary in a suit brought by a creditor, in the same court in which he has established the liability of the defendant by an earlier decree, to reach and apply property which cannot be taken on execution at law. *Parkhurst v. Almy*, 222 Mass. 27, 109 N. E. 733.

² *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202.

³ *Farmers' & Merchants' Nat. Bank v. Mosher*, 68 Neb. 713, 724, 100 N. W. 133, 94 N. W. 1003, 63 Neb. 130, 88 N. W. 552.

In a suit in equity to determine the ownership of the stock and to appropriate it to the satisfaction of the plaintiff's claim, all persons claiming the stock should be made parties. *Farmers' & Merchants' Nat. Bank v. Mosher*, 68 Neb. 713, 724, 100 N. W. 133, 94 N. W. 1003.

⁴ See section 14 of the act. This act has been adopted and is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

⁵ **United States.** *Gundry v. Reakirt*, 173 Fed. 167; *Ashley v. Quintard*, 90 Fed. 84. See also *McKane v. Burke*, 132 Fed. 688.

Arizona. See *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

California. *Wait v. Kern River Mining, Milling & Developing Co.*, 157 Cal. 16, 106 Pac. 98.

Connecticut. *Barber v. Morgan*, 84 Conn. 618, Ann. Cas. 1912 D 951, 80 Atl. 791; *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250.

Delaware. *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 80 Atl. 666.

Georgia. See *People's Nat. Bank v. Cleveland*, 117 Ga. 908, 44 S. E. 20, where this is said to be the rule under the code.

Indiana. *Smith v. Downey*, 8 Ind. App. 179, 52 Am. St. Rep. 467, 35 N. E. 568, 34 N. E. 823.

Kentucky. *New Jersey Sheep & Wool Co. v. Traders' Deposit Bank*, 104 Ky. 90, 46 S. W. 677.

the attachment of, or the levy of execution upon, shares of stock, though general in their terms, are usually held to apply to domestic corporations only, at least in the absence of anything showing a contrary intention on the part of the legislature.⁶ Nor does it follow from the fact that the laws of a state require, as a condition of doing business in that state, that foreign corporations shall submit to be sued there, that those laws require the shareholders of such a corporation to submit their shares to the dominion of that state, and thereby subject them to execution and attachment within its borders.⁷

Maryland. See *United States Exp. Co. v. Hurlock*, 120 Md. 107, Ann. Cas. 1915 A 566, 87 Atl. 834.

Missouri. *Dean Rapid Tel. Co. v. Howell*, 162 Mo. App. 100, 144 S. W. 135; *Caffery v. Choctaw Coal & Mining Co.*, 95 Mo. App. 174, 68 S. W. 1049. See also *Richardson v. Busch*, 198 Mo. 174, 115 Am. St. Rep. 472, 95 S. W. 894; *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690.

New York. *Plimpton v. Bigelow*, 93 N. Y. 592. But see *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 55 L. R. A. 796, 58 N. E. 896, aff'g 47 App. Div. 17, 61 N. Y. Supp. 1033.

Rhode Island. *Maertens v. Scott*, 33 R. I. 356, 80 Atl. 369; *Ireland v. Globe Milling & Reduction Co.*, 19 R. I. 180, 29 L. R. A. 429, 61 Am. St. Rep. 756, 32 Atl. 921.

Tennessee. See *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202.

"Every consideration * * * of public policy and private justice to the parties concerned requires that the situs of shares of stock for seizure by attachment or execution at law shall be that of the corporate domicile, or, if there can be any other, then that of the domicile of the shareholder. If they cannot be attached or taken in execution at either of these places, there is no reason why they should be elsewhere." *Ashley v. Quintard*, 90 Fed. 84.

See also § 3141, *supra*.

As to the situs of stock generally, see § 3434, *supra*.

⁶ **United States.** *Gundry v. Reakirt*, 173 Fed. 167; *Ashley v. Quintard*, 90 Fed. 84.

Indiana. *Smith v. Downey*, 8 Ind. App. 179, 52 Am. St. Rep. 467, 35 N. E. 568, 34 N. E. 823.

Maryland. *United States Exp. Co. v. Hurlock*, 120 Md. 107, Ann. Cas. 1915 A 566, 87 Atl. 834; *Morton v. Grafflin*, 68 Md. 545, 15 Atl. 298, 13 Atl. 341.

Missouri. *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690; *Dean Rapid Tel. Co. v. Howell*, 162 Mo. App. 100, 144 S. W. 135.

New York. *Plimpton v. Bigelow*, 93 N. Y. 592.

Washington. *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411, 68 Pac. 884.

In the absence of proof that the law of a foreign country authorizes an execution sale of stock in a foreign corporation, the presumption is that the law of the foreign country and the law of the forum are the same in this respect. *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411, 68 Pac. 884.

⁷ "If the state has the power to attach such a condition to the license of doing business in the state, it should expressly define the condition, and it is not necessarily to be implied from any statutes authorizing process against the company itself nor from any authorizing the property of nonresidents to be attached. The sub-

The courts are agreed that shares of stock cannot be reached by execution, attachment or garnishment in a state other than that in which the corporation was created, although the officers of the corporation are within the state and the business of the corporation is being carried on there, where the defendant is a nonresident and the certificates are in his possession without the state,⁸ especially where the plaintiff is also a nonresident.⁹ And the same rule has been applied by some

jection of the shares of the stockholders to execution or attachment, or of the shareholders themselves to any kind of suit within the state, not connected with some liability of the company, is a subject-matter entirely foreign to the subject-matter of process against foreign corporations." *Ashley v. Quintard*, 90 Fed. 84.

⁸ *United States. Gundry v. Reakirt*, 173 Fed. 167; *Ashley v. Quintard*, 90 Fed. 84.

Kentucky. *New Jersey Sheep & Wool Co. v. Traders' Deposit Bank*, 104 Ky. 90, 46 S. W. 677.

Maryland. *United States Exp. Co. v. Hurlock*, 120 Md. 107, Ann. Cas. 1915 A 566, 87 Atl. 834.

Missouri. *Caffery v. Choctaw Coal & Mining Co.*, 95 Mo. App. 174, 68 S. W. 1049.

New York. *Plimpton v. Bigelow*, 93 N. Y. 592.

Rhode Island. *Ireland v. Globe Milling & Reduction Co.*, 19 R. I. 180, 29 L. R. A. 429, 61 Am. St. Rep. 756, 32 Atl. 921.

Washington. *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411, 68 Pac. 884.

"Shares for the purpose of attachment proceedings may be deemed to be in the possession of the corporation which issued them, but only at the place where the corporation by intendment of law always remains, to-wit, in the state or country of its creation." *Plimpton v. Bigelow*, 93 N. Y. 592.

"Shares of stock represent aliquot parts of the corporate property in a certain sense, but this is as to the

whole property, and not segregated parts that may happen to be in a particular place or under the particular dominion of a given state; and these shares cannot be ascertained and distributed on a winding up until all the property wherever situate, has been gathered together for such a distribution in solido, and not as to each separate part. Therefore, theoretically as well as practically, the location of never so much of the corporate property in a state where it is not incorporated or organized, but is only doing business by permission, does not, as to that property so located, establish the shares or aliquot parts thereof in the state of that location. It is quite incapable of such treatment under any view of corporate existence or control." *Ashley v. Quintard*, 90 Fed. 84.

The fact that the plaintiff is a resident of the state of the forum does not change the rule. *Ashley v. Quintard*, 90 Fed. 84.

In *United States Exp. Co. v. Hurlock*, 120 Md. 107, Ann. Cas. 1915 A 566, 87 Atl. 834, it is said: "Had the shares of stock condemned been actually within the jurisdiction of the court a different question would have been presented. They might then have been liable to attachment." The court evidently means certificates instead of shares.

⁹ *United States Exp. Co. v. Hurlock*, 120 Md. 107, Ann. Cas. 1915 A 566, 87 Atl. 834; *Plimpton v. Bigelow*, 93 N. Y. 592.

courts where the certificates are in the possession of a third person, as for example a pledgee or a trustee, or one to whom the owner has intrusted them for purposes of sale, who is a resident of the state where the proceeding is instituted,¹⁰ and even where the stockholder is himself a resident of the state of the forum and has the certificates in his possession there.¹¹ In other words, these courts hold that a court can acquire no jurisdiction over stock by virtue of an attachment merely because the certificate of stock is within its jurisdiction.¹²

10 Connecticut. *Tweedy v. Bogart*, 56 Conn. 419, 15 Atl. 374; *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250.

Indiana. *Smith v. Downey*, 8 Ind. App. 179, 52 Am. St. Rep. 467, 35 N. E. 568, 34 N. E. 823.

Missouri. *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690. See also *Richardson v. Busch*, 198 Mo. 174, 115 Am. St. Rep. 472, 95 S. W. 894; *Dean Rapid Tel. Co. v. Howell*, 162 Mo. App. 100, 144 S. W. 135.

Pennsylvania. *Christmas v. Biddle*, 13 Pa. 223.

Tennessee. *R. Moore & Co. v. Gennett & Co.*, 2 Tenn. Ch. 375.

In *Pinney v. Nevills*, 86 Fed. 97, this was held to be true in Massachusetts, since the statutes of that state in terms provided for the attachment of shares of domestic corporations or of corporations organized under the laws of the United States.

In *Whitecomb v. J. J. Quinlan & Co.*, 75 N. H. 429, 75 Atl. 525, the question of whether the stockholder's interest could be reached by trustee process was not decided since it was held that the trustee was not chargeable in any event under the facts.

This is particularly true where the corporation has never appointed an agent or attorney to accept service of process in the state. *Maertens v. Scott*, 33 R. I. 356, 80 Atl. 369.

The foundation of the rule is "that the intangible property right inherent in the stock of a corporation must

have a situs, a place of existence, just as tangible property; that property, whether tangible or intangible, cannot exist in two places at once; that the common law regards the situs of property in the stock of a corporation as being at the place of the domicile, the home of the corporation; that, as a corporation is an alien to all other jurisdictions than that of its domicile, so is its stock an alien in such other jurisdictions; and that therefore stock in a foreign corporation cannot be reached by process issued in this state, since our laws and our processes can have no extraterritorial effect." *Dean Rapid Tel. Co. v. Howell*, 162 Mo. App. 100, 144 S. W. 135.

¹¹ *Gundry v. Reakirt*, 173 Fed. 167.

"In the absence of legislation attempting to reach the foreign stock, it can make no difference whether the owner of the shares is a resident of the domestic, or of the foreign, state." *Gundry v. Reakirt*, 173 Fed. 167.

In *Reid Ice-Cream Co. v. Stephens*, 62 Ill. App. 334, it was held that an attempted levy and sale on execution of the stock of a foreign corporation pursuant to a judgment against a resident stockholder, who had pledged his stock to the corporation, was void. The corporation was carrying on business in the state, but it does not appear from the opinion where the certificates were, and apparently it was deemed immaterial.

¹² **Arizona.** See *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

On the other hand, some courts hold that stock in a corporation organized in one state may be attached or garnished in another state by service of process on a third person in possession of the certificates in the latter state.¹³ In support of this rule it has been said that the

Connecticut. Winslow v. Fletcher, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250.

Indiana. Smith v. Downey, 8 Ind. App. 179, 52 Am. St. Rep. 467, 35 N. E. 568.

Missouri. Armour Bros. Banking Co. v. St. Louis Nat. Bank, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690; Caffery v. Choctaw Coal & Mining Co., 95 Mo. App. 174, 68 S. W. 1049. See also Richardson v. Busch, 198 Mo. 174, 115 Am. St. Rep. 472, 95 S. W. 894.

Pennsylvania. Christmas v. Biddle, 13 Pa. 223.

Rhode Island. Maertens v. Scott, 33 R. I. 356, 80 Atl. 369.

Tennessee. R. Moore & Co. v. Gennett & Co., 2 Tenn. Ch. 375.

"Stock cannot be attached by attaching the certificates any more than lands situate in another state can be attached by an attachment in this state on the title deeds to such lands." Caffery v. Choctaw Coal & Mining Co., 95 Mo. App. 174, 68 S. W. 1049. And see to the same effect Christmas v. Biddle, 13 Pa. 223.

In Winslow v. Fletcher, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250, where a resident of Indiana, owning stock in a bank of that state, had pledged the certificate, with a blank power to sell and transfer the same to a corporation in Connecticut, it was held that neither the stock nor the surplus interest therein could be reached by attachment in Connecticut. Judge Carpenter, after stating the proposition that certificates of stock are not the stock, and defining a share of stock as consisting of a set of rights and duties between the corporation and the owner of the share,

said: "These rights and duties are in fact and law quite distinguishable from the certificates and the power to transfer those rights and duties. The certificate is evidence that the person therein named possesses those rights and is subject to those duties, but is not in law the equivalent of those rights and duties. They are muniments of title, but not the title itself; much less the real property. While these certificates are in themselves valuable for some purposes, and to some extent may properly be regarded as property, yet they are distinct from the holder's interest in the capital stock of the corporation, and are not goods and effects within the meaning of the statute relating to foreign attachment. They are no more subject to an attachment or a trustee process than a promissory note. The debt is subject to attachment, but the note itself, which is simply evidence of the debt, is not. So with stock. That may be attached, but the certificates cannot be. * * * The bank is a foreign corporation. No part of its capital or property is within the jurisdiction of this court. The certificates and authority to transfer are held by one of our citizens; but we cannot through them reach the stock or take any action relative thereto which the authorities of the bank or the courts of Indiana are bound to respect."

¹³ Certificates of stock in a foreign corporation are personal property, and, when in the hands of third parties within this state, are subject to garnishment proceedings. Puget Sound Nat. Bank of Everett v. Mather, 60 Minn. 362, 62 N. W. 396. In this case the plaintiff was also a foreign corpo-

question is not whether the property of the corporation can be said to be within the state for jurisdictional purposes through attachment proceedings, but whether, the certificates being in the state under a transfer by their owner to a pledgee to secure an indebtedness of the owner, there is not present in the state property of the debtor which is capable of effectual seizure by the court's process.¹⁴ It has also been said that while, if the stock were sold at a judicial sale, the courts of the forum could not compel a transfer to the purchaser on the books of the corporation, the presumption is that the corporation itself would recognize and give effect to the purchaser's title.¹⁵

Even in states where the situs of stock for the purpose of attachment or garnishment is held to be solely at the domicile of the corporation, it has been held that if a corporation organized in one state becomes in effect a domestic corporation of another state by complying with its laws for the purpose of doing business there, its stock has

ration, and it does not appear whether the defendant was a resident of the state where the action was brought or not. The court says that "*Plimpton v. Bigelow*, 93 N. Y. 592, is not in point, as will be seen at a glance."

This is true where the certificates are in possession of a pledgee who is a resident of the state, and the plaintiff is also a resident of the state. *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 55 L. R. A. 796, 58 N. E. 896, aff'g 47 N. Y. App. Div. 17, 61 N. Y. Supp. 1033. In this case the court distinguishes *Plimpton v. Bigelow*, 93 N. Y. 592, on the ground that there both the plaintiff and the defendant were nonresidents, and that the certificates were in the possession of the defendant at his domicile.

The rule has also been applied where the certificates were held by a resident of the state under a pooling agreement. *Lowenthal v. Hodge*, 120 N. Y. App. Div. 304, 105 N. Y. Supp. 120. And also where they were in the possession of a resident to whom they had been sent by the owner, assigned in blank, for purposes of sale. *People v. Grifenhagen*, 167 N. Y. App. Div.

572, 152 N. Y. Supp. 679. Apparently the plaintiff was a resident of the state, although it is not so stated.

See *De Bearn v. De Bearn*, 115 Md. 668, 36 L. R. A. (N. S.) 421, 81 Atl. 223, where it was held that under the special facts of the particular case registered coupon bonds of a foreign corporation belonging to a nonresident, but in the possession of a resident of the state, might be attached. And see, also, in this connection, *United States Exp. Co. v. Hurlock*, 120 Md. 107, Ann. Cas. 1915 A 566, 87 Atl. 834, where it is said that the same rule might apply in the case of stock if the shares were actually within the jurisdiction, but the question is not decided. See, however, *Morton v. Graffin*, 68 Md. 545, 15 Atl. 298, 13 Atl. 341.

¹⁴ *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 55 L. R. A. 796, 58 N. E. 896, aff'g 47 N. Y. App. Div. 17, 61 N. Y. Supp. 1033.

¹⁵ *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 55 L. R. A. 796, 58 N. E. 896, aff'g 47 N. Y. App. Div. 17, 61 N. Y. Supp. 1033.

a situs in the latter state and is subject to attachment there to the same extent as the stock of domestic corporations.¹⁶

Of course, stock owned by a nonresident debtor in a domestic corporation may be attached where the statutes allow, as they generally do, attachment of the property of a nonresident, and make shares of stock subject to attachment; and it can make no difference that the certificates of stock are not within the jurisdiction of the court.¹⁷

¹⁶ *Dean Rapid Tel. Co. v. Howell*, 162 Mo. App. 100, 144 S. W. 135; *Caffery v. Choctaw Coal & Mining Co.*, 95 Mo. App. 174, 68 S. W. 1049; *Smith v. Pilot Min. Co.*, 47 Mo. App. 409.

"A corporation * * * may domesticate itself in a state other than that of its nativity in a way to bring itself within the operation of statutes relating only to domestic corporations." *Dean Rapid Tel. Co. v. Howell*, 162 Mo. App. 100, 144 S. W. 135.

In *Bowman v. Breyfogle*, 145 Ky. 443, Ann. Cas. 1914 B 938, 140 S. W. 694, it was held that where a Delaware corporation had its manufacturing plant and its principal office in Kentucky, and kept all its books, including its stock book, there, and issued its stock and paid its dividends there, its stock had a situs in Kentucky, and that the courts of that state had jurisdiction of an equitable action under the statute to subject it to the payment of a judgment against a former owner alleged to have transferred it in fraud of creditors, even though the statute did not in terms declare the corporation to be a domestic one.

It was held, in *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202, that since, under the statutes of Tennessee, a foreign corporation becomes a domestic corporation of that state upon complying with the statutes for the purpose of doing business there, shares of stock in such a corporation, which has complied with such statutes, are subject to attachment in Tennes-

see, although the debtor and owner of the shares is a nonresident, and the certificates of stock are in his possession beyond the limits of the state. Compare, however, the other cases cited in this note.

Where the chief office of a corporation is established and maintained in a state other than that where it was incorporated, its stock is subject to levy and attachment there. *Dean Rapid Tel. Co. v. Howell*, 162 Mo. App. 100, 144 S. W. 135. In this case, in the course of its opinion, the court says: "By the chief office we do not mean the office where the business of the corporation with the public is chiefly transacted but the office wherein is transacted what we may call the internal business of the corporation and where its corporate books and records, such as its minute book and stock register are kept."

See also *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411, 68 Pac. 884, where it was held that a foreign corporation did not become a domestic one of British Columbia by complying with its statutes relative to foreign corporations.

¹⁷ **California.** See *Wait v. Kern River Mining, Milling & Developing Co.*, 157 Cal. 16, 106 Pac. 98.

Connecticut. *Barber v. Morgan*, 84 Conn. 618, Ann. Cas. 1912 D 951, 80 Atl. 791.

Kentucky. *Bowman v. Breyfogle*, 145 Ky. 443, Ann. Cas. 1914 B 938, 140 S. W. 694. See also *New Jersey Sheep & Wool Co. v. Traders' Deposit Bank*, 104 Ky. 90, 46 S. W. 677.

§ 3440. Title. Of course shares of stock cannot be attached or taken on execution if they do not belong to the debtor,¹⁸ as where he has transferred them in good faith and for value,¹⁹ or holds them merely as trustee.²⁰

It has been said that garnishment or the levy of an execution reaches the real, actual rights of the stockholder without regard to his apparent interest.²¹ And it has been held that the interest of a person in shares may be attached though they stand on the books in the name of another.²² But, on the other hand, there is authority to the effect that shares are not subject to levy on execution under such circumstances.²³

New Hampshire. *Abbot v. Kimball*, 68 N. H. 303, 38 Atl. 1051.

New Jersey. *Cord v. Newlin*, 71 N. J. L. 438, 59 Atl. 22.

Ohio. *National Bank of New London v. Lake Shore & M. S. Ry. Co.*, 21 Ohio St. 221.

Tennessee. *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202.

Virginia. *Chesapeake & O. Ry. Co. v. Paine & Co.*, 29 Gratt. 502.

"Where there is an attachment and no appearance by a nonresident defendant, the action is treated as in the nature of a proceeding in rem. If he appears it becomes a proceeding in personam." *Barber v. Morgan*, 84 Conn. 618, Ann. Cas. 1912 D 951, 80 Atl. 791.

¹⁸ *Magerstadt v. Schaefer*, 213 Ill. 351, 72 N. E. 1063, aff'g 110 Ill. App. 166; *Boone v. Van Gorder*, 164 Ind. 499, 108 Am. St. Rep. 314, 74 N. E. 4; *Beckwith v. Burrough*, 13 R. I. 294.

The judgment is a lien only on the interest which the shareholder has. *Owens v. Atlanta Trust & Banking Co.*, 122 Ga. 521, 50 S. E. 379.

¹⁹ *Farmers' & Merchants' Nat. Bank v. Mosher*, 68 Neb. 713, 724, 100 N. W. 133, 94 N. W. 1003; *Reilly v. Absecon Land Co.*, 75 N. J. Eq. 71, 71 Atl. 248; *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

"In case he has regularly passed to another the legal title so that, as against him, the transfer is good and is one the company is bound to recognize, the shares are not leviable on attachment or execution issued against his property." *Van Norman v. Jackson Circuit Judge*, 45 Mich. 204, 7 N. W. 796.

²⁰ *Hitchcock v. Galveston Wharf Co.*, 50 Fed. 263.

Stock held by a debtor as treasurer, or as trustee, is not subject to levy under an execution running against him individually. *Nashville Trust Co. v. Weaver*, 102 Tenn. 66, 50 S. W. 763.

"Corporate stock held by a debtor in a fiduciary or trust relation is not subject to execution running against him individually." *Nashville Trust Co. v. Weaver*, 102 Tenn. 66, 50 S. W. 763.

As to the agent's or trustee's liability to the principal or cestui que trust, where stock has been seized and sold for the former's debt, see *Hovey v. Bradbury*, 112 Cal. 620, 44 Pac. 1077.

²¹ *Everitt v. Farmers' & Merchants' Bank*, 82 Neb. 191, 20 L. R. A. (N. S.) 996, 117 N. W. 401; *Farmers' & Merchants' Nat. Bank v. Mosher*, 63 Neb. 130, 88 N. W. 552.

²² *Tufts v. Volkening*, 122 Mo. 631, 27 S. W. 522, aff'g 51 Mo. App. 7.

²³ *Feige v. Burt*, 118 Mich. 243, 74 Am. St. Rep. 390, 77 N. W. 928.

The rights of an unregistered owner of shares of stock, as against an execution or attachment by a creditor of the person appearing upon the books of the corporation as owner, are considered in treating of the transfer of shares and registration of transfers in subsequent subdivisions of this chapter.²⁴

§ 3441. Equitable title or interest. Ordinarily, it is only the legal interest in property which can be reached by an execution or attachment, and shares of stock cannot be taken under execution or attachment by a creditor of one who has merely an equitable title or interest.²⁵ In some jurisdictions, however, the statutes are broad enough to obviate this difficulty.²⁶

In some jurisdictions the statutes are broad enough to permit a creditor to levy an execution or attachment upon shares of stock which have been fraudulently transferred by the debtor, instead of first suing in equity to set the transfer aside,²⁷ while in others the contrary is true.²⁸

²⁴ See subd. XVIII et seq., *infra*, this chapter.

²⁵ **United States.** See *Deacon v. Oliver*, 14 How. 610, 14 L. Ed. 563.

Alabama. *Nabring v. Bank of Mobile*, 58 Ala. 204.

Massachusetts. See *Athol Sav. Bank v. Bennett*, 203 Mass. 480, 89 N. E. 632.

Michigan. *Gypsum, Plaster & Stucco Co. v. Kent Circuit Judge*, 97 Mich. 631, 57 N. W. 191; *Van Norman v. Jackson Circuit Judge*, 45 Mich. 204, 7 N. W. 796.

New York. *Weller v. J. B. Pace Tobacco Co.*, 2 N. Y. Supp. 292.

Rhode Island. *Lippitt v. American Wood Paper Co.*, 15 R. I. 141, 2 Am. St. Rep. 886, 23 Atl. 111. See also *Maertens v. Scott*, 33 R. I. 356, 80 Atl. 369; *Beckwith v. Burroughs*, 14 R. I. 366, 51 Am. Rep. 392.

They cannot be taken by a creditor of one who has merely an executory or equitable title, as in a case where an assignment of stock has not been registered. *Lippitt v. American Wood Paper Co.*, 15 R. I. 141, 2 Am. St. Rep. 886, 23 Atl. 111. See also *Beck-*

with v. Burroughs, 14 R. I. 366, 51 Am. Rep. 392.

²⁶ **New York Commercial Co. v. Francis**, 83 Fed. 769; *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250; *Middletown Sav. Bank v. Jarvis*, 33 Conn. 372; *Tufts v. Volkening*, 122 Mo. 631, 27 S. W. 522, *aff'g* 51 Mo. App. 7; *Foster v. Potter*, 37 Mo. 525; *Pelzer Mfg. Co. v. Pitts & Hartzog*, 76 S. C. 349, 11 Ann. Cas. 665, 57 S. E. 29. See also the cases cited in the notes following.

²⁷ **Indiana.** *Scott v. Indianapolis Wagon Works*, 48 Ind. 75.

Maryland. *Morton v. Grafflin*, 68 Md. 545, 15 Atl. 298, 13 Atl. 341.

Missouri. See *McDonald v. First Nat. Bank*, 116 Fed. 129.

New Jersey. *Curtis v. Steever*, 36 N. J. L. 304.

Ohio. *National Bank of New London v. Lake Shore & M. S. Ry. Co.*, 21 Ohio St. 221.

Rhode Island. *Beckwith v. Burroughs*, 14 R. I. 366, 51 Am. Rep. 392.

Virginia. See *Massey v. Yancey*, 90 Va. 626, 19 S. E. 184.

²⁸ *Van Norman v. Jackson Circuit*

Ordinarily, a mortgage or pledge of shares of stock does not prevent a creditor of the mortgagor or pledgor from levying thereon, and subjecting the equity of redemption, as in the case of other property.²⁹ But the contrary has been held to be true in some states,³⁰ especially where the stock has been transferred to the pledgee or mortgagee on the corporate books.³¹

§ 3442. Persons in whose hands stock may be levied upon. For the purpose of execution, attachment or garnishment the stock is generally regarded as being in the possession of the corporation in which the shares are held although the certificates are in the possession of the stockholder or of a third person.³² And it is also generally held

Judge, 45 Mich. 204, 7 N. W. 796.

²⁹ **California.** Edwards v. Beugnot. 7 Cal. 162.

Colorado. Ellis v. Gibbons, 26 Colo. App. 454, 145 Pac. 285.

Connecticut. Winslow v. Fletcher, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250; Middletown Sav. Bank v. Jarvis, 23 Conn. 372.

Indiana. Manns v. Brookville Nat. Bank, 73 Ind. 243.

Kentucky. Johnson's Assignee v. Louisville City Nat. Bank, 22 Ky. L. Rep. 118, 56 S. W. 710.

Massachusetts. Vantine v. Morse, 104 Mass. 275. See Athol Sav. Bank v. Bennett, 203 Mass. 480, 89 N. E. 632.

Missouri. Foster v. Potter, 37 Mo. 525.

New York. Simpson v. Jersey City Contracting Co., 165 N. Y. 193, 55 L. R. A. 796, 58 N. E. 896, aff'g 47 App. Div. 17, 61 N. Y. Supp. 1033; Simpson v. Jersey City Contracting Co., 47 App. Div. 17, 61 N. Y. Supp. 1033. See also People v. Grifenhagen, 167 App. Div. 572, 152 N. Y. Supp. 679; Lowenthal v. Hodge, 120 App. Div. 304, 105 N. Y. Supp. 120.

Ohio. Norton v. Norton, 43 Ohio St. 509, 3 N. E. 348.

South Carolina. Pelzer Mfg. Co. v. Pitts & Hartzog, 76 S. C. 349, 11 Ann. Cas. 665, 57 S. E. 29.

³⁰ In Morton v. Grafflin, 68 Md. 545, 15 Atl. 298, 13 Atl. 341, it was held that, under the Maryland statute then in force, a lien could not be acquired on stock pledged in good faith by merely laying an attachment in the hands of the pledgee.

³¹ Nabring v. Bank of Mobile, 58 Ala. 204.

³² **Colorado.** Ellis v. Gibbons, 26 Colo. App. 454, 145 Pac. 285.

Illinois. People v. Goss & Phillips Mfg. Co., 99 Ill. 355, rev'g 4 Ill. App. 510.

Maryland. United States Exp. Co. v. Hurlock, 120 Md. 107, Ann. Cas. 1915 A 566, 87 Atl. 834; Morton v. Grafflin, 68 Md. 545, 15 Atl. 298, 13 Atl. 341.

New York. Plimpton v. Bigelow, 93 N. Y. 592.

Ohio. Ball v. Towle Mfg. Co., 67 Ohio St. 306, 93 Am. St. Rep. 682, 65 N. E. 1015.

Texas. Presnall v. Stockyards Nat. Bank, — Tex. Civ. App. —, 151 S. W. 873.

Virginia. Chesapeake & O. Ry. Co. v. Paine & Co., 29 Gratt. 502.

Wisconsin. O. L. Packard Machinery Co. v. Laev, 100 Wis. 644, 76 N. W. 596.

that the levy must be upon the shares of stock, and cannot be made by seizing the stock certificates,³³ since they are not the stock itself, but are merely evidences of it.³⁴ Where these rules obtain, it fol-

33 Arizona. *Hook v. Hoffman*, 16 Ariz. 540, 147 Pac. 722.

Connecticut. *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250.

Indiana. *Boone v. Van Gorder*, 146 Ind. 499, 108 Am. St. Rep. 314, 74 N. E. 4; *Smith v. Downey*, 8 Ind. App. 179, 52 Am. St. Rep. 467, 35 N. E. 568, 34 N. E. 823.

Missouri. *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690; *Caffery v. Choctaw Coal & Min. Co.*, 95 Mo. App. 174, 68 S. W. 1049. See also *Richardson v. Busch*, 198 Mo. 174, 115 Am. St. Rep. 472, 95 S. W. 894.

Pennsylvania. *Christmas v. Biddle*, 13 Pa. 223.

Rhode Island. *Maertens v. Scott*, 33 R. I. 356, 80 Atl. 369.

Tennessee. *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202; *R. Moore & Co. v. Gennett & Co.*, 2 Tenn. Ch. 375.

Texas. *Presnall v. Stockyards Nat. Bank*, — Tex. Civ. App. —, 151 S. W. 873.

Wisconsin. *O. L. Packard Machinery Co. v. Laev*, 100 Wis. 644, 76 N. W. 596.

The stock may be attached, but the certificate cannot be. *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250.

The levy is not made by seizing the stock certificate, but is made upon the judgment debtor's shares of stock as registered in the corporate books, access to those books being accorded by the statute to the sheriff for the purpose of making the levy. *Boone v. Van Gorder*, 164 Ind. 499, 108 Am. St. Rep. 314, 74 N. E. 4.

"A levy of execution upon the certificate would not be * * * equivalent to a levy on the share or interest of the owner in the corporation any more than the levy on a bill of lading would be a levy on the goods therein described, or a levy on a chattel mortgage instrument itself would be a levy on the chattels mortgaged." *Presnall v. Stockyards Nat. Bank*, — Tex. Civ. App. —, 151 S. W. 873.

"A share of stock in a corporation consists of a set of rights and duties between the corporation and the owner of the share. These rights and duties are in fact and law quite distinguishable from the certificates and the power to transfer those rights and duties. The certificate is evidence that the person therein named possesses those rights and is subject to those duties, but is not in law the equivalent of those rights and duties. They are muniments of title, but not the title itself; much less the real property. While these certificates are in themselves valuable for some purposes, and to some extent may properly be regarded as property, yet they are distinct from the holder's interest in the capital stock of the corporation, and are not goods and effects within the meaning of the statute relating to foreign attachment. They are no more subject to an attachment or a trustee process than a promissory note. The debt is subject to attachment, but the note itself which is simply evidence of the debt, is not. So with stock. That may be attached, but the certificates cannot be." *Winslow v. Fletcher*, 53 Conn. 390, 55 Am. Rep. 122, 4 Atl. 250.

³⁴ See § 3425, *supra*.

lows that the corporation, and not the holder of the certificates of stock, is the proper party upon whom to serve attachment or garnishee process to reach and subject shares of stock.³⁵ But in some jurisdictions a contrary rule obtains, and it is held that the stock may be reached by serving garnishment or attachment process upon a third person who has possession of the certificates, as for example on a pledgee.³⁶

35 United States. *Younkin v. Collier*, 47 Fed. 571.

Nebraska. *Farmers' & Merchants' Nat. Bank v. Mosher*, 68 Neb. 713, 724, 100 N. W. 133, 94 N. W. 1003, 63 Neb. 130, 88 N. W. 552.

Texas. *Presnall v. Stockyards Nat. Bank*, — Tex. Civ. App. —, 151 S. W. 873.

Virginia. *Chesapeake & O. Ry. Co. v. Paine & Co.*, 29 Gratt. 502.

West Virginia. *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

Wisconsin. *O. L. Packard Machinery Co. v. Laev*, 100 Wis. 644, 76 N. W. 596. Since certificates of stock are not the stock itself, the stock is not in the possession or control of one who has possession of the certificates, and therefore a creditor of an owner of shares of stock cannot reach the shares by garnishment of the person in possession of the certificates, under the statute enabling a creditor to reach, by garnishment of the person in possession or control thereof, property, money, credits or effects of the debtor, etc. *O. L. Packard Machinery Co. v. Laev*, 100 Wis. 644, 76 N. W. 596.

The corporation is the proper garnishee when the proceeding is under the general attachment laws, and the same is generally true in proceedings under special statutes. *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

In *Morton v. Grafflin*, 68 Md. 545, 15 Atl. 298, 13 Atl. 341, it was held that under the Maryland statute then in

force a lien could not be acquired on stock pledged in good faith by the mere laying of an attachment in the hands of the pledgee.

One to whom stock is pledged as collateral and who takes out a new certificate in his own name as trustee cannot be charged as garnishee of the pledgor after the pledgor has paid the debt and the new certificate has been delivered to him with a blank power of attorney to transfer the same on the books. *Cooke v. Hallett*, 119 Mass. 148.

36 California. *Edwards v. Beugnot*, 7 Cal. 162.

Kentucky. *Johnson's Assignee v. Louisville City Nat. Bank*, 22 Ky. L. Rep. 118, 56 S. W. 710.

Michigan. *Old Second Nat. Bank v. Williams*, 112 Mich. 564, 71 N. W. 150.

Minnesota. *Puget Sound Nat. Bank of Everett v. Mather*, 60 Minn. 362, 62 N. W. 396.

New York. *Simpson v. Jersey City Contracting Co.*, 165 N. Y. 193, 55 L. R. A. 796, 58 N. E. 896, aff'g 47 App. Div. 17, 61 N. Y. Supp. 1033; *People v. Grifenhagen*, 167 App. Div. 572, 152 N. Y. Supp. 679; *Lowenthal v. Hodge*, 120 App. Div. 304, 105 N. Y. Supp. 120.

Where stock has been assigned as collateral security and transferred to the pledgee on the corporate books, the pledgee is the only proper garnishee. The corporation is not the proper garnishee under such circumstances since it is no longer in privity with the pledgor. *Edwards v. Beugnot*, 7 Cal. 162.

It has been held that a corporation having a claim against one of its stockholders may reach his interest by garnishee process served upon itself,³⁷ or may attach shares of its own stock belonging to the stockholder.³⁸

§ 3443. Mode of levy and sale. In levying upon and selling shares of stock on execution, attachment or garnishment, in pursuance of a statute, the provisions of the statute as to the mode of levy and sale must be substantially complied with, or the sale will be absolutely void.³⁹ Thus, if the statute so requires, notice must be properly given

³⁷ Norton v. Norton, 43 Ohio St. 509, 3 N. E. 348.

³⁸ Hagar v. Union Nat. Bank, 63 Me. 509.

³⁹ **United States.** Younkin v. Collier, 47 Fed. 571.

Arkansas. Scott v. Hout, 73 Ark. 78, 83 S. W. 1057; Deutschman v. Byrne, 64 Ark. 111, 40 S. W. 780.

Connecticut. Stamford Bank v. Ferris, 17 Conn. 259.

Delaware. Fowler v. Dickson, 1 Boyce 113, 74 Atl. 601.

Idaho. Wells v. Price, 6 Idaho 490, 56 Pac. 266.

Illinois. See People v. Goss & Phillips Mfg. Co., 99 Ill. 355, rev'g 4 Ill. App. 510.

Iowa. Croft v. Colfax Elec. Light & Power Co., 113 Iowa 455, 85 N. W. 761.

Maryland. United States Exp. Co. v. Hurlock, 120 Md. 107, Ann. Cas. 1915 A 566, 87 Atl. 834; Morton v. Graffin, 68 Md. 545, 15 Atl. 298, 13 Atl. 341.

Massachusetts. Howe v. Starkweather, 17 Mass. 240; Titcomb v. Union Marine & Fire Ins. Co., 8 Mass. 326.

Michigan. Feige v. Burt, 118 Mich. 243, 74 Am. St. Rep. 390, 77 N. W. 928; Van Norman v. Jackson Circuit Judge, 45 Mich. 204, 7 N. W. 796; Blair v. Compton, 33 Mich. 414.

New Hampshire. Abbott v. Kimball, 68 N. H. 303, 38 Atl. 1051.

New Jersey. Cord v. Newlin, 71 N.

J. L. 438, 59 Atl. 22; Voorhis v. Terhune, 50 N. J. L. 147, 7 Am. St. Rep. 781, 13 Atl. 391; Princeton Bank v. Crozer & Moore, 22 N. J. L. 383, 53 Am. Dec. 254.

Wisconsin. O. L. Packard Machinery Co. v. Laev, 100 Wis. 644, 76 N. W. 596; Barthell v. Hencke, 99 Wis. 660, 75 N. W. 952.

Wyoming. Wyoming Fair Ass'n v. Talbott, 3 Wyo. 244, 21 Pac. 700.

See also § 3141, supra.

Provisions of the statutes as to the mode of service of a writ of attachment are only directory. Substantial compliance with them is sufficient, and if the officer's return fails to show such compliance, it is amendable according to the facts. Cord v. Newlin, 71 N. J. L. 438, 59 Atl. 22.

The corporation cannot waive compliance with the provisions of the statute so as to affect the rights of the defendant. Fowler v. Dickson, 1 Boyce (Del.) 113, 74 Atl. 601.

As to sales of shares in a block, instead of in parcels, see Connecticut & P. Rivers R. Co. v. Morris, 14 Can. Sup. Ct. 318; Morris v. Connecticut & P. Rivers R. Co., L. R. 2 Q. B. (Montreal) 303.

That a sale of shares on execution at nine o'clock at night, when there are few persons present, is void, see McNaughton v. McLean, 73 Mich. 250, 41 N. W. 267.

That a bond given to procure an attachment of shares will not be in-

to the stockholder or the corporation, or to both; ⁴⁰ the number of shares must be ascertained and stated; ⁴¹ the sale must be properly advertised; ⁴² a copy of the writ must be left with the corporation, properly indorsed. ⁴³

creased because the value of the shares may decrease, and that such a decrease does not render the sureties liable, see *Miller v. Ferry*, 50 Hun (N. Y.) 256, 2 N. Y. Supp. 863.

⁴⁰ *Deutschman v. Byrne*, 64 Ark. 111, 40 S. W. 780; *Croft v. Colfax Elec. Light & Power Co.*, 113 Iowa 455, 85 N. W. 761; *Commercial Nat. Bank v. Farmers' & Traders' Nat. Bank*, 82 Iowa 192, 47 N. W. 1080; *Moore v. Marshalltown Opera-House Co.*, 81 Iowa 45, 46 N. W. 750; *Voorhis v. Terhune*, 50 N. J. L. 147, 7 Am. St. Rep. 781, 13 Atl. 391; *Princeton Bank v. Crozer*, 22 N. J. L. 383, 53 Am. Dec. 254.

The Alabama statute makes the giving of notice of his action by the officer executing a writ of attachment to the custodian of the books of transfer an essential part of the levy itself. Hence an averment of the fact of levy involves an averment that such notice was given. *Wetumpka Bridge Co. v. Kidd*, 124 Ala. 242, 27 So. 431.

In Arkansas a written notice specifying the property attached must be delivered to one of the corporate officers specified in the statute in order to render an attachment effectual. *Deutschman v. Byrne*, 64 Ark. 111, 40 S. W. 780.

In New Jersey it has been held that notice must be given to the garnishee although the statute does not expressly so provide. *Cord v. Newlin*, 71 N. J. L. 438, 59 Atl. 22.

In Tennessee notice to the corporation or to the officer having charge of the books of the company is essential in the case of execution. *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202.

In Texas the levy of attachment is

made by leaving a notice with any officer of the company. *Presnall v. Stockyards Nat. Bank*, — Tex. Civ. App. —, 151 S. W. 873.

In Colorado failure to give notice of the levy to the execution defendant is not fatal, there being no statute which in terms requires such notice. *Ellis v. Gibbons*, 26 Colo. App. 454, 145 Pac. 285.

See *Fowler v. Dickson*, 1 Boyce (Del.) 113, 74 Atl. 601, for a review of the methods of attachment and levy prevailing in the various states.

⁴¹ *People v. Goss & Phillips Mfg. Co.*, 99 Ill. 355; *Blair v. Compton*, 33 Mich. 414; *Keating v. J. Stone & Sons Live-Stock Co.*, 83 Tex. 467, 29 Am. St. Rep. 670, 18 S. W. 797.

"The same certainty is not required in an attachment levy as is required in an execution levy and sale, because the attached property is subject to further orders of the court before exposed to sale, and a levy sufficiently definite to identify it will hold it until the court can act." *Scott v. Hout*, 73 Ark. 78, 83 S. W. 1057.

A return upon a writ of attachment showing a levy upon all the stock belonging to the debtor is sufficient where the officer is unable to particularly describe it because of the refusal of the corporate secretary to permit him to examine the stock book, and where the secretary is subsequently required to produce the book in court, and the return is then amended so as to specifically describe the stock. *Scott v. Hout*, 73 Ark. 78, 83 S. W. 1057.

⁴² *Howe v. Starkweather*, 17 Mass. 240; *Titcomb v. Union Marine & Fire Ins. Co.*, 8 Mass. 326.

⁴³ *Connecticut. Barber v. Morgan*, 85 Conn. 618, Ann. Cas. 1912 D 951, 80

In some jurisdictions the levying officer is entitled to a certificate from the secretary or other officer of the corporation showing the number of shares held by the defendant in the corporation to aid him in making the levy.⁴⁴

Under some statutes it is not necessary to the validity of the sale that the officer have possession of the certificates or that he deliver the

Atl. 791; *Stamford Bank v. Ferris*, 17 Conn. 259.

Delaware. *Fowler v. Dickson*, 1 Boyce 113, 74 Atl. 601.

Illinois. *Union Nat. Bank of Chicago v. Byram*, 131 Ill. 92, 22 N. E. 842; *People v. Goss & Phillips Mfg. Co.*, 99 Ill. 355, rev'g 4 Ill. App. 510.

Michigan. *Feige v. Burt*, 118 Mich. 243, 74 Am. St. Rep. 390, 77 N. W. 928.

Missouri. *Armour Bros. Banking Co. v. St. Louis Nat. Bank*, 113 Mo. 12, 35 Am. St. Rep. 691, 20 S. W. 690.

Wisconsin. *O. L. Packard Machinery Co. v. Laev*, 100 Wis. 644, 76 N. W. 596; *Barthell v. Hencke*, 99 Wis. 660, 75 N. W. 952.

Wyoming. *Wyoming Fair Ass'n v. Talbott*, 3 Wyo. 244, 21 Pac. 700.

The New York statute (Code Civ. Proc. § 649, subd. 3) requiring, on an attachment of stock, a certified copy of the warrant, and a notice showing the property attached, to be left with the president or head of the corporation, or the secretary, cashier or managing agent thereof, has been held to apply only to stock in domestic corporations. *Simpson v. Jersey City Contracting Co.*, 47 N. Y. App. Div. 17, 61 N. Y. Supp. 1033.

In Connecticut "a nonresident's stock in a Connecticut corporation may be attached, under § 833 of the General Statutes, by leaving a copy of the process and complaint, duly attested, with the secretary, clerk, or cashier of the corporation, as the section prescribes. This stands in the place of actual seizure in the case of tangible property."

Gen. St. § 828, providing that when

a nonresident's estate is attached, a copy of the process and complaint, with a return describing the estate attached, shall be left by the officer serving the process with the agent or attorney of the defendant within the state, or if he has no such agent or attorney within the state, with him who has charge or possession of the estate attached, is intended to provide means for the nonresident to obtain notice of the attachment. It does not apply where there is no actual seizure of the property but a mere constructive seizure, as in cases of garnishment and the attachment of stock. "In such cases the attachment is made, and the estate of the debtor taken into the custody of the law, by leaving a copy of the process, in the one case with the agent or debtor of the defendant, and in the other with the secretary, clerk, or cashier of the corporation whose capital stock is attached. No good end can be served by leaving a second copy with the same parties." *Barber v. Morgan*, 84 Conn. 618, Ann. Cas. 1912 D 951, 80 Atl. 791.

⁴⁴*O. L. Packard Machinery Co. v. Laev*, 100 Wis. 644, 76 N. W. 596.

The object of such a provision is to enable the sheriff to find out what the interest of the stockholder is so he can intelligently levy his writ. He is not required to return the certificate with his return of the manner in which he executed the writ. *Thompson v. Wells*, 57 Ill. App. 436.

In Connecticut the officer is entitled to demand and receive such a certificate, but the purpose of this provision is to aid him in making the attach-

same to the purchaser.⁴⁵ The uniform stock transfer act, however, provides that no attachment or levy upon shares of stock for which a certificate is outstanding shall be valid until such certificate is actually seized by the officer making the attachment or levy, or is surrendered to the corporation which issued it, or its transfer by the holder is enjoined.⁴⁶

If the charter of a corporation fixes the right to take shares of its stock on execution or attachment, or the mode of levying upon and selling the same, it supersedes a general law on the subject previously enacted; but it is otherwise where the general law is subsequently enacted.⁴⁷

§ 3444. Effect of levy and sale. As in other cases, the lien of an attachment of shares of stock takes effect from its levy.⁴⁸ And, in case the corporation is garnished, it becomes liable, from the time of the service of notice on it, to account to the attaching creditor for the stock then owned by the debtor and its proceeds.⁴⁹

The levy impounds the whole interest of the stockholder in the property and rights of the corporation,⁵⁰ including dividends subsequently declared.⁵¹

ment. The demand and receipt of the certificate is no part of the service of the process, and the failure of the officer to make such a demand does not invalidate the attachment. *Barber v. Morgan*, 84 Conn. 618, Ann. Cas. 1912 D 951, 80 Atl. 791.

⁴⁵ *West Coast Safety Faucet Co. v. Wulff*, 133 Cal. 315, 85 Am. St. Rep. 171, 65 Pac. 622; *Ellis v. Gibbons*, 26 Colo. App. 454, 145 Pac. 285.

⁴⁶ This act has been adopted and is in effect in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

⁴⁷ *Howe v. Starkweather*, 17 Mass. 240; *Titcomb v. Union Marine & Fire Ins. Co.*, 8 Mass. 326.

In *Fowler v. Dickson*, 1 Boyce (Del.) 113, 74 Atl. 601, it was held that statutory provisions relative to the service of process on corporate officers in proceedings to attach corporate stock, being a special act with respect to a particular procedure, was not repealed or

altered by the general provisions of a general corporation law, subsequently adopted, relating generally to service of legal process. .

⁴⁸ *Morehead v. Western North Carolina R. Co.*, 96 N. C. 362, 2 S. E. 247.

The stock is bound from the time when notice is served on the corporation, and from that time the attaching creditor acquires a valid lien thereon. *Ball v. Towle Mfg. Co.*, 67 Ohio St. 306, 93 Am. St. Rep. 682, 65 N. E. 1015.

See standard works on attachment.

⁴⁹ *Farmers' & Merchants' Nat. Bank v. Mosher*, 68 Neb. 713, 724, 100 N. W. 133, 94 N. W. 1003, 63 Neb. 130, 88 N. W. 552; *National Bank of New London v. Lake Shore & M. S. Ry. Co.*, 21 Ohio St. 221.

See standard works on garnishment.

⁵⁰ *Farmers' & Merchants' Nat. Bank v. Mosher*, 68 Neb. 713, 724, 100 N. W. 133, 94 N. W. 1003.

⁵¹ See subd. xvi, *infra*, this chapter.

Ordinarily levy of an execution or attachment upon shares of stock takes precedence over subsequent sales or assignments thereof,⁵² including a sale of the stock previously negotiated, but not consummated by an actual transfer and delivery of the certificates of stock until after the levy, although the transfer and delivery of the certificates may have been without notice of the attachment.⁵³ And this is true even though the transferee is a bona fide purchaser.⁵⁴ But a statute providing that the delivery of a stock certificate to a bona fide purchaser or pledgee for value, together with a written transfer of the same, or a written power of attorney to sell, assign and transfer the same, signed by the owner of the certificate, shall be a sufficient delivery to transfer the title as against all parties, has been held to give such a bona fide transferee without notice a good title as against prior attaching creditors.⁵⁵ The rights of an unregistered owner of shares as against a subsequent execution or attachment by a creditor of the person appearing upon the books of the corporation as owner will be considered in a subsequent section.⁵⁶

A sale of stock under execution passes the title to the purchaser as in the sale of other personal property,⁵⁷ and he has a right to have the same transferred to him on the corporate books,⁵⁸ and is entitled to the usual remedies to compel such a transfer.⁵⁹

The doctrine of caveat emptor applies with reference to a purchase of corporate stock at an execution sale, and mere silence of the owner of the stock at the time of the sale, unaccompanied by any

⁵² *Braden's Estate*, 165 Pa. St. 184, 30 Atl. 746; *Cates v. Baxter*, 97 Tenn. 443, 37 S. W. 219; *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202; *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913; *Chesapeake & O. Ry. Co. v. Paine & Co.*, 29 Gratt. (Va.) 502.

Levy and sale under an execution gives the purchaser a title which relates back to the teste of the execution as against subsequent assignments and rendering them void. *Memphis Appeal Pub. Co. v. Pike*, 9 Heisk. (Tenn.) 697.

A subsequent pledgee of the stock takes it subject to the lien of the attachment. *Ball v. Towle Mfg. Co.*, 67 Ohio St. 306, 93 Am. St. Rep. 682, 65 N. E. 1015.

⁵³ *Cates v. Baxter*, 97 Tenn. 443,

37 S. W. 219; *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202.

⁵⁴ *In re Braden's Estate*, 165 Pa. 184, 30 Atl. 746; *Young v. South Tredegar Iron Co.*, 85 Tenn. 189, 4 Am. St. Rep. 752, 2 S. W. 202; *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913; *Chesapeake & O. R. Co. v. Paine & Co.*, 29 Gratt. (Va.) 502.

⁵⁵ *Parkhurst v. Almy*, 222 Mass. 27, 109 N. E. 733; *Clews v. Friedman*, 182 Mass. 555, 66 N. E. 201.

⁵⁶ See subd. xxii, *infra*, this chapter.

⁵⁷ *Wetumpka Bridge Co. v. Kidd*, 124 Ala. 242, 27 So. 431; *Memphis Appeal Pub. Co. v. Pike*, 9 Heisk. (Tenn.) 697.

⁵⁸ See subd. xxi, *infra*, this chapter.

⁵⁹ See subd. xxi, *infra*, this chapter.

other act construable as ratification, will not estop such owner from recovering his stock where the sale is void.⁶⁰ Nor will the fact that the judgment defendant pays the balance due on the judgment after deducting the amount realized on an execution sale of his stock estop him from subsequently attacking the sale.⁶¹

Where the judgment creditor who purchases the stock at the execution sale subsequently receives and accepts from the judgment debtor the full amount of the execution, including the amount bid for the stock, this is *prima facie* an abandonment of his purchase and an estoppel against a subsequent assertion of title.⁶²

V. CONVERSION OF SHARES OF STOCK

§ 3445. Whether shares may be the subject of conversion. Because of the fact that shares of stock, although personal property,⁶³ are intangible and incapable of being identified and taken into actual possession,⁶⁴ trover would not lie at common law for their conversion.⁶⁵ And this rule has been adopted by the courts of Pennsylvania.⁶⁶ In other jurisdictions, however, it is the settled doctrine that shares of stock, since they are personal property, may be the subject of a conversion, notwithstanding their intangible nature, and that the action of trover will lie to recover damages for their conversion, the declaration or complaint alleging a conversion, not merely of the certificate of stock which is evidence of the stock, but of the stock itself.⁶⁷

⁶⁰ *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411, 68 Pac. 884.

⁶¹ *Daniel v. Gold Hill Min. Co.*, 28 Wash. 411, 68 Pac. 884.

⁶² *Memphis Appeal Pub. Co. v. Pike*, 9 Heisk. (Tenn.) 697.

⁶³ See § 3429, *supra*.

⁶⁴ See § 3430, *supra*.

⁶⁵ *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80; *Coray v. Perry Irrigation Co.*, — Utah —, 166 Pac. 672.

"It lay only for tangible property, capable of being identified and taken into actual possession." *Payne v. Elliot*, 54 Cal. 339, 35 Am. Rep. 80.

Contra, *Small v. Wilson*, — Ga. App. —, 93 S. E. 518.

⁶⁶ *Neiler & Warren v. Kelley*, 69 Pa. St. 403, 407; *Biddle v. Bayard*, 13 Pa.

St. 150; *Sewall v. Lancaster Bank*, 17 Serg. & R. (Pa.) 285.

But see *Sparks v. Hurley*, 208 Pa. 166, 101 Am. St. Rep. 926, 57 Atl. 364, and *Pennsylvania Co. for Insurance v. Philadelphia, G. & N. R. R.*, 153 Pa. St. 160, where actions for the conversion of stock were maintained. The question whether conversion would lie was not referred to in either of these cases.

⁶⁷ *United States*. *McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615, *aff'g* 1 Utah 273; *London, P. & A. Bank v. Aronstein*, 117 Fed. 601, *certiorari* denied 187 U. S. 641, 47 L. Ed. 345 (*mem. dec.*). See also *Merritt v. American Steel-Barge Co.*, 79 Fed. 228.

§ 3446. What constitutes a conversion—General principles. Any act of dominion wrongfully exerted over another's property, in denial of his right, or inconsistent with it, may be treated as a conversion; and this is just as true of shares of stock as it is of other property.⁶⁸

Alabama. Sharpe v. National Bank of Birmingham, 87 Ala. 644, 7 So. 106; Nabring v. Bank of Mobile, 58 Ala. 204.

California. Ralston v. Bank of California, 112 Cal. 208, 44 Pac. 476; Payne v. Elliot, 54 Cal. 339, 35 Am. Rep. 80. See Myers v. Chittyna Exploration Co., 20 Cal. App. 418, 129 Pac. 469.

Colorado. Crosby v. Stratton, 17 Colo. App. 212, 68 Pac. 130.

Connecticut. Ayres v. French, 41 Conn. 142.

Delaware. See Stewart v. Bright, 6 Houst. 344; Layman v. F. F. Slocumb & Co., 7 Pennew. 403, 76 Atl. 1094.

Georgia. Small v. Wilson, — Ga. App. —, 93 S. E. 518.

Illinois. Sturges v. Keith, 57 Ill. 451, 11 Am. Rep. 28; Miller v. Doran, 151 Ill. App. 527, aff'd 245 Ill. 200, 91 N. E. 1039; Lewis v. Bidwell Elec. Co., 141 Ill. App. 33.

Indiana. B. L. Blair Co. v. Rose, 26 Ind. App. 487, 60 N. E. 10.

Iowa. Doyle v. Burns, 123 Iowa 488, 99 N. W. 195; Loetscher v. Dillon, 119 Iowa 202, 93 N. W. 98.

Kentucky. New Jersey Sheep & Wool Co. v. Traders' Deposit Bank, 104 Ky. 90, 46 S. W. 677; Bank of America v. McNeil, 10 Bush 54.

Maryland. Jones v. Ortel, 114 Md. 205, 78 Atl. 1030; Maryland Fire Ins. Co. v. Dalrymple, 25 Md. 242, 89 Am. Dec. 779.

Massachusetts. Jarvis v. Rogers, 15 Mass. 389.

Michigan. Hine v. Commercial Bank of Bay City, 119 Mich. 448, 78 N. W. 471; Feige v. Burt, 118 Mich. 243, 74 Am. St. Rep. 390, 77 N. W. 928; Allen v. DuBois, 117 Mich. 115, 75 N. W. 443; Hubbell v. Blandy, 87 Mich. 209, 24 Am. St. Rep. 154, 49

N. W. 502; Daggett v. Davis, 53 Mich. 35, 51 Am. Rep. 91, 18 N. W. 548; Morton v. Preston, 18 Mich. 60, 100 Am. Dec. 146.

Minnesota. Carpenter v. American Building & Loan Ass'n, 54 Minn. 403, 40 Am. St. Rep. 345, 56 N. W. 95; Allen v. American Building & Loan Ass'n, 49 Minn. 544, 32 Am. St. Rep. 574, 52 N. W. 144.

Missouri. Newman v. Mercantile Trust Co., 189 Mo. 423, 88 S. W. 6; Greer v. Lafayette County Bank, 128 Mo. 559, 30 S. W. 319; Withers v. Lafayette County Bank, 67 Mo. App. 115.

Nebraska. Herrick v. Humphrey Hardware Co., 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685.

Nevada. Boylan v. Huguet, 8 Nev. 345.

New York. Anderson v. Nicholas, 28 N. Y. 600; Mahaney v. Walsh, 16 App. Div. 601, 44 N. Y. Supp. 969.

Oregon. Budd v. Multnomah St. Ry. Co., 15 Ore. 413, 3 Am. St. Rep. 169, 15 Pac. 659.

Utah. Coray v. Perry Irrigation Co., 166 Pac. 672; Kuhn v. McAllister, 1 Utah 273, aff'd 96 U. S. 87, 24 L. Ed. 615.

If the shares are converted by means of a wrongful use of the certificate, the owner may count upon the conversion of either. Daggett v. Davis, 53 Mich. 35, 51 Am. Rep. 91, 18 N. W. 548.

That certificates of stock, as distinguished from the shares themselves, may be converted, see § 3426, supra.

⁶⁸ **Colorado.** Crosby v. Stratton, 17 Colo. App. 212, 68 Pac. 130.

Delaware. Layman v. F. F. Slocumb & Co., 7 Pennew. 403, 76 Atl. 1094.

"Conversion, in the sense of the law of trover, consists either in the appropriation of the property of another, or its destruction, or in exercising dominion over it in defiance of the owner's rights, or in withholding the possession from him under an adverse claim of title."⁶⁹ "The gist of the action of trover is the wrongful conversion of the property of the defendant."⁷⁰

Conversion may be direct or constructive, and therefore may be proved directly or by inference.⁷¹

"Whether, in a given case, there is a conversion or not, is dependent upon the nature of the plaintiff's right in the property, and the character of the act constituting the alleged conversion."⁷²

In order to maintain an action of trover the plaintiff must have had title to, or a right of property in, the stock at the time of the acts relied upon as a conversion,⁷³ and "there must be an invasion of a

Minnesota. *Humphreys v. Minnesota Clay Co.*, 94 Minn. 469, 103 N. W. 338; *Carpenter v. American Building & Loan Ass'n*, 54 Minn. 403, 40 Am. St. Rep. 345, 56 N. W. 95; *Allen v. American Building & Loan Ass'n*, 49 Minn. 544, 32 Am. St. Rep. 574, 52 N. W. 144.

Missouri. *Wilkinson v. Misner*, 158 Mo. App. 551, 138 S. W. 931; *Miller v. Lange*, 84 Mo. App. 219; *Withers v. Lafayette County Bank*, 67 Mo. App. 115.

Nebraska. *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685.

Nevada. *Robinson Min. Co. v. Riepe*, 37 Nev. 27, 138 Pac. 910.

New York. *Mahaney v. Walsh*, 16 App. Div. 601, 44 N. Y. Supp. 969.

"Every unauthorized taking of personal property, and all intermeddling with it, beyond the extent of the authority conferred, in case a limited authority has been given with intent so to apply and dispose of it as to alter its condition or interfere with the owner's dominion, is a conversion." *Kilmer v. Hutton*, 131 N. Y. App. Div. 625, 116 N. Y. Supp. 127.

In general, the rules relative to the

conversion of shares of stock are the same as those relative to the conversion of other personalty, and reference should be had to standard textbooks and encyclopedic articles on the subject of conversion.

⁶⁹ *Merchants' Nat. Bank v. Williams*, 110 Md. 334, 72 Atl. 1114, quoted with approval in *Hammond v. DuBois*, — Md. —, 101 Atl. 612.

The exercise of an unjustifiable control over another's stock in derogation of his title to the same constitutes a conversion. *Morgan v. Johns*, 84 Ore. 557, 165 Pac. 369.

⁷⁰ *Stewart v. Bright*, 6 Houst. (Del.) 344; *Layman v. F. F. Slocomb & Co.*, 7 Pennw. (Del.) 403, 76 Atl. 1094.

"The action of trover cannot be maintained without a conversion." *Hammond v. DuBois*, — Md. —, 101 Atl. 612.

⁷¹ *Hammond v. DuBois*, — Md. —, 101 Atl. 612; *Jones v. Ortel*, 114 Md. 205, 78 Atl. 1030.

⁷² *Crosby v. Stratton*, 17 Colo. App. 212, 68 Pac. 130.

⁷³ *Stewart v. Bright*, 6 Houst. (Del.) 344; *Layman v. F. F. Slocomb & Co.*, 7 Pennw. (Del.) 403, 76 Atl. 1094; *Newman v. Mercantile Trust Co.*, 189 Mo. 423, 88 S. W. 6; *Wilkinson v.*

legal, as contradistinguished from an equitable right. There can be no conversion of property, the title to which consists only in the right at some future time to acquire it by purchase." ⁷⁴ So depriving a stockholder of his right to purchase his proportionate share of a new issue of stock does not amount to a conversion. ⁷⁵ A pledgee may maintain an action for the conversion of the pledged stock, ⁷⁶ and an executor or administrator for the conversion of stock belonging to his decedent. ⁷⁷

The plaintiff must also have had a lawful possession of the stock at the time of the supposed conversion, or a right to its immediate possession. ⁷⁸

The plaintiff must show that the defendant wrongfully converted

Misner, 158 Mo. App. 551, 138 S. W. 931; Martin v. Megargee, 212 Pa. 558, 61 Atl. 1023.

A stockholder may not maintain action for conversion after a judgment in a prior action declaring that he has no title to the stock, and a surrender by the stockholder of the stock for cancellation in consideration of discontinuance by the corporation of a second action against the stockholder. O'Dwyer v. Verdon, 115 N. Y. App. Div. 37, 100 N. Y. Supp. 588, aff'd 190 N. Y. 505, 83 N. E. 1128.

When the title to shares of stock is, under a will, in a cestui que trust, the trustee, being directed merely to collect and pay over dividends, cannot maintain an action of trover for their conversion. Onondaga Trust & Deposit Co. v. Price, 87 N. Y. 542; White v. Price, 39 Hun (N. Y.) 394, aff'd 108 N. Y. 661, 15 N. E. 427.

In Small v. Wilson, — Ga. App. —, 93 S. E. 518, it is said that bare possession of a chattel was a sufficient title upon which to base an action of trover against a wrongdoer, at common law.

For the proper method of pleading ownership of the stock in such an action, see Paine v. British-Butte Min. Co., 41 Mont. 28, 108 Pac. 12.

⁷⁴ App. 212, 68 Pac. 130.

⁷⁵ Crosby v. Stratton, 17 Colo. App. 212, 68 Pac. 130.

⁷⁶ Brown v. Union Savings & Loan Ass'n, 28 Wash. 657, 69 Pac. 383. See also § 3450, *infra*, and subd. xxvi, *infra*, this chapter.

⁷⁷ London, P. & A. Bank v. Aronstein, 117 Fed. 601; Small v. Wilson, — Ga. App. —, 93 S. E. 518; Reichard v. Hutton, 148 N. Y. App. Div. 813, 133 N. Y. Supp. 44; Coray v. Perry Irrigation Co., — Utah —, 166 Pac. 672.

⁷⁸ United States. Chew v. Louchheim, 80 Fed. 500.

Colorado. Crosby v. Stratton, 17 Colo. App. 212, 68 Pac. 130.

Delaware. Stewart v. Bright, 6 Houst. 344; Layman v. F. F. Slocumb & Co., 7 Pennw. 403, 76 Atl. 1094.

Missouri. Newman v. Mercantile Trust Co., 189 Mo. 423, 88 S. W. 6; Wilkinson v. Misner, 158 Mo. App. 551, 138 S. W. 931.

Pennsylvania. Martin v. Megargee, 212 Pa. 558, 61 Atl. 1023.

If the plaintiff under the terms of his contract with the defendant was not entitled to the stock at the time when he demanded it, defendant's refusal to deliver it was not a conversion. Stewart v. Bright, 6 Houst. (Del.) 344.

the stock.⁷⁹ The acts relied on must have been wrongful,⁸⁰ and such as to deprive the owner of his stock, either permanently and absolutely, or partially or temporarily.⁸¹

⁷⁹ *Stewart v. Bright*, 6 Houst. (Del.) 344; *Layman v. F. F. Slocomb & Co.*, 7 Pennw. (Del.) 403, 76 Atl. 1094; *Hammond v. DuBois*, — Md. —, 101 Atl. 612; *Emmet v. City of New York*, 163 N. Y. App. Div. 603, 148 N. Y. Supp. 640, aff'd 218 N. Y. 666, 113 N. E. 1055.

The president of a corporation surrendered ten shares of his stock to the corporation, and it issued a certificate for them to the plaintiff. Thereafter the president caused a new certificate to be issued to himself for the full number of shares held by him before the sale, and the corporation refused to make a transfer to the plaintiff on its books. It was held that this did not constitute a conversion of the plaintiff's stock by the president personally. *O'Dwyer v. Verdon*, 115 N. Y. App. Div. 37, 100 N. Y. Supp. 588, aff'd 190 N. Y. 505, 83 N. E. 1128.

Where a special administrator of an estate, as such, and without authority, sells shares of stock in a corporation which had been pledged to the deceased in his lifetime as security for a loan of money, and receives the proceeds, which he pays over to the executors, this is not a conversion of the stock by the estate, so as to enable the pledgor to maintain trover. His remedy is an action for money had and received. *Von Schmidt v. Bourn*, 50 Cal. 616.

⁸⁰ The act of the defendant in turning the stock over to a third person cannot amount to a conversion where the owner consents to his doing so. *Doyle v. Burns*, 123 Iowa 488, 99 N. W. 195.

Where several stockholders enter into an agreement to contribute a certain number of shares each, to be sold

for the benefit of the corporation, one of them cannot back out after the rest have contributed their portions; and if he attempts to do so, and his shares are used in accordance with the agreement, he cannot bring trover for them. *Conrad v. La Rue*, 52 Mich. 83, 17 N. W. 706.

⁸¹ "Conversion does not necessarily imply a complete and absolute deprivation of property; there may be a deprivation which is only partial or temporary, and where the property of the plaintiff remains in or is restored to him. * * * The difference between such a case and one in which the property is wholly made away with is one affecting the damages only; the damages go to the whole value of the property in the one case, and are commonly less in the other." *Daggett v. Davis*, 53 Mich. 35, 51 Am. Rep. 91, 18 N. W. 548.

The mere fact that the corporation in its answer in a garnishment proceeding to subject certain stock denies that the principal debtor owns it does not amount to a conversion, where the corporation does not otherwise question his ownership of it, and its officers subsequently regard him as a stockholder, and he retains possession of his stock certificate. *New Jersey Sheep & Wool Co. v. Traders' Deposit Bank*, 104 Ky. 90, 46 S. W. 677.

In *Allen v. Hook*, — Mich. —, 164 N. W. 384, it was held that a pledgee of stock could not be charged with its conversion where he had not sold it, nor refused to transfer it to the pledgor upon tender of the payment of the debt, and had not had it transferred to himself on the corporate books, but still held possession of it on the day of the trial in the same manner as when it was delivered to him,

In order that conversion of a certificate of stock may constitute a conversion of the stock which it represents, the owner must be thereby deprived of the stock, and not merely of the certificate. It has been held, therefore, that conversion of an unindorsed certificate of stock is not a conversion of the stock.⁸² It is not necessary to show that the defendant has applied the stock to his own use.⁸³

In general the conversion dates from the time when the stockholder, being entitled to the immediate possession of the stock or of the certificate, makes a demand for it which is refused.⁸⁴ Demand and refusal to surrender do not in all cases constitute a conversion, however, but are simply evidences thereof,⁸⁵ which may be explained and rebutted by evidence to the contrary.⁸⁶ And there may be a conversion without a demand.⁸⁷ Thus, no demand is necessary where the taking of possession and the conversion is wrongful, since the wrong-

⁸² *Cummins v. People's Building, Loan & Savings Ass'n*, 61 Neb. 728, 86 N. W. 474.

Under such circumstances the person guilty of the conversion cannot make either the certificate or the shares which it represents the property of himself or of a third person by anything that he can do with the certificate. *Daggett v. Davis*, 53 Mich. 35, 51 Am. Rep. 91, 18 N. W. 548.

⁸³ *Hubbell v. Blandy*, 87 Mich. 209, 24 Am. St. Rep. 157, 49 N. W. 502; *Withers v. Lafayette County Bank*, 67 Mo. App. 115.

⁸⁴ *Colorado*. *Grimes v. Barndollar*, 58 Colo. 421, 148 Pac. 256.

Delaware. *Stewart v. Bright*, 6 Houst. 344.

Indiana. *B. L. Blair Co. v. Rose*, 26 Ind. App. 487, 60 N. E. 10.

Iowa. *Teeple v. Hawkeye Gold Dredging Co.*, 137 Iowa 206, 114 N. W. 906.

Kentucky. *Ohio Valley Banking & Trust Co. v. Wathen's Ex'rs*, 166 Ky. 274, 179 S. W. 230.

Maryland. *Baltimore City Passenger Ry. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402.

Texas. *Grasham v. Island City Sav. Bank*, 2 Tex. Civ. App. 52, 21 S. W. 556.

Conversion may be proved *prima facie* by a demand upon the defendant for the stock and his refusal to deliver it. *Stewart v. Bright*, 6 Houst. (Del.) 344; *Layman v. F. F. Slocomb & Co.*, 7 Pennew. (Del.) 403, 76 Atl. 1094.

⁸⁵ *Colorado*. *Salida Building & Loan Ass'n v. Davis*, 16 Colo. App. 294, 64 Pac. 1046.

Delaware. *Layman v. F. F. Slocomb & Co.*, 7 Pennew. 403, 76 Atl. 1094.

Indiana. *Citizens' St. R. Co. v. Robbins*, 144 Ind. 671, 43 N. E. 649, 42 N. E. 916.

Iowa. *Doyle v. Burns*, 123 Iowa 488, 99 N. W. 195.

Maryland. *Hammond v. DuBois*, 101 Atl. 612; *Jones v. Ortel*, 114 Md. 205, 78 Atl. 1030.

Michigan. *Daggett v. Davis*, 53 Mich. 35, 51 Am. Rep. 91, 18 N. W. 548.

⁸⁶ *Stewart v. Bright*, 6 Houst. (Del.) 344; *Hammond v. DuBois*, — Md. —, 101 Atl. 612; *Jones v. Ortel*, 114 Md. 205, 78 Atl. 1030.

⁸⁷ *Salida Building & Loan Ass'n v. Davis*, 16 Colo. App. 294, 64 Pac. 1046; *Doyle v. Burns*, 123 Iowa 488, 99 N. W. 195.

ful taking and converting is in itself an assertion of ownership.⁸⁸ But where an actual conversion is not proven, a demand and refusal made at a time when the defendant had the power to give up the stock must be shown.⁸⁹ So when a person is lawfully in possession of stock, a demand is necessary before an action of trover can be maintained against him.⁹⁰ A demand and refusal is also necessary before an action for conversion can be maintained against a corporation for failure to deliver a certificate of stock to a subscriber who is entitled to it.⁹¹ And, under such circumstances, the demand must be made upon the officer or governing body authorized to act in the premises.⁹² The corporation is not obliged to carry the stock to the owner and place it in his hands, and if, after the corporation notifies him that his claim for stock has been allowed, he does not present himself and request the issuance and delivery of the stock, he cannot recover damages for failure to deliver it.⁹³ It has been held that a demand by letter is not sufficient.⁹⁴

Delay in delivery, in order to amount to a refusal, must be unreasonable.⁹⁵

The return and acceptance of the stock after an action is brought for its conversion, or after the conversion, and before action, does not defeat the action, but merely affects the measure of damages.⁹⁶ The plaintiff is not bound to accept an offer to return the stock made before action is brought⁹⁷ or during the trial,⁹⁸ and such an offer does not defeat his right of action, nor mitigate the damages.

⁸⁸ Where the secretary of the corporation refuses to register a transfer, no formal demand is necessary. *Robinson Min. Co. v. Riepe*, 37 Nev. 27, 138 Pa. 910.

⁸⁹ *Hammond v. DuBois*, — Md. —, 101 Atl. 612; *Jones v. Ortel*, 114 Md. 205, 78 Atl. 1030.

⁹⁰ *Salida Building & Loan Ass'n v. Davis*, 16 Colo. App. 294, 64 Pac. 1046; *Moynahan v. Prentiss*, 10 Colo. App. 295, 51 Pac. 94.

⁹¹ *Teeple v. Hawkeye Gold Dredging Co.*, 137 Iowa 206, 114 N. W. 906.

⁹² *Teeple v. Hawkeye Gold Dredging Co.*, 137 Iowa 206, 114 N. W. 906.

⁹³ *Teeple v. Hawkeye Gold Dredging Co.*, 137 Iowa 206, 114 N. W. 906.

⁹⁴ *Teeple v. Hawkeye Gold Dredging Co.*, 137 Iowa 206, 114 N. W. 906.

⁹⁵ *Teeple v. Hawkeye Gold Dredging Co.*, 137 Iowa 206, 114 N. W. 906.

⁹⁶ *Carpenter v. American Building & Loan Ass'n*, 54 Minn. 403, 40 Am. St. Rep. 345, 56 N. W. 95.

But if the stock is returned and accepted the plaintiff cannot recover its value. *Sargent v. American Bank & Trust Co.*, 80 Ore. 16, 156 Pac. 431, 154 Pac. 759.

If the plaintiff accept a return of the property, he cannot recover damages for time and trouble and expenses incurred in obtaining the return of the same. *Collins v. Lowry*, 78 Wis. 329, 47 N. W. 612.

That he can only recover nominal damages under such circumstances, see § 3453, *infra*.

⁹⁷ *Carpenter v. American Building & Loan Ass'n*, 54 Minn. 403, 40 Am. St. Rep. 345, 56 N. W. 95.

⁹⁸ *Dooley v. Gladiator Consol. Gold Mines & Milling Co.*, 134 Iowa 468, 13

§ 3447. — Conversion by corporation. Shares of stock in a corporation may be converted by the corporation itself.⁹⁹ So a corporation may be guilty of a conversion of stock if it wrongfully refuses to issue a certificate therefor to a stockholder,¹ or if it wrongfully refuses to recognize a valid transfer, and to register the transfer, and issue a new certificate to the transferee,² or if it wrongfully cancels the certificate of a stockholder,³ or if it sells or declares a forfeiture of stock for nonpayment of calls or assessments where it has no right to do so, or without complying with the charter or statutory provisions as to the mode of forfeiture or sale.⁴

The fact that by suing in tort as for a conversion the owner gives up his position as a stockholder, and the person found guilty of the conversion becomes the owner of the converted shares,⁵ does not prevent the maintenance of such an action against the corporation either on the theory that it is contrary to public policy for the corporation to acquire shares of its own stock,⁶ or because its stock is thereby reduced otherwise than in the manner prescribed by law.⁷

When stock is converted by the corporation, the owner may maintain trover to recover damages for the conversion, without returning or offering to return his certificate of stock.⁸

§ 3448. — Conversion by third person. Shares of stock may be converted by a third person as well as by the corporation.⁹ Any

Ann. Cas. 297, 109 N. W. 864.

⁹⁹ *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685.

"The corporation may interfere with the rights of a stockholder by simply denying them, and thus become liable for a conversion." *Withers v. Lafayette County Bank*, 67 Mo. App. 115.

See also cases cited in the following notes and in § 3449 et seq.

¹ See § 3484, *infra*.

² See subd. XIX, *infra*, this chapter.

³ See § 3485, *infra*.

⁴ See § 666, *supra*, and see subd. xxxv, *infra*, this chapter.

⁵ See § 3454, *infra*.

⁶ If necessary to save itself from loss, a corporation may take title to a stockholder's share in payment of his

indebtedness to it, and if, for the same purpose, it in good faith and under a claim of right refuses to register a transfer by a stockholder who is indebted to it, and thereby undesignedly converts his shares, its acquisition of title by this means, though wrongful as to the transferee, is no more obnoxious to public policy than its acquisition by contract would be. *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476.

⁷ The authorized capital is not reduced under such circumstances, since the shares are not extinguished, but may be reissued. *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476.

⁸ *Carpenter v. American Building & Loan Ass'n*, 54 Minn. 403, 40 Am. St. Rep. 345, 56 N. W. 95.

⁹ *Doyle v. Burns*, 123 Iowa 488, 99

wrongful use of a certificate of stock, bearing an executed assignment and power to transfer the same, so as to procure the title to be vested in a person not entitled, or otherwise deprive the owner of his property in the stock, may be treated as a conversion, and sued upon as such, notwithstanding the fact that the certificate is not the stock itself.¹⁰ A person who obtains possession of stock from the owner for a par-

N. W. 195; *Loetscher v. Dillon*, 119 Iowa 202, 93 N. W. 98; *Merchants' Nat. Bank v. Williams*, 110 Md. 334, 72 Atl. 1114; *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685. And see cases cited in the following notes.

Where one of three associates acted as the agent of the others in the purchase of a gas plant, which was to be taken over by a corporation to be organized by them, and by falsely representing that the purchase price was larger than it actually was, and that he was to pay part of the consideration, obtained stock in the corporation, it was held that he was guilty of converting such stock. *Bellus v. Peters*, 165 Cal. 112, 130 Pac. 1186.

¹⁰ *McAllister v. Kuhn*, 96 U. S. 87, 24 L. Ed. 615, aff'g 1 Utah 273; *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28.

In *Hubbell v. Blandy*, 87 Mich. 209, 24 Am. St. Rep. 154, 49 N. W. 502, it was held that a gratuitous bailee of stock is liable for its conversion, if, without authority from the owner, he delivers the certificate to the officers of the corporation, who cancel it, and issue a new certificate to another person, although he may have acted in good faith, and on a forged order.

Where stock indorsed to the plaintiff is delivered to a broker's clerk to procure it to be transferred to the plaintiff on the corporate books, and he delivers them to the brokers as his own property, he is guilty of conversion and the brokers are also *prima facie* guilty, where they credit the

stock to the clerk's account and procure it to be transferred to them. *Kilmer v. Hutton*, 131 N. Y. App. Div. 625, 116 N. Y. Supp. 127.

An action against a transferee of stock, or one claiming under him, for conversion, based on the alleged invalidity of the sale, cannot be maintained where the sale is not void, but is merely voidable. *Noyes v. Woodruff*, — Vt. —, 100 Atl. 759.

Where the president of a corporation holding one hundred and fifty-nine shares surrenders ten thereof to the corporation and same are reissued to a third party, the president cannot be held for conversion of the ten shares where a new certificate is issued to him by the corporation for the total one hundred and fifty-nine shares, since the holder of the ten shares is not affected by the subsequent over-issue of the capital stock. *O'Dwyer v. Verdon*, 115 N. Y. App. Div. 37, 100 N. Y. Supp. 588, aff'd 190 N. Y. 505, 83 N. E. 1128.

Where stock is loaned to a person, to sell the same, and use the proceeds in his business, and he does so, but afterwards refuses or fails to return the stock or account, he is not liable to an action of trover. The relation between the parties is simply that of debtor and creditor. *Borland v. Stokes*, 120 Pa. St. 278, 14 Atl. 61.

A transfer of stock by brokers may amount to a conversion though it is not strictly a sale, where they had no right to make it. *Reichard v. Hutton*, 148 N. Y. App. Div. 813, 133 N. Y. Supp. 44.

ticular purpose is guilty of conversion if he makes an unauthorized use of it,¹¹ or if he sells or pledges it and appropriates the proceeds.¹²

Where the holder of a certificate of stock transfers part of the shares represented thereby by an instrument in writing, and afterwards, before the transfer is entered on the books of the corporation, transfers all of the shares represented by the certificate to another party, he wrongfully exercises an active dominion over the shares first transferred, and converts the same.¹³ Shares of stock may be converted by a pledgee, as by selling the same without notice to the pledgor.¹⁴ A tax collector is liable in trover for wrongfully selling stock for an illegal tax.¹⁵ A trustee may be guilty of conversion where he treats the stock as his own absolute property, and ignores the trust relation,¹⁶ or where he holds the stock in trust for purposes of distribution and wrongfully refuses to turn it over to the person entitled to it,¹⁷ or where he purchases the trust stock at a sale for nonpayment of assessments thereon.¹⁸ A person is guilty of conversion who sells the stock of another without authority from the owner, though he acts under the authority of one claiming to be the owner and is ignorant of the latter's want of title.¹⁹

¹¹ *Kilmer v. Hutton*, 131 N. Y. App. Div. 625, 116 N. Y. Supp. 127.

¹² Where one to whom a certificate of stock is intrusted by the owner for a particular purpose, transfers it to another and appropriates the proceeds, he is guilty of conversion. *Wilkinson v. Misner*, 158 Mo. App. 551, 138 S. W. 931.

Where the defendant received the stock of the plaintiff under an agreement to return the same or its equivalent in certificates of the reorganized corporation, and received the proceeds of a sale of property represented by the stock which he pocketed, and refused to return anything, it was held that he was guilty of conversion. *Miller v. Miles*, 58 N. Y. App. Div. 103, 68 N. Y. Supp. 565, *aff'd* 171 N. Y. 675, 64 N. E. 1123.

Where the widow and heirs of a stockholder, thinking to avoid the expense of administration, took his certificate of stock and indorsed their names upon it, and left it with one of

their number to be sold for the benefit of all, and the person with whom it was left, instead of selling it, pledged it for his own debt, and the pledgee was recognized by the corporation as the owner of the stock, and disposed of it as owner, it was held that an administrator subsequently appointed could maintain an action against the pledgee for conversion of the stock. *Morton v. Preston*, 18 Mich. 60, 100 Am. Dec. 146.

¹³ *Mahaney v. Walsh*, 16 N. Y. App. Div. 601, 44 N. Y. Supp. 969.

¹⁴ See subd. xxvi, *infra*, this chapter.

¹⁵ *Sprague v. Fletcher*, 69 Vt. 69, 37 L. R. A. 840, 37 Atl. 239.

¹⁶ *Hetrick v. Smith*, 67 Wash. 664, 122 Pac. 363.

¹⁷ *Loetscher v. Dillon*, 119 Iowa 202, 93 N. W. 98.

¹⁸ *Freeman v. Harwood*, 49 Me. 195.

¹⁹ See subd. xxiv, *infra*, this chapter.

All who aid, command, assist or participate in the unlawful acts are liable,²⁰ and if stock is converted by one person and afterwards delivered to another, trover may be maintained against the latter as well as against the former.²¹

§ 3449. Measure of damages—General rules. It is agreed that the plaintiff in an action for the conversion of shares of stock is entitled to recover as his damages a sufficient sum to compensate him for his actual loss, and that he is not entitled to recover more than this.²² And to accomplish this end all damages must be given which necessarily flow from the wrongful act.²³ But as to the proper measure of damages, when the plaintiff has been wholly deprived of his stock, there has been some difference of opinion. In England it has been held in some cases that the measure of damages is the value of the stock at the time of the trial in the action for conversion.²⁴ It has been said in criticism of this rule that, instead of being general, fixed and certain, it is merely speculative, conjectural, and dependent upon accidental circumstances.²⁵

In this country, in some of the cases, it has been held to be the highest value of the stock between the time of the conversion and the time of the trial or verdict.²⁶ But it has been said that to adopt

²⁰ *Merchants' Nat. Bank v. Williams*, 110 Md. 334, 72 Atl. 1114. See also *Hammond v. DuBois*, — Md. —, 101 Atl. 612.

²¹ *Hubbell v. Blandy*, 87 Mich. 209, 24 Am. St. Rep. 154, 49 N. W. 502.

It makes no difference that some person other than the defendant took the property in the same instance. *Kuhn v. McAllister*, 1 Utah 273, aff'd 96 U. S. 87, 24 L. Ed. 615.

²² *United States. McKinley v. Williams*, 74 Fed. 94.

Connecticut. *Seymour v. Ives*, 46 Conn. 109.

Kentucky. *Ohio Valley Banking & Trust Co. v. Wathen's Ex'rs*, 166 Ky. 274, 179 S. W. 230.

Michigan. *Daggett v. Davis*, 53 Mich. 35, 51 Am. Rep. 9, 18 N. W. 548.

Nevada. *Boylan v. Huguet*, 8 Nev. 345.

New York. *Griggs v. Day*, 158 N. Y. 1, 52 N. E. 692, rev'g 21 App. Div.

442, 47 N. Y. Supp. 609; *Barnes v. Brown*, 130 N. Y. 372, 29 N. E. 760; *Gruman v. Smith*, 81 N. Y. 25, 26; *Baker v. Drake*, 66 N. Y. 518, 23 Am. Rep. 80, 53 N. Y. 211, 13 Am. Rep. 507.

North Dakota. *Second Nat. Bank of Grand Forks v. First Nat. Bank*, 8 N. D. 50, 76 N. W. 504.

See also the cases cited in the following notes.

²³ *Boylan v. Huguet*, 8 Nev. 345.

²⁴ *Harrison v. Harrison*, 1 C. & P. 412; *Owen v. Routh*, 14 C. B. 327; *Shepherd v. Johnson*, 2 East 211; *Downes v. Back*, 1 Stark. 318; *McArthur v. Seaforth*, 2 Taunt. 257. But see *In re Bahia & San Francisco R. Co.*, L. R. 3 Q. B. 584; *Shaw v. Holland*, 15 M. & W. 136. See also *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28, for a review of the English authorities.

²⁵ *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28.

²⁶ See *Central Railroad & Banking*

this rule "is to encourage the owner to delay and speculate upon the chances of higher markets without assuming the chances of lower markets." 27

In many jurisdictions it is held that the proper measure of damages is the value of the stock at the time of its conversion.²⁸ In

Co. v. Atlantic & G. R. Co., 50 Ga. 444; **Kid v. Mitchell**, 1 Nott & McC. (S. C.) 334, 9 Am. Dec. 702.

²⁷ **Citizens' St. R. Co. v. Robbins**, 144 Ind. 671, 43 N. E. 649, 42 N. E. 916.

²⁸ **Arizona**. **Salt River Canal Co. v. Hickey**, 4 Ariz. 240, 36 Pac. 171.

Arkansas. See **Jefferson v. Hale**, 31 Ark. 286, where this rule was applied in an action for the conversion of state warrants or scrip.

Colorado. **Grimes v. Barndollar**, 58 Colo. 421, 148 Pac. 256; **Continental Divide Min. Inv. Co. v. Bliley**, 23 Colo. 160, 46 Pac. 633.

Connecticut. **Bridgeport Bank v. New York & N. H. R. Co.**, 30 Conn. 231. See also **Seymour v. Ives**, 46 Conn. 109.

Delaware. **Stewart v. Bright**, 6 Houst. 344; **Layman v. F. F. Slocumb & Co.**, 7 Pennew. 403, 76 Atl. 1094.

Georgia. **Bank of Culloden v. Bank of Forsyth**, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226; **Hilton v. Sylvania & G. R. Co.**, 8 Ga. App. 10, 68 S. E. 746.

Illinois. **Brewster v. Van Liew**, 119 Ill. 554, 59 Am. Rep. 823, 8 N. E. 842, rev'g 20 Ill. App. 43; **Sturges v. Keith**, 57 Ill. 451, 11 Am. Rep. 28.

Maine. **Freeman v. Harwood**, 49 Me. 195. See also **McKenney v. Haines**, 63 Me. 74.

Maryland. **Merchants' Nat. Bank v. Williams**, 110 Md. 334, 72 Atl. 1114; **Baltimore City Passenger Ry. Co. v. Sewell**, 35 Md. 238, 6 Am. Rep. 402.

Massachusetts. **Hagar v. Norton**, 188 Mass. 47, 73 N. E. 1073; **Bond v. Mt. Hope Iron Co.**, 99 Mass. 505, 97 Am. Dec. 49. See also **Fisher v. Brown**, 104 Mass. 259, 6 Am. Rep. 235;

Wyman v. American Powder Co., 8 Cush. 168; **Sargent v. Franklin Ins. Co.**, 8 Pick. 90, 19 Am. Dec. 306.

Michigan. **Feige v. Burt**, 124 Mich. 565, 83 N. W. 367, 118 Mich. 243, 74 Am. St. Rep. 390, 77 N. W. 928; **Hubbell v. Blandy**, 87 Mich. 209, 24 Am. St. Rep. 154, 49 N. W. 502.

Minnesota. **Hawkins v. Mellis, Pirie & Co.**, 127 Minn. 393, Ann. Cas. 1916 C 640, 149 N. W. 663; **Humphreys v. Minnesota Clay Co.**, 94 Minn. 469, 103 N. W. 338; **Nicollet Nat. Bank v. City Bank**, 38 Minn. 85, 8 Am. St. Rep. 643, 35 N. W. 577.

Mississippi. **Mobile & O. Ry. Co. v. Humphries**, 7 So. 522.

Missouri. **Darling v. Potts**, 118 Mo. 506, 24 S. W. 461; **Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co.**, 118 Mo. 447, 24 S. W. 129.

Nevada. **Torp v. Clemons**, 37 Nev. 474, 142 Pac. 1115; **Robinson Min. Co. v. Riepe**, 37 Nev. 27, 138 Pac. 910; **Bereich v. Marye**, 9 Nev. 312; **Boylan v. Huguet**, 8 Nev. 345. But in a statutory action of claim and delivery, the measure of damages upon failure to return the property is the value of the stock at the day of the trial, together with the dividends that have been paid upon it as damages for its detention. **Bereich v. Marye**, 9 Nev. 312.

New Hampshire. **Pinkerton v. Manchester & L. R. R.**, 42 N. H. 424.

New Jersey. **Siegel v. Riverside Box & Lumber Co.** (N. J. Eq.), 99 Atl. 407.

North Dakota. **Second Nat. Bank of Grand Forks v. First Nat. Bank**, 8 N. D. 50, 76 N. W. 504.

Ohio. See **State v. Carpenter**, 51

criticism of this rule it has been said that it enables "the converting holder to make the market for the owner and deprive him of his stock, whether he so wills or not."²⁹ On the other hand, it has been

Ohio St. 83, 46 Am. St. Rep. 556, 37 N. E. 261.

Texas. Rio Grande Cattle Co. v. Burns, 82 Tex. 50, 17 S. W. 1043; Gresham v. Island City Sav. Bank, 2 Tex. Civ. App. 52, 21 S. W. 556.

Washington. Hetrick v. Smith, 67 Wash. 664, 122 Pac. 363.

In *Leury v. Bank of Baton Rouge*, 131 La. 30, Ann. Cas. 1913 E 1168, 58 So. 1022, it was held that where a corporation had permitted a husband to transfer stock standing in his name after the death of his wife, and was sued nearly ten years later by a minor, who had attained his majority, for damages for having allowed the transfer of the community interest in such shares which he had inherited from his mother, the measure of damages should ordinarily be the value of the minor's interest at the date of the transfer. The court said, however, that there are undoubtedly some cases in which to hold the defendant liable only for the value of the shares at the date of their conversion would afford an inadequate remedy.

It has been said that where a demand and refusal either constitute the conversion or afford presumptive evidence of it, it is no infringement of this rule to regard that as the time of estimating the value. *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28.

It is not necessary to allege in the complaint the value of the stock converted provided it contains an allegation of damages. In such a case the value of the stock is evidence of the damage sustained and need not be pleaded. *Humphreys v. Minnesota Clay Co.*, 94 Minn. 469, 103 N. W. 338.

Evidence of the value of the stock more than two years after the date of the conversion is inadmissible.

Torp v. Clemons, 37 Nev. 474, 142 Pac. 1115.

²⁹ *Citizens' St. R. Co. v. Robbins*, 144 Ind. 671, 43 N. E. 649, 42 N. E. 916.

"To allow merely their value at the time of conversion would, in most cases, afford a very inadequate remedy, and, in the case of a broker, holding the stocks of his principal, it would afford no remedy at all. The effect would be to give to the broker the control of the stock, subject only to nominal damages. The real injury sustained by the principal consists not merely in the assumption of control over the stock, but in the sale of it at an unfavorable time, and for an unfavorable price. Other goods wrongfully converted are generally supposed to have a fixed market value at which they can be replaced at any time; and hence with regard to them, the ordinary measure of damages is their value at the time of conversion, or, in the case of sale and purchase, at the time fixed for their delivery. But the application of this rule to stocks would as before said, be very inadequate and unjust." *Gáligher v. Jones*, 129 U. S. 193, 32 L. Ed. 658, quoted in *Morris v. Wood* (Tenn.), 35 S. W. 1013.

The general rule that the measure of damages for conversion is the value of the property at the time it was converted "has been found inadequate to furnish just indemnity for the losses occasioned by the conversion of, or the wrongful failure to deliver, stocks and other properties of like character, the values of which are subject to frequent and wide fluctuations. The general rule gives to the agent, broker, or person in possession of such property, that is really val-

said in support of it that, "While it makes it possible for the wrongdoer to profit by a subsequent rise of value, it prevents both parties from speculating thereon."³⁰

Some courts hold that the proper measure of damages is the highest intermediate value of the stock between the time of conversion and a reasonable time after the owner has received notice of the conversion to enable him to replace the stock.³¹ This rule is based upon the theory

uable, frequent opportunity to convert it to his own use, at a time when its market price is far below its actual value, and thus offers a prize for the breach of duty, while it often leaves the injured party remediless." *McKinley v. Williams*, 74 Fed. 94.

³⁰ *Siegel v. Riverside Box & Lumber Co.* (N. J. Eq.), 99 Atl. 407.

³¹ *United States*. *Galigher v. Jones*, 129 U. S. 193, 32 L. Ed. 658, rev'g 3 Utah 54, 1 Pac. 15; *Wilson v. Colorado Min. Co.*, 227 Fed. 721; *In re Swift*, 114 Fed. 947; *McKinley v. Williams*, 74 Fed. 94.

Indiana. *Citizens' St. R. Co. v. Robbins*, 144 Ind. 671, 43 N. E. 649, 42 N. E. 916; *B. L. Blair Co. v. Rose*, 26 Ind. App. 487, 60 N. E. 10. See also *Vernon, G. & R. R. Co. v. Washington Tp. of Decatur County*, 48 Ind. App. 309, 95 N. E. 599. "Especially is this the correct rule where the act of conversion is not wilful and fraudulent, but where * * * it is without benefit to the party charged with conversion, but is from a mere omission to carefully observe the proceedings under which the purchase of the stock was claimed." *Citizens' St. R. Co. v. Robbins*, 144 Ind. 671, 43 N. E. 649, 42 N. E. 916. "The time when the converted stock so takes the value so chargeable to the defendant is the time when a technical conversion takes place." *Citizens' St. R. Co. v. Robbins*, 144 Ind. 671, 43 N. E. 649, 42 N. E. 916. Since the natural, necessary and direct result of the conversion is to deprive the owner of the stock and damage him to the ex-

tent of its value, a general allegation of damage is sufficient. *B. L. Blair Co. v. Rose*, 26 Ind. App. 487, 60 N. E. 10.

Iowa. *In Doyle v. Burns*, 123 Iowa 488, 99 N. W. 195, and *Loetscher v. Dillon*, 119 Iowa 202, 93 N. W. 98, the court adopted Mr. Sedgwick's rule that where the stock is marketable, the measure of damages is the highest intermediate value between the time of conversion and notice to the owner, if the stock has been paid for, or, if the purchase price has not been paid, the highest value between the conversion and the bringing of the action, provided it is brought within a reasonable time (2 Sedgwick on Damages, § 507). *In Dooley v. Gladiator Consol. Gold Mines & Milling Co.*, 134 Iowa 468, 13 Ann. Cas. 297, 109 N. W. 864, it was held that where the conversion consists in a refusal by the corporation to transfer the stock to the plaintiff, he may recover the full value of the stock at the time demand to transfer was made.

New York. *Griggs v. Day*, 158 N. Y. 1, 52 N. E. 692, rev'g 21 App. Div. 442, 47 N. Y. Supp. 609; *Smith v. Savin*, 141 N. Y. 315, 36 N. E. 338; *Barnes v. Brown*, 130 N. Y. 372, 29 N. E. 760; *Wright v. Bank of Metropolis*, 110 N. Y. 237, 1 L. R. A. 289, 6 Am. St. Rep. 356, 18 N. E. 79; *Colt v. Owens*, 90 N. Y. 368; *Gruman v. Smith*, 81 N. Y. 25, 26; *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507, 66 N. Y. 518, 23 Am. Rep. 80, overruling *Markham v. Jaudon*, 41 N. Y. 235, and *Romaine v. Van Allen*, 26 N. Y.

that justice and fair dealing impose upon the party whose stock is converted the duty of making his loss as light as possible.³² What is a reasonable time is a question of law for the court, where the facts are undisputed and different inferences cannot reasonably be drawn from them.³³

In Pennsylvania the measure of damages is the market value of the stock at the time of the conversion, with interest, except in cases involving an actual wrongful conversion or breach of trust, in which case it is the highest value attained by the stock between the time of conversion and the date of the trial.³⁴

309. See also *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623. In *Kavanaugh v. McIntyre*, 74 Misc. 222, 133 N. Y. Supp. 679, it was held that where stock is intentionally converted by brokers and sold, the owner may recover the highest value reached by the stock down to the time of the trial, especially where that price was reached at a time when the action was progressing with reasonable celerity. The judgment was affirmed by the Appellate Division (151 App. Div. 910, 135 N. Y. Supp. 1120) without opinion, and its judgment was affirmed by the Court of Appeals (210 N. Y. 175, 104 N. E. 135) in an opinion which did not refer to or discuss the question of damages. The holding of the lower court was expressly based on *Romaine v. Van Allen*, 26 N. Y. 309, and *Markham v. Jaudon*, 41 N. Y. 235, which were overruled by *Baker v. Drake*, 53 N. Y. 211, 13 Am. Rep. 507, 66 N. Y. 518, 23 Am. Rep. 80, at least in so far as they attempted to lay down a rule of damages applicable in all cases. The court makes no reference to the latter case, nor to the later cases previously cited which uphold the rule stated in the text. In an action against a broker for damages for selling stock in violation of his contract to carry it for the plaintiff, the latter can recover nominal damages only, where, for thirty days after the sale, he could have purchased

the stock on the market for the price for which it was sold, or less, but failed to do so. *Colt v. Owens*, 90 N. Y. 368.

Oregon. Apparently this is the rule in Oregon. *Morgan v. Johns*, 84 Ore. 557, 165 Pac. 369.

Tennessee. *Morris v. Wood*, 35 S. W. 1013.

Utah. See dictum in *Walley v. Deseret Nat. Bank*, 14 Utah 305, 315, 47 Pac. 147.

³² *Griggs v. Day*, 158 N. Y. 1, 52 N. E. 692, rev'g 21 N. Y. App. Div. 442, 47 N. Y. Supp. 609.

³³ *Griggs v. Day*, 158 N. Y. 1, 52 N. E. 692, rev'g 21 N. Y. App. Div. 442, 47 N. Y. Supp. 609; *Wright v. Bank of Metropolis*, 110 N. Y. 237, 1 L. R. A. 289, 6 Am. St. Rep. 356, 18 N. E. 79.

In *Griggs v. Day*, *supra*, it was held that four years, or even one year, was more than a reasonable time.

³⁴ *Learock v. Paxson*, 208 Pa. 602, 57 Atl. 1097; *Pennsylvania Co. for Insurance on Lives, etc. v. Philadelphia, G. & N. R. Co.*, 153 Pa. St. 160, 25 Atl. 1043; *North v. Phillips*, 89 Pa. St. 250; *Huntingdon & B. T. M. Railroad & Coal Co. v. English*, 86 Pa. St. 247; *Work v. Bennett*, 70 Pa. St. 484; *Neiler & Warren v. Kelley*, 69 Pa. St. 403; *Musgrave v. Beckendorff*, 53 Pa. St. 310; *Reitenbaugh v. Ludwick*, 31 Pa. St. 131.

Under the California Code the owner may recover either the value of the stock at the time of the conversion, with interest, or where the action has been prosecuted with reasonable diligence, its highest market value at any time between the conversion and the verdict, without interest, at his election.³⁵

If a certificate of stock only, as distinguished from the stock, is converted, the action must be for conversion of the certificate, and the measure of damages is not the value of the stock, but the actual loss sustained.³⁶ But there is authority to the effect that the plaintiff under such circumstances is entitled to recover the full value of the shares represented by the certificate.³⁷

§ 3450. — Where plaintiff's interest is a qualified one. Where stock is converted by one to whom it was pledged as security for a debt, the amount due the defendant is to be deducted in estimating the pledgor's damages.³⁸ A pledgee's measure of damages for the con-

³⁵ Civ. Code, § 3336. *Potts v. Paxton*, 171 Cal. 493, 153 Pac. 957; *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476; *Myers v. Chittyna Exploration Co.*, 20 Cal. App. 418, 129 Pac. 469. See also *Fromm v. Sierra Nevada Silver Min. Co.*, 61 Cal. 629; *Dent v. Holbrook*, 54 Cal. 145; *Tulley v. Tranor*, 53 Cal. 274; *Thompson v. Toland*, 48 Cal. 99; *Page v. Fowler*, 39 Cal. 412, 2 Am. Rep. 462; *Hamer v. Hathaway*, 33 Cal. 117; *Douglass v. Kraft*, 9 Cal. 562.

This measure of damages applies to mining stocks, notwithstanding the fact that they are subject to great fluctuations in value. *Potts v. Paxton*, 171 Cal. 493, 153 Pac. 957.

"A plaintiff is entitled to the highest market value only where he has prosecuted his action with reasonable diligence. This highest market value is the highest market value after the conversion and up to the moment of the rendition of the verdict, and manifestly during all of that time, if he has prosecuted his action with reasonable diligence, the option or election is open to him. He is not required to plead it. It is sufficient

if in any appropriate way, even by oral declaration in open court, he announces his determination to demand the highest market value." And he does not, by laying his damages in the complaint at the value of the property when converted, deprive himself of the right to insist upon the alternative measure of damages at the trial. *Potts v. Paxton*, 171 Cal. 493, 153 Pac. 957.

Where several years elapsed between the commencement of the action and the trial, and there is no finding that the action has been prosecuted with reasonable diligence, the measure of damages is the value of the shares at the time of the conversion, with interest. *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476.

³⁶ *Daggett v. Davis*, 53 Mich. 35, 51 Am. Rep. 91, 18 N. W. 548.

³⁷ *Connor v. Hillier*, 11 Rich. L. (S. C.) 193, 73 Am. Dec. 105.

³⁸ *United States v. Davis v. Finch*, 236 Fed. 89.

Kentucky. *Kentucky Title Sav. Bank & Trust Co. v. McClarty*, 174 Ky. 171, 191 S. W. 892.

version of the pledged stock by the corporation is not, necessarily, the value of the stock, but the value of his special interest therein, which would be measured by the indebtedness to which it was collateral, but not exceeding the value of the property.³⁹ And the bur-

Maryland. *Harris v. President & Directors of Franklin Bank*, 77 Md. 423, 26 Atl. 523.

Massachusetts. See *Fisher v. Brown*, 104 Mass. 259, 6 Am. Rep. 235.

Michigan. *Feige v. Burt*, 118 Mich. 243, 74 Am. St. Rep. 390, 77 N. W. 928.

New York. *Smith v. Savin*, 141 N. Y. 315, 36 N. E. 338; *Kavanaugh v. McIntyre*, 74 Misc. 222, 133 N. Y. Supp. 679, aff'd 151 App. Div. 910, 135 N. Y. Supp. 1120, aff'd 210 N. Y. 175, 104 N. E. 135.

Pennsylvania. *Work v. Bennett*, 70 Pa. St. 484.

But to be entitled to such a deduction, the defendant must plead such indebtedness in mitigation of damages, since otherwise, though the jury might deduct the amount of the debt, there would be nothing in the record which the debtor could plead in bar of a subsequent action to recover it. *Morgan v. Johns*, 84 Ore. 557, 165 Pac. 369.

Where one with whom shares have been pledged as collateral wrongfully sells the same for the full market price, and the pledgor files a bill in equity to redeem, his recovery is not limited to the damages which he might recover in an action of trover, but he is entitled to be placed in the same position as if the sale had not been made, and the defendant, therefore, may be charged with the value of the shares at the time of filing the bill. *Fowle v. Ward*, 113 Mass. 548, 18 Am. Rep. 534.

³⁹*Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226; *Second Nat. Bank of Grand Forks v. First Nat. Bank*,

8 N. D. 50, 76 N. W. 504; *Brown v. Union Savings & Loan Ass'n*, 28 Wash. 657, 69 Pac. 383.

The measure of damages is the amount of the debt with interest. *Bank of Holly Springs v. Pinsoq*, 58 Miss. 421, 38 Am. Rep. 330.

But where the conversion takes place after the stock is sold under the terms of the pledge on default and is bought by the pledgee, who thereby acquires the pledgor's title free from any equity of redemption, the measure of damages is the value of the shares. *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226.

Where stock is pledged to secure a debt the amount of which is undetermined, and the corporation refuses to make the transfer until the amount of the debt is established, but then does so, the pledgee is not entitled to recover for the depreciation in the value of the stock in the meantime, where he had no right to sell it during that time, since the loss is that of the pledgor. *Eisenhauer v. New Orleans Cotton Exchange*, 140 La. 574, 73 So. 685. But the pledgee was entitled to lease the stock during that period and hence may recover its rental value during that time. *Id.*

When a pledgee of stock sues the corporation for refusal to transfer the stock to him on its books, a money judgment for him must be limited to his special interest in the stock, not exceeding the value of the stock, and he must prove his interest before any money judgment can be rendered in his favor. *Second Nat. Bank of Grand Forks v. First Nat. Bank of St. Thomas*, 8 N. D. 50, 76 N. W. 504.

den is upon him to establish the amount of such special interest.⁴⁰ When shares are converted by the corporation by an unauthorized or invalid forfeiture or sale for nonpayment of assessments, the measure of damages is not the value of the shares, but their value less the amount due thereon.⁴¹ And it has been held that the amount of the assessments and the expenses of the sale must also be deducted where a person holding the stock of another in trust for him is guilty of a conversion in purchasing the stock at a sale for the nonpayment of an assessment and afterwards disposing of the same.⁴²

It has also been held that where stock is converted by the corporation before the certificates are delivered to a subscriber, the latter may recover the difference between the market and par values less the amount, if any, unpaid on the stock.⁴³

§ 3451. — Method of estimating value. The value of shares of stock for the purpose of ascertaining the damages for its conversion is not necessarily its par value, but it is its actual value, whether above or below par.⁴⁴ It is not the market value, if it appears that the actual value was different,⁴⁵ or if it has no market value.⁴⁶ But the market value, if there was any, is to be taken as the actual value, in the absence of evidence to the contrary.⁴⁷

⁴⁰ Second Nat. Bank of Grand Forks v. First Nat. Bank, 8 N. D. 50, 76 N. W. 504.

⁴¹ Budd v. Multnomah St. Ry. Co., 15 Ore. 413, 3 Am. St. Rep. 169, 15 Pac. 659.

It has been held in California that in order to maintain an action for conversion against the corporation for selling the stock for nonpayment of an assessment, the plaintiff must pay or tender to the corporation, or the party holding the stock sold, the amount for which the same was sold, by analogy to the statute makes such payment or tender a condition precedent to the recovery of the stock because of irregularities in the proceedings. Ward v. California Celery & Produce Co., 15 Cal. App. 84, 113 Pac. 888.

⁴² Freeman v. Harwood, 49 Me. 195.

⁴³ Nicholson-Watson Shoe & Clothing Co. v. Urquhart, 32 Tex. Civ. App. 527, 75 S. W. 45.

⁴⁴ Myers v. Chittyna Exploration Co., 20 Cal. App. 418, 129 Pac. 469; Hawkins v. Mellis, Pirie & Co., 127 Minn. 303, Ann. Cas. 1916 C 640, 149 N. W. 663; State v. Carpenter, 51 Ohio St. 83, 46 Am. St. Rep. 556, 37 N. E. 261; Freon v. Carriage Co., 42 Ohio St. 30, 51 Am. Rep. 794; Slemmons v. Thompson, 23 Ore. 215, 31 Pac. 514. See also Enders v. Board of Public Works, 1 Gratt. (Va.) 364; Bull v. Douglas, 4 Munf. (Va.) 303.

⁴⁵ State v. Carpenter, 51 Ohio St. 83, 46 Am. St. Rep. 556, 37 N. E. 261; Freon v. Carriage Co., 42 Ohio St. 30, 51 Am. Rep. 794. See Redding v. Godwin, 44 Minn. 355, 46 N. W. 563.

⁴⁶ Morgan v. Johns, 84 Ore. 557, 165 Pac. 369.

⁴⁷ Sturges v. Keith, 57 Ill. 451, 11 Am. Rep. 28; Darling v. Potts, 118 Mo. 506, 24 S. W. 461; Hetrick v. Smith, 67 Wash. 664, 122 Pac. 363.

The market value is what the stock

If it had no market value, the actual value is to be proven by other evidence,⁴⁸ as by proof of its dividend earning capacity, the value of the corporate assets, individual sales of stock not under compulsion, and the like.⁴⁹

was selling for in the market at the time in question. *Dooley v. Gladiator Consol. Gold Mines & Milling Co.*, 134 Iowa 468, 13 Ann. Cas. 297, 109 N. W. 864.

The market value of stock is the actual price at which it is commonly sold. That price may be fixed by sales of the stock in market at or about a given time. If no sales can be shown on the precise day, recourse may be had to sales before or after such day, and for that inquiry a reasonable range in point of time is allowable. *Douglass v. Mercedes*, 25 N. J. Eq. 144.

48 California. *Hitchcock v. McElrath*, 72 Cal. 565, 14 Pac. 305.

Colorado. *Moynahan v. Prentiss*, 10 Colo. App. 295, 51 Pac. 94.

Massachusetts. *Hagar v. Norton*, 188 Mass. 47, 73 N. E. 1073.

Missouri. *Moffit v. Hereford*, 132 Mo. 513, 34 S. W. 252; *Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co.*, 118 Mo. 447, 24 S. W. 129.

Montana. *Pabst Brewing Co. v. Montana Brewing Co.*, 19 Mont. 294, 48 Pac. 234.

New York. *Brown v. Lawton*, 53 Hun 636, 6 N. Y. Supp. 137.

Oregon. *Slemmons v. Thompson*, 23 Ore. 215, 31 Pac. 514.

A finding that the value of stock on a certain day was much below its previous value, or was of no value, is not justified by the mere fact that there was no market sale for it on such day. *Pabst Brewing Co. v. Montana Brewing Co.*, 19 Mont. 294, 48 Pac. 234.

If it has no market value, and after the conversion the entire corporate property is sold and a part of the proceeds distributed to the stockholders, the defendant will be required to account to the owner for whatever he has

received from the corporation on account of the stock, with interest on that amount from the time of its receipt until the date of the judgment. *Loetscher v. Dillon*, 119 Iowa 202, 93 N. W. 98.

49 Feige v. Burt, 124 Mich. 565, 83 N. W. 367; *Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co.*, 118 Mo. 447, 24 S. W. 129.

"When stock in a corporation has not figured in the markets, and there have been no sales or dealings therein, its actual value must be determined at the fair price which a person who desires to buy would be willing to pay, taking into consideration the original capital, how far there has been profit or loss in the business carried on, the assets and liabilities, the future prospects, and everything that goes to affect the value of the shares of stock." *Hawkins v. Mellis, Pirie & Co.*, 127 Minn. 393, Ann. Cas. 1916 C 640, 149 N. W. 663.

If there is no market value, proof may be given of transactions in the particular stock, sales, options and prices at which such stock has been sold or optioned, and at which it can be sold or optioned. *Moynahan v. Prentiss*, 10 Colo. App. 295, 302, 51 Pac. 94; *Kuhn v. McKay*, 7 Wyo. 42, 51 Pac. 205, 49 Pac. 473. See also *Smith v. Traders' Nat. Bank*, 82 Tex. 368, 17 S. W. 779.

Evidence of what the stock sold for in a bona fide transaction is relevant to prove its value under such circumstances. *Humphreys v. Minnesota Clay Co.*, 94 Minn. 469, 103 N. W. 338.

Evidence of a sale of certain other shares of stock of the corporation a short time prior to the conversion in question is admissible. *B. L. Blair Co.*

It has been held that, in the absence of any evidence as to the actual value, it will be presumed that the par value was the actual value.⁵⁰ But it has been held that there is no such presumption where

v. Rose, 26 Ind. App. 487, 60 N. E. 10.

Actual value of stock may be established by proof of its dividend-earning capacity, or the value of its assets, or individual sales of stock not under compulsion. Greer v. Lafayette County Bank, 128 Mo. 559, 30 S. W. 319; Hewitt v. Steele, 118 Mo. 463, 24 S. W. 440; Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co., 118 Mo. 447, 24 S. W. 129.

Actual value of the stock of a corporation "may be shown by proof of the value of the property and business of the corporation, its good will, and dividend-earning capacity." State v. Carpenter, 51 Ohio St. 83, 46 Am. St. Rep. 556, 37 N. E. 261; Freon v. Carriage Co., 42 Ohio St. 30, 51 Am. Rep. 794.

Its value is to be taken as its due proportion of the net value of the corporate assets and of its good-will or money earning capacity. Leurey v. Bank of Baton Rouge, 131 La. 30, Ann. Cas. 1913 E 1168, 58 So. 1022.

The value of the corporate assets, the dividends paid, the permanency of the business, the control of the stock, and other circumstances of a like nature, may be taken into consideration. Moffitt v. Hereford, 132 Mo. 513, 34 S. W. 252. And see Nelson v. First Nat. Bank of Killingley, 69 Fed. 798.

Where the stock has no known market value, and none of it has ever been listed for sale or sold, its "value may be proven by showing the value of the property and business of the corporation at the date of the conversion less the liabilities at that time." Hetrick v. Smith, 67 Wash. 664, 122 Pac. 363.

The value of the stock cannot be determined by the amount realized from a sale of the personal property of the corporation by its officers and from a sale of its realty under foreclosure of

a mortgage held by the defendant, both sales being after the conversion. Feige v. Burt, 124 Mich. 565, 83 N. W. 367.

The value cannot be ascertained by considering the value of the corporate assets alone, but the amount of its indebtedness must also be considered. Morgan v. Johns, 84 Ore. 557, 165 Pac. 369.

The condition of the assets and liabilities of a corporation at a certain time does not tend to show the value of its stock four years earlier, in the absence of anything to connect the two periods. Jones v. Ellis' Estate, 68 Vt. 544, 35 Atl. 488.

Newspaper quotations are admissible to show value without requiring proof as to how the information published was obtained, where it is shown that the paper in question is accepted by the trade as trustworthy and reliable in stating the market price of the stock, but not otherwise. Jones v. Ortel, 114 Md. 205, 78 Atl. 1030.

As to proof of the value of stock in a corporation which has been placed in the hands of a receiver in proceedings for its dissolution as insolvent, see Nelson v. First Nat. Bank of Killingley, 69 Fed. 798.

⁵⁰ Hawkins v. Mellis, Pirie & Co., 127 Minn. 393, Ann. Cas. 1916 C 640, 149 N. W. 663; Moffitt v. Hereford, 132 Mo. 513, 34 S. W. 252; Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co., 118 Mo. 447, 24 S. W. 129; Harris' Appeal (Pa.), 12 Atl. 743. See also Vernon, G. & R. R. Co. v. Washington Tp. of Decatur County, 48 Ind. App. 309, 95 N. E. 599; Thompson v. Metropolitan Bldg. Co., 95 Wash. 546, 164 Pac. 222.

In Siegel v. Riverside Box & Lumber Co. (N. J. Eq.), 99 Atl. 407, it is said

a loss of capital is shown,⁵¹ or where it seems probable that the stock has never been in fact fully paid, and the business has been conducted at a loss,⁵² or where the plaintiff alleges his damages at a sum less than the par value of the converted stock.⁵³

§ 3452. — Special damages, interest, dividends. In addition to the value of the stock, the plaintiff is entitled to recover any special damages resulting proximately from the conversion, and which he alleges and proves,⁵⁴ as, for example, damages resulting from the loss of a sale of the stock due to the wrongful acts of the defendant.⁵⁵ If, by reason of a wrongful refusal of the corporation to make a transfer, the vendor of stock loses a sale, and afterwards sells it for a less sum, he may recover the difference between what he actually got for it and the amount of the first offer, provided he used due diligence to get the best price obtainable.⁵⁶ By statute in California he is entitled to a fair compensation for the time and money properly expended in the pursuit of the property.⁵⁷

Generally the plaintiff is entitled to interest on the value of the stock from the time of the conversion to the time of the verdict.⁵⁸

that it may be that there would be such a presumption in some cases.

In *Consolidated Mining & Prospecting Co. v. Huff*, 62 Kan. 405, 63 Pac. 442, it was held that an allegation that the capital stock of the company was "divided into 100,000 shares of the par value of one dollar each," was not an allegation of either market value or special value.

⁵¹ "In the case at bar it was shown that after the corporation had been in operation a little over a year its original capital of \$10,000 had dwindled to \$6,846.69 in book assets. This is adequate reason for saying that the par value was not presumptively the actual value of the stock." *Hawkins v. Mellis, Pirie & Co.*, 127 Minn. 393, Ann. Cas. 1916 C 640, 149 N. W. 663.

⁵² *Siegel v. Riverside Box & Lumber Co. (N. J. Eq.)*, 99 Atl. 407.

⁵³ Although a certificate introduced in evidence states that the shares are of the par value of one dollar and are fully paid up, it cannot be presumed that they were of that value and that

the damages for their conversion were that sum where the complaint alleges the damages to be twenty cents a share. The actual damages may be less than the par value of the shares. *Uncle Sam Oil Co. v. Forrester*, 79 Kan. 610, 100 Pac. 512.

⁵⁴ *Boylan v. Huguet*, 8 Nev. 345. See also *Seymour v. Ives*, 46 Conn. 109.

The damages recoverable must be such as result naturally and proximately from the conversion. *Seymour v. Ives*, 46 Conn. 109.

Special damages are not recoverable unless they are specially pleaded. *Seymour v. Ives*, 46 Conn. 109.

⁵⁵ *Humphreys v. Minnesota Clay Co.*, 94 Minn. 469, 103 N. W. 338.

⁵⁶ *Hilton v. Sylvania & G. R. Co.*, 8 Ga. App. 10, 68 S. E. 746.

⁵⁷ Civ. Code, § 3336. *Myers v. Chittyna Exploration Co.*, 20 Cal. App. 418, 129 Pac. 469.

⁵⁸ *United States v. Wilson*, Colorado Min. Co., 227 Fed. 721.

Arizona. *Salt River Canal Co. v. Hickey*, 4 Ariz. 240, 36 Pac. 171.

And, as a rule, he is entitled to recover the amount of any dividends received by the defendant upon the stock up to the time of the conversion, with interest thereon to the time of the trial,⁵⁹ although there

Colorado. *Grimes v. Barndollar*, 58 Colo. 421, 148 Pac. 256; *Continental Divide Min. Inv. Co. v. Bliley*, 23 Colo. 160, 46 Pac. 633.

Illinois. *Sturges v. Keith*, 57 Ill. 451, 11 Am. Rep. 28.

Iowa. *Dooley v. Gladiator Consol. Gold Mines & Milling Co.*, 134 Iowa 468, 13 Ann. Cas. 297, 109 N. W. 864; *Doyle v. Burns*, 123 Iowa 488, 99 N. W. 195.

Louisiana. *Leurey v. Bank of Baton Rouge*, 131 La. 30, Ann. Cas. 1913 E 1168, 58 So. 1022.

Maine. *Freeman v. Harwood*, 49 Me. 195. See *McKenney v. Haines*, 63 Me. 74.

Maryland. *Merchants' Nat. Bank v. Williams*, 110 Md. 334, 72 Atl. 1114; *Baltimore City Passenger Ry. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402.

Massachusetts. See *Sargent v. Franklin Ins. Co.*, 8 Pick. 90, 19 Am. Dec. 306.

Michigan. *Hubbell v. Blandy*, 87 Mich. 209, 24 Am. St. Rep. 154, 49 N. W. 502.

Missouri. *Darling v. Potts*, 118 Mo. 506, 24 S. W. 461.

Nevada. *Torp v. Clemons*, 37 Nev. 474, 142 Pac. 1115; *Robinson Min. Co. v. Riepe*, 37 Nev. 27, 138 Pac. 910; *Boylan v. Huguet*, 8 Nev. 345; *O'Meara v. North American Min. Co.*, 2 Nev. 112.

New Hampshire. *Pinkerton v. Manchester & L. R. R.*, 42 N. H. 424.

New York. *Ormsby v. Vermont Copper Min. Co.*, 56 N. Y. 623; *White v. Smith*, 54 N. Y. 522.

Pennsylvania. *Pennsylvania Co. for Insurance on Lives, etc. v. Philadelphia, G. & N. R. Co.*, 153 Pa. St. 160, 25 Atl. 1043; *North v. Phillips*, 89 Pa. St. 250. See *Huntingdon & B. T. M.*

Railroad & Coal Co. v. English, 86 Pa. St. 247.

Virginia. See *Enders v. Board of Public Works*, 1 Gratt. 364; *Bull v. Douglas*, 4 Munf. 303, 6 Am. Dec. 518.

Under the California code he is entitled to the value of the property at the time of the conversion, with interest, or where the action has been prosecuted with reasonable diligence, the highest market value of the property at any time between the conversion and the verdict, without interest, at his election. *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476; *Myers v. Chittyna Exploration Co.*, 20 Cal. App. 418, 129 Pac. 469.

He is entitled to interest from the time the value of the stock is fixed down to the time of the verdict, "for the reason that he is at that time entitled to the money value of the stock, rather than to the stock itself, * * * and the debt being, by operation of law, created at that time, plaintiff should have interest thereon." *Doyle v. Burns*, 123 Iowa 488, 99 N. W. 195.

Interest from the time of the conversion to judgment is allowed as damages for detention of the value of the property. *Boylan v. Huguet*, 8 Nev. 345.

The plaintiff is not entitled to interest where the measure of damages is the highest value reached by the stock between the conversion and the trial. *Kavanaugh v. McIntyre*, 74 N. Y. Misc. 222, 133 N. Y. Supp. 679, aff'd 151 N. Y. App. Div. 910, 135 N. Y. Supp. 1120, aff'd 210 N. Y. 175, 104 N. E. 135.

59 Georgia. *Nutting v. Thomasson*, 57 Ga. 418.

Indiana. *Citizens' St. R. Co. v. Rob-*

is authority to the contrary.⁶⁰ Dividends declared after both the actual and technical conversion cannot be recovered where the measure of damages is the value of the stock at the time of the conversion or a reasonable time thereafter.⁶¹

§ 3453. — Nominal damages. If the plaintiff has sustained no actual damages, because the stock was of no value at all, or was returned to him, or for any other reason, he can recover nominal damages, and such damages only.⁶² And the same is true if there is no

bins, 144 Ind. 671, 43 N. E. 649, 42 N. E. 916.

Iowa. Doyle v. Burns, 123 Iowa 488, 99 N. W. 195.

Maine. Freeman v. Harwood, 49 Me. 195.

Maryland. Baltimore City Passenger R. Co. v. Sewell, 35 Md. 238, 6 Am. Rep. 402.

Michigan. Hubbell v. Blandy, 87 Mich. 209, 24 Am. St. Rep. 154, 49 N. W. 502.

Nevada. Bercich v. Marye, 9 Nev. 312.

"This for the reason that, until the value of the stock is fixed for the purpose of determining the plaintiff's damage, he was entitled to the dividends earned from time to time, for the property was his, under all circumstances, until that time. After the value is fixed, and the amount awarded is paid, the title to the stock passes to the defendant, by relation back to the time when the value is determined, and from that time on he is, to all intents and purposes, the owner of the stock." Doyle v. Burns, 123 Iowa 488, 99 N. W. 195.

⁶⁰ In California the statute fixing the measure of damages for conversion does not provide for the recovery of dividends, and hence they are not recoverable as a part of the damages for the conversion. Ralston v. Bank of California, 112 Cal. 208, 44 Pac. 476.

In Pennsylvania interest on the value of the stock is substituted for

the dividends in cases not involving an actual wrongful conversion or breach of trust. Pennsylvania Co. for Insurance, on Lives, etc. v. Philadelphia, G. & N. R. Co., 153 Pa. St. 160, 25 Atl. 1043.

But dividends are recoverable where there has been such an actual wrongful conversion or breach of trust. Bank of Montgomery v. Reese, 26 Pa. St. 143.

⁶¹ Citizens' St. R. Co. v. Robbins, 144 Ind. 671, 43 N. E. 649, 42 N. E. 916; Leuréy v. Bank of Baton Rouge, 131 La. 30, Ann. Cas. 1913 E 1168, 58 So. 1022.

Pending an action against a corporation for conversion of shares of stock, on its refusal to recognize the plaintiff as a stockholder, he cannot maintain an action for dividends. Hughes v. Vermont Copper Min. Co., 72 N. Y. 207.

⁶² McLean v. Charles Wright Medicine Co., 96 Mich. 479, 56 N. W. 68; Fosdick v. Greene, 27 Ohio St. 484, 22 Am. Rep. 328; Budd v. Multnomah St. R. Co., 15 Ore. 413, 3 Am. St. Rep. 169, 15 Pac. 659. See also Barnes v. Brown, 130 N. Y. 372, 29 N. E. 760.

If the defendant returns the stock to the plaintiff before trial, and the plaintiff accepts the same, he cannot recover more than nominal damages. Owen v. Williams, 38 Colo. 79, 89 Pac. 778; Carpenter v. American Building & Loan Ass'n, 54 Minn. 403, 40 Am. St. Rep. 345, 56 N. W. 95.

proof and no presumption as to the value of the converted stock.⁶³

§ 3454. Effect of suit on status of stockholder. By suing in tort as for a conversion the owner gives up his position as a stockholder,⁶⁴ and the person found guilty of the conversion becomes the owner of the converted shares.⁶⁵

VI. AMOUNT OF CAPITAL STOCK AND INCREASE AND REDUCTION THEREOF

§ 3455. Amount of original capital stock. The amount of the capital stock which a corporation is authorized or required to have is fixed by the charter or the general law under which it is formed, or by its articles or certificate of association or incorporation under authority of the charter or general law, and it is well settled that, when the amount thereof is so fixed, it cannot be changed, even with the consent of all the stockholders, directly or indirectly, unless the power to change the same has been expressly conferred by the legislature.⁶⁶

The petition in an action to recover damages for a refusal of the corporation to transfer stock on its books must allege facts showing damage from the refusal. *Hilton v. Sylvia & G. R. Co.*, 8 Ga. App. 10, 68 S. E. 746.

⁶³ *Siegel v. Riverside Box & Lumber Co.* (N. J. Eq.), 99 Atl. 407; *Griggs v. Day*, 158 N. Y. 1, 52 N. E. 692, 21 N. Y. App. Div. 442, 47 N. Y. Supp. 609; *Swartz v. Rosseau*, 112 N. Y. Supp. 1065.

⁶⁴ *Miller v. Doran*, 151 Ill. App. 527, aff'd 245 Ill. 200, 91 N. E. 1039; *Hughes v. Vermont Copper Min. Co.*, 72 N. Y. 207.

⁶⁵ *Davis v. Finch*, 236 Fed. 89; *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476; *Doyle v. Burns*, 123 Iowa 488, 99 N. W. 195; *Siegel v. Riverside Box & Lumber Co.* (N. J. Eq.), 99 Atl. 407.

Upon payment of the judgment in the action the title passes to the judgment debtor. *Siegel v. Riverside Box & Lumber Co.* (N. J. Eq.), 99 Atl. 407.

"After the value is fixed, and the amount awarded is paid, the title to

the stock passes to the defendant by relation back to the time when the value is determined and from that time on he is, to all intents and purposes, the owner of the stock." *Doyle v. Burns*, 123 Iowa 488, 99 N. W. 195.

Where the conversion of the stock and its value is admitted, it is not necessary for the court to order a return of the stock by the defendant as a condition precedent to the entry of a judgment for the plaintiff. *Belus v. Peters*, 165 Cal. 112, 130 Pac. 1186.

⁶⁶ **Connecticut.** *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560.

Massachusetts. *Salem Mill Dam Corporation v. Ropes*, 6 Pick. 23.

New Jersey. *State v. Morristown Fire Ass'n*, 23 N. J. L. 195.

New York. *Sutherland v. Olcott*, 95 N. Y. 100.

Tennessee. *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

Amount is fixed by charter and divided into aliquot parts. *Leurey v. Bank of Baton Rouge*, 131 La. 30, Ann. Cas. 1913 E 1168, 58 So. 1022.

"A corporation has no implied authority to increase or diminish its capital stock."⁶⁷

A concise statement, which might well have been made of all corporations, is: "The terms and conditions upon which railway corporations may be created, the powers and capital stock they may have, the purposes for which they may increase their capital stock, and the limitations and conditions to be imposed upon the right to such increase, are exclusively matters for legislative action, which cannot be delegated."⁶⁸

If the charter of a corporation or the general law does not fix the amount of its capital stock, it must be fixed by the stockholders or directors, and this must be done before a subscriber for shares can be held liable on his subscription.⁶⁹ In such a case, it may be fixed by the stockholders, or by the directors under authority from the stockholders, at such amount as they may see fit.⁷⁰ A statute authorizing the members of a corporation to determine the amount of the capital stock, and to issue the same to the persons incorporated to the amount of their interest, authorizes the issue of stock to any amount, and to any persons designated by the members.⁷¹

As was explained in a former section, the capital stock of a corporation is not the same thing as its capital, the capital stock being the fund contributed by the stockholders for the purposes of the corporation, and the capital being the actual assets of the corporation. The capital may be increased by surplus profits, or diminished by losses, but this does not increase or diminish the amount of the capital stock. "The funds of the company may fluctuate. Its capital stock remains invariable, save by legislative enactment."⁷²

⁶⁷ Sutherland v. Olcott, 95 N. Y. 100.

⁶⁸ State v. Great Northern R. Co., 100 Minn. 445, 10 L. R. A. (N. S.) 250, 111 N. W. 289.

⁶⁹ Somerset & K. R. Co. v. Cushing, 45 Me. 524.

⁷⁰ Somerset & K. R. Co. v. Cushing, 45 Me. 524; Com. v. Central Passenger Ry., 52 Pa. St. 506; State v. Bank of Commerce, 95 Tenn. 221, 31 S. W. 993.

Where an act incorporating a railroad company provided that its capital stock should not exceed two thousand shares, that the number of shares should be determined from time to time by the directors, and that, as

soon as two hundred and fifty shares should be subscribed, the company might construct its road, and after more than two hundred and fifty shares had been subscribed, the directors voted to close the subscription books, it was held that the vote was in effect a vote fixing the number of shares to be issued for the time being at the number then subscribed, as ascertained by the subscription books. Lexington & W. C. R. Co. v. Chandler, 13 Mete. (Mass.) 311.

⁷¹ Com. v. Central Passenger Ry. Co., 52 Pa. St. 506.

⁷² State v. Morristown Fire Ass'n, 23 N. J. L. 195. And see § 3414, supra.

§ 3456. Par value of shares and shares without expressed par or nominal value. The amount of money expressed as the par value of the shares is entirely a matter of statutory or charter regulation, although some par value would seem to be necessary in order to define the shares, unless there are statutes like those next to be considered which allow issuance of shares without any par value. A large group of states allow any par value from one to one hundred dollars, or not exceeding one hundred dollars.⁷³ Other states have other limits, and some appear to fix no limits.⁷⁴

In Delaware and New York there have recently been enacted statutes authorizing the issuance of stock without any expressed par value. These are distinct from a well-known class of statutes which allow issuance of stock of any value but require an expressed value of par, leaving it to the incorporators to fix such value by the articles.⁷⁵ These statutes do not permit the issuance of preferred stock without par value, if the preference is as to principal under the New York statute⁷⁶ or with preference either as to dividends or assets under the Delaware law.⁷⁷

73 Alaska. Not less than one nor more than one hundred dollars. Laws 1913, c. 58, § 2.

Colorado. Not less than one nor more than one hundred dollars. Laws 1899, p. 96, § 1; Rev. St. § 850.

Indiana. Shall not exceed one hundred dollars. Burns' Ann. Stat. 1908, §§ 5084, 4286. (Manufacturing and Mining Act and Voluntary Associations Act.)

Minnesota. Not less than one nor more than one hundred dollars. Gen. St. 1913, § 6181.

Pennsylvania. Any par value not exceeding one hundred dollars each. Laws 1889, p. 180.

Tennessee. One hundred dollars or less. Shannon's Ann. Code, § 2052.

Vermont. Not exceeding one hundred dollars each. Pub. St. 1906, § 4311.

74 Arkansas. Not less than five dollars, no maximum. Kirby's Dig. 1904, §§ 838, 6721.

Connecticut. Not less than twenty-five dollars. Pub. Acts 1903, c. 194, § 63.

Florida. Not less than ten dollars. Gen. Stats. § 2653.

Illinois. Not less than ten nor more than one hundred dollars each. Gen. Corp. Law, § 7.

Massachusetts. Not less than five dollars. Bus. Corp. Law, § 8.

Michigan. Shares must be of the par value of ten dollars or one hundred dollars each. Pub. Acts 1903, No. 232, § 35.

New Hampshire. Not less than twenty-five nor more than five hundred dollars each. Pub. St. c. 147, § 6 as amended by Laws 1907, c. 129.

New York. Not less than five nor more than one hundred dollars. Business Corporation Law, § 2.

75 Delaware. Gen. Corp. Law 1915, §§ 4a, 5; New York Consol. Laws, c. 59 (Stock Corp. Law), §§ 19-23, which was added by Laws 1912, c. 351.

No decisions construing such statutes have been found.

76 Stock "other than preferred stock having a preference as to principal." N. Y. Stock Corp. Law, § 19.

77 Gen. Corp. Law, § 4a.

The New York law applies to reorganized corporations as well as to corporations formed under the act, while the Delaware law permits amendment of the certificate of incorporation to come under it.⁷⁸ In New York "moneyed" corporations and public service corporations cannot issue such stock.⁷⁹ The certificate of incorporation under both statutes is required to state certain facts as a basis for such shares.⁸⁰ The stock certificates also must state similar facts.⁸¹ All such shares are equal to every other share of such stock subject to the preferences, if any, of the preferred stock.⁸² A stated amount of capital, which must be paid in in money or property, is required by the New York law⁸³ which also declares that such stock shall be fully paid and non-assessable.⁸⁴

⁷⁸ N. Y. Stock Corp. Law, § 19; Delaware Gen. Corp. Law, § 4a.

⁷⁹ A "moneyed corporation" or "a corporation under the jurisdiction of any public service commission." N. Y. Stock Corp. Law, § 19.

⁸⁰ In Delaware: "Shall state the total number of shares authorized and that they are without nominal or par value, and the number of shares with which it will commence business, which shall not be less than ten shares; and if there be more than one class of stock * * * a description of the different classes with the terms on which the respective classes of stock are created." Gen. Corp. Law, § 5, subd. 4.

In New York: Must state (1) "the number of shares that may be issued by the corporation, and if any of such shares be preferred stock, the preferences thereof." [Preferences as to principal must also be stated, if any, and the amount of each share thereof, which shall be five dollars or some multiple thereof not exceeding one hundred.] (2) "The amount of capital with which the corporation will carry on business, which amount will not be less than" the amount of stock preferred as to principal, "and in addition thereto a sum equivalent to five dollars or some multiple of five dollars for every share authorized to be issued other than such preferred

stock" but in no event less than five hundred dollars. "Such statements in the certificate shall be in lieu of any statements prescribed by the law under which the corporation was formed or reorganized as to the amount" or capital stock or number of shares or their amount or par value. N. Y. Stock Corp. Law, § 19.

⁸¹ Every certificate for such shares shall state: "the number of shares which it represents, and the number of such shares which the corporation is authorized to issue," the preferred certificates must state the amount of preference in principal and "any other rights and preferences." N. Y. Stock Corp. Law, § 19.

See Delaware Gen. Corp. Law, § 4a, last clause to about the same effect.

⁸² N. Y. Stock Corp. Law, § 19.

"Except that [it may be provided] that such stock shall be divided into different classes with such designations and voting powers or restriction or qualification thereof as shall be stated [in the certificate of incorporation]." Delaware Gen. Corp. Law, § 4a.

⁸³ The corporation cannot begin to carry on business until the stated amount of capital "shall have been fully paid in money or property taken at its actual value." N. Y. Stock Corp. Law, § 20.

⁸⁴ "Any and all shares issued as

In Delaware, however, it is only fully paid and nonassessable when the full consideration has been paid or delivered, and the statute authorizes calls for the unpaid portions of such consideration.⁸⁵ The directors, or the stockholders in meeting, are empowered to fix the consideration on which such stock shall be issued.⁸⁶ Provisions for increase or reduction of such stock, restriction of dividends which would impair capital, valuation of the capital stock or taxation, are also found in the statutes.⁸⁷

§ 3457. Increase of original or authorized capital stock—In general. The distinction elsewhere alluded to between “capital” and “capital stock” is essential to proper consideration of this subject. Any accession to the assets of the corporation is an increase of its “capital” and is one of the objects of its very existence if the corporation is one for profit.⁸⁸ A stock dividend increases the number of shares, leaving the assets the same, and may but does not necessarily increase the authorized capital stock, though it does increase

permitted by this section shall be deemed fully paid and nonassessable and the holder of such shares shall not be liable to the corporation or to its creditors in respect thereof.” N. Y. Stock Corp. Law, § 19.

⁸⁵ Delaware Gen. Corp. Law, §§ 4a, 21.

⁸⁶ “Such corporation may issue and may sell its authorized shares from time to time for such consideration as may be prescribed in the certificate of incorporation, or as from time to time may be fixed by the board of directors pursuant to authority conferred in such certificate, or if such certificate shall not so provide, then by the consent of the holders of two-thirds of each class of shares then outstanding given at a meeting called for that purpose,” etc. N. Y. Stock Corp. Law, § 19.

The Delaware provision is nearly the same. Gen. Corp. Law, § 4a.

⁸⁷ Corporations issuing stock without expressed nominal or par value may increase or reduce capital or increase or reduce the number of shares

in the manner prescribed by N. Y. Stock Corp. Law, § 22.

No dividends may be declared which will “reduce the amount of its capital below the amount stated in the certificate.” N. Y. Stock Corp. Law, § 20.

“The amount of capital stock” of any corporation issuing stock without par value “shall be deemed the aggregate amount specified in the certificate,” and “the amount or the par value of each share” other than valued preferred stock, “shall be deemed to be an aliquot part of the aggregate capital so specified,” etc., with the amount of preferences deducted. N. Y. Stock Corp. Law, § 23.

In Delaware each share is valued at one hundred dollars for purposes of incorporation and franchise taxes only. Gen. Corp. Law, § 4a.

Organization, stock transfer and franchise taxes on or pertaining to such corporations are regulated by section 21 of the New York law.

⁸⁸ See the distinction explained, this chapter, § 3414, supra.

the capitalized portion of the assets.⁸⁹ A fictitious increase exists when new stock is put out without actual assets to represent it, but this may be only an increase in the amount outstanding and not in the amount authorized.⁹⁰ There may be an increase of the number of shares or of their value without increasing the capital stock.⁹¹ Changing common stock to preferred is not an increase of the aggregate, nor does it increase the preferred if there was none before.⁹² It is said that an increase is presumptively for the purpose of selling stock.⁹³

§ 3458. — Power and authority to make increase. When the charter of a corporation, or the general law under which it is formed, or its articles of association under authority thereby conferred, fixes the amount of its capital stock, as is invariably the case, the corpora-

⁸⁹ Stock dividends merely increase the number of shares leaving the amount of assets unchanged. *Lancaster Trust Co. v. Mason*, 152 N. C. 660, 136 Am. St. Rep. 851, 68 S. E. 235.

Stock dividends are an increase of capital stock. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538.

Converts surplus into increased capital. *Bryan v. Aikin*, — Del. Ch. —, 82 Atl. 817.

As between the corporation and the holders a stock dividend is capital, and merely capitalizes accumulated profits permanently. *Bryan v. Aikin*, — Del. Ch. —, 82 Atl. 817.

Does not reduce assets but increases liabilities. The surplus is capitalized. *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

Issuing new stock and using lawful cash dividends to pay for the deferred portion of a subscription thereon, does not show a fraudulent issue within a criminal statute (*How. Ann. St. § 14,872*). *Ford v. Kalamazoo Circuit Judge*, — Mich. —, 158 N. W. 841.

An increase of stock paid for out of accumulated undivided profits, which account was charged accordingly, and credited to capital stock

account, which stock was then distributed, one half to old stockholders pro rata, and the other half sold at a price to employees with distribution of resultant proceeds to old holders pro rata, was substantially a stock dividend. *Bowers v. Post*, 209 Fed. 660.

⁹⁰ Issue of inflated original stock for stock in old corporation was equivalent to fictitious increase. *State v. Citizens Light & Power Co.*, 172 Ala. 232, 55 So. 193.

A transaction to sell the whole stock and to mortgage all the corporate assets for the purpose of paying, in part, the value of the outgoing stockholders' equity in the stock, is obnoxious to Const. art. 9, § 10, forbidding fictitious increases of stock or indebtedness. *Shumpert v. National State Bank of Columbia*, 231 Fed. 82.

⁹¹ As to increase in number or value of shares without change in capital stock, see § 3473, *infra*.

⁹² *California Telephone & Light Co. v. Jordan*, 19 Cal. App. 536, 126 Pac. 598.

⁹³ *Aldrich v. Crawford Chair Co.*, 152 Mich. 369, 116 N. W. 461, 15 Det. L. N. 301.

tion is absolutely without the power to afterwards increase the same, directly or indirectly, even with the consent of all the stockholders, except in so far as the power to do so has been expressly or impliedly conferred upon it by the legislature; and any overissue of stock is therefore void. No principle in the law of corporation is more surely settled than this.⁹⁴ If any stock is put out over this amount it must be regarded as an overissue and unauthorized.⁹⁵ Power to increase its capital stock beyond the amount originally fixed, or to increase the same from time to time, may be conferred upon a corporation by its charter or the general law under which it is organized, or by the articles of association under authority of the charter or general law,⁹⁶ provided the grant of power does not violate any constitutional provision, such as one regulating increases⁹⁷ or such as that against spe-

94 United States. *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Chicago City Ry. Co. v. Allerton*, 18 Wall. 233, 21 L. Ed. 902; *Laredo Improvement Co. v. Stevenson*, 66 Fed. 633.

Alabama. *Grangers' Life & Health Ins. Co. v. Kamper*, 73 Ala. 325.

Georgia. *Clark v. Turner*, 73 Ga. 1.

Illinois. *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, aff'g 63 Ill. App. 593.

Indiana. *McCord v. Ohio & M. R. Co.*, 13 Ind. 220.

New Jersey. *State v. Morristown Fire Ass'n*, 23 N. J. L. 195.

New York. *Sutherland v. Oleott*, 95 N. Y. 93; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Mechanics' Bank v. New York & N. H. R. Co.*, 13 N. Y. 599; *Einstein v. Rochester Gas & Electric Co.*, 77 Hun 149, 28 N. Y. Supp. 434, aff'd 146 N. Y. 46, 40 N. E. 631; *People v. Parker Vein Coal Co.*, 10 How. Pr. 543.

Rhode Island. *Anthony v. Household Sew.-Mach. Co.*, 16 R. I. 571, 5 L. R. A. 575, 18 Atl. 176.

Tennessee. *Cartwright v. Dickin-son*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

Texas. *Kampman v. Tarver*, 87 Tex. 491, 29 S. W. 768.

An individual contract that the cor-

poration would increase its stock is not specifically enforceable. *Bivens v. Hull*, 58 Colo. 338, 145 Pac. 694.

As to increase by issuance of preferred, see *Foote v. Greilick*, 166 Mich. 636, 132 N. W. 473, and see also § 3622 et seq., this chapter.

⁹⁵ See § 3467, infra.

96 United States. *Peck v. Elliott*, 79 Fed. 10, 38 L. R. A. 616; *Laredo Improvement Co. v. Stevenson*, 66 Fed. 633.

Maryland. *Wellersburg & W. N. Plank Road Co. v. Hoffman*, 9 Md. 559.

Massachusetts. *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156.

Michigan. *Detroit Chamber of Commerce v. Secretary of State*, 109 Mich. 691, 67 N. W. 897.

New Hampshire. *Jones v. Concord & M. R. Co.*, 67 N. H. 119, 234, 68 Am. St. Rep. 650, 38 Atl. 120, 30 Atl. 614.

⁹⁷ Where there was a constitutional prohibition against an increase of stock by a corporation except on the assent of the holders of a majority of the stock at a meeting called for that purpose, on sixty days' notice, it was held that a statute authorizing an increase on the written assent of the holders of three-fourths of the original stock, being in contravention of the constitution, was void, and that an attempted increase in compliance there-

cial laws.⁹⁸ The charter limit has been said to be a contract with the stockholders, which the legislature cannot impair.⁹⁹ The articles of association of a corporation, however, cannot give it the power to increase its capital stock, unless such a provision is authorized by the law under which it is organized; and if such a provision is inserted in the articles without authority, it is void.¹ There has been a conflict of opinion as to whether the legislature has the power to amend the charter of a corporation by authorizing it to increase its capital stock, and make the amendment binding upon dissenting stockholders when accepted by a majority of the stockholders.²

It has been held that, when the charter of a corporation or the general law gives it the power to fix its capital stock by by-law, it may at any time increase the same by amendment of its by-laws.³ This, however, is doubtful.⁴

Whether or not a particular statute confers upon a corporation the power to increase its capital stock, and the extent of the power, depend, of course, upon a construction of the statute. Some of the decisions in which the statutes have been construed are given in the note below and in subsequent notes.⁵ A permissive or enabling act will not dis-

with was therefore void. *Ewing v. Oroville Min. Co.*, 56 Cal. 649.

⁹⁸ Power to increase stock, being fundamental, a special act of amendment authorizing it partakes of "creation by special act" (Const. art. 11, § 13), and is therefore void. *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782.

⁹⁹ *Einstein v. Raritan Woolen Mills*, 74 N. J. Eq. 624, 70 Atl. 295.

¹ *Laredo Improvement Co. v. Stevenson*, 66 Fed. 633; *Grangers' Life & Health Ins. Co. v. Kamper*, 73 Ala. 325; *Eastern Plank Road Co. v. Vaughan*, 14 N. Y. 546; *Kampman v. Tarver*, 87 Tex. 491, 29 S. W. 768.

A statute providing that a corporation may provide by its articles of association for an increase of its capital stock authorizes it to amend its articles so as to increase its capital stock, but the same formalities as to filing and publishing the amendment are necessary as are required of the original articles. *Palmer v. Bank of Zumbrota*, 72 Minn. 266, 75 N. W. 380. See also

Detroit Chamber of Commerce v. Gardner, 109 Mich. 691, 67 N. W. 897.

² See supra, Chap. 39 as to majority rule in matters of policy and management.

³ *Peck v. Elliott*, 79 Fed. 10, 38 L. R. A. 616.

⁴ That there is no such power was held in *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed. 957.

⁵ A statute authorizing the formation of corporations for manufacturing and other purposes, which authorizes the trustees to purchase property necessary for their business, and issue stock to the amount and value thereof, in payment, does not authorize the issue of stock in addition to their capital stock in payment, but refers only to the capital stock. *Schenck v. Andrews*, 46 N. Y. 589.

Where a corporation whose stock was divided into preferred and common stock was authorized by statute to increase its capital stock, and nothing was said as to the class to which

pense with unanimous consent.⁶ The power is generally conferred in express terms, but it may be impliedly conferred. Thus, authority given to a corporation to issue bonds convertible into stock at the option of the holder, necessarily includes the power to issue such an amount of stock as may be necessary to enable the corporation to perform its contract, although the issue may increase its capital stock beyond the amount fixed by its charter.⁷

If there is any limitation as to the amount of the increase, the corporation has no more power to exceed the limit than it would have if no power to make any increase at all were given.⁸ If the charter of a

the increased stock should belong, it was held that the inference was that it was common stock. *Jones v. Concord & M. R. R.*, 67 N. H. 119, 234, 68 Am. St. Rep. 650, 38 Atl. 120, 30 Atl. 614.

Statutes construed and held to require an amendment of charter to effect an increase even as to specially chartered corporations. *State v. Northern Pac. Ry. Co.*, 157 Wis. 73, 147 N. W. 219, but see dissenting opinion by Winslow, C. J.

In England the matter of increases of stock is, since 1908, regulated by the Companies Act of 1908. Sections 41 and 58 expressly relate thereto. Reference should be had to that act, which superseded the previous legislation and consolidated it into one act. A discussion of the effects of the act will be found in 5 Halsbury's Laws of England, p. 95 et seq.

⁶ The statute authorizing increase (P. L. 1908, p. 127, Act of April 6, 1908) merely permits such a corporation to make the increase if all agree. *Einstein v. Raritan Woolen Mills*, 74 N. J. Eq. 624, 70 Atl. 295.

⁷ *Belmont v. Erie Ry. Co.*, 52 Barb. (N. Y.) 637; *Ramsey v. Erie Ry. Co.*, 38 How. Pr. (N. Y.) 193. See *infra*, subd. xv, this chapter, as to convertible stock.

⁸ *Laredo Improvement Co. v. Stevenson*, 66 Fed. 633; *Kampman v. Tarver*, 87 Tex. 491, 29 S. W. 768.

A charter limit on the amount to

which the stock can be carried by increase is a contract whose obligation cannot be impaired by legislative act or act of the stockholders. *Einstein v. Raritan Woolen Mills*, 74 N. J. Eq. 624, 70 Atl. 295.

Under a statute providing that a corporation may increase its capital stock to any amount "not exceeding double the amount of its authorized capital," where a corporation increases its capital stock more than double the amount of its original authorized capital stock, the increase is invalid, whether it is attempted to be made at one or more times. *Berg v. San Antonio St. Ry. Co.*, 17 Tex. Civ. App. 291, 43 S. W. 929, 42 S. W. 647.

Where an act authorized corporations to increase their capital stock to not exceeding double the amount of their authorized capital stock, by a vote of the stockholders, and a later amendatory act provided that any corporation might amend its charter subject to the constitution and laws of the state and the provisions of the act, it was held that the limitation in the original act upon the power to increase the capital stock was not removed by the amendment, and that a corporation could not, by changing their articles of incorporation, increase their capital stock beyond double the amount originally fixed. *Laredo Improvement Co. v. Stevenson*, 66 Fed. 633; *Kampman v. Tarver*, 87 Tex. 491, 29 S. W. 768.

corporation allows it to fix the capital stock within certain limits, it may commence with the minimum amount, and subsequently increase it up to the limit.⁹

When the law authorizes a corporation to increase its capital stock to a certain amount for a certain purpose, the courts will not, in an action by a stockholder to enjoin an issue of increased stock, inquire into the necessity for the increase.¹⁰ All of the principles that deny the right to issue stock against fictitious values or against overvaluation of property or services will be hereafter considered. They are to be regarded as affecting the right rather than the power to make increase. They go not so much to the amount of the stock as to the substance of it,¹¹ and they apply to increases in the way of dividends or otherwise.¹²

The making of the increase by a foreign corporation may be proved by an official certificate required by the statutes of that state.¹³

§ 3459. — Prerequisites and conditions to increase; fees. As a rule, the increase must be made in the mode and with the formalities, if any, prescribed by the statute, and all express conditions precedent to the right to make an increase must be performed or fulfilled; ¹⁴ but

Where a railroad company was authorized to increase its capital stock for the extension of its road, and by a later statute the capital stock required was reduced one-half, it was held that the later statute was enabling, not restrictive, and that an increase in excess of the amount thereby required was valid. *Agricultural Branch R. Co. v. Winchester*, 13 Allen (Mass.) 29.

⁹ *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156.

¹⁰ *Jones v. Concord & M. R. R.*, 67 N. H. 119, 234, 68 Am. St. Rep. 650, 38 Atl. 120, 30 Atl. 614.

Declaration of stock dividend is discretionary act which the courts will not control. *Schell v. Alston Mfg. Co.*, 149 Fed. 439.

Preliminary injunction was allowed where a corporation proposed to vote shares held by it in a \$100,000 corporation in favor of a proposed increase to \$10,000,000 for the purpose of making a holding corporation for other

stocks. *Robinson v. Holbrook*, 148 Fed. 107.

¹¹ See § 3517 et seq.

¹² An increase issued against a fictitious capital account for good-will, held bad, see *Coleman v. Booth*, 268 Mo. 64, 186 S. W. 1021.

As to right to make stock issues against good-will or the like, or against accumulated capital values, see §§ 3523, 3577, *infra*.

¹³ The certificate of the New Jersey secretary of state as to an increase is admissible to show the increase without the great seal of state or authentication according to act of congress, especially since the New Jersey law makes it evidence thereof. *Person & Riegel Co. v. Lipps*, 219 Pa. 99, 67 Atl. 1081.

¹⁴ **United States.** *Winters v. Armstrong*, 37 Fed. 508.

Indiana. *McCord v. Ohio & M. R. Co.*, 13 Ind. 220.

Louisiana. *Lincoln v. New Orleans Exp. Co.*, 45 La. Ann. 729, 12 So. 937.

mere informalities and irregularities, as we shall hereafter see, will not necessarily render the increase void.¹⁵ In granting to a corporation the power to increase its capital stock, the legislature may, subject to constitutional limitations, impose any conditions it may see fit. It may exact a bonus or require payment of a fee to the state.¹⁶ But if the charter of a corporation gives it the unconditional right to increase its capital stock, and the right to alter, amend or repeal the charter is not reserved, the constitutional prohibition against laws impairing the obligation of contracts prevents the state from afterwards taking away or impairing such right, by exacting a bonus or otherwise.¹⁷ Under the Wisconsin statute, however, it was held that a corporation formed under a special act must pay the same fee that other corporations under the general act must pay.¹⁸ Constructions of statutes imposing an organization tax, fees on an increase, and a certificate as to amount subscribed, are cited in the footnotes.¹⁹ A fee to be paid on filing the

Minnesota. *State v. Great Northern R. Co.*, 100 Minn. 445, 10 L. R. A. (N. S.) 250, 111 N. W. 289.

Missouri. *Nichols v. Stephens*, 32 Mo. App. 330.

New Hampshire. *Jones v. Concord & M. R. R.*, 67 N. H. 119, 234, 68 Am. St. Rep. 650, 38 Atl. 120, 30 Atl. 614.

Canada. *Page v. Austin*, 10 Can. Sup. Ct. 132.

See also other decisions in this section.

¹⁵ *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428. See § 3468, *infra*.

¹⁶ *Pacolet Mfg. Co. v. Gantt*, 68 S. C. 199, 46 S. E. 1005. See also *First Nat. Bank of Wilkes Barre v. Wyoming Valley Ice Co.*, 136 Fed. 466.

The Illinois Act of 1895, requiring all corporations "at present organized," that may increase their capital stock, to pay a fee, was held to include corporations subsequently organized, since the object of the act was to raise revenue, and another statute of that state provided that statutes shall be construed so as to carry out the intent with which they were enacted, and that words in the present tense include

the future. *People v. Hinrichsen*, 161 Ill. 223, 43 N. E. 973.

¹⁷ *Com. v. Erie & W. Transp. Co.*, 107 Pa. St. 112. See chapter as to power to alter or repeal charter, *infra*.

¹⁸ A specially chartered railroad company. *State v. Northern Pac. Ry. Co.*, 157 Wis. 73, 147 N. W. 219.

¹⁹ Organization tax is payable only on increase where corporation antedated the tax law, *Ky. St. § 4225*. *Louisville Gas & Electric Co. v. Bosworth*, 169 Ky. 824, 185 S. W. 125.

The statutes requiring fees to be paid on increase of capital stock of a corporation doing business in the state (*Gen. St. 1901, § 1265*, *Laws 1907, p. 237*) refer to newly authorized capital, and must be paid whether or not such increase is issued. *State v. St. Louis & S. F. R. Co.*, 81 Kan. 404, 105 Pac. 685 (applied to foreign corporation).

The Michigan statute, requiring a fifty per cent. subscription before a valid increase, does not mean that fifty per cent. of the increased total shall have been subscribed, but merely requires the certificate to show it before it can be recorded. *Foote v. Greilick*, 166 Mich. 636, 132 N. W. 473.

certificate cannot be evaded by failing to file it.²⁰ The failure to file it has been held an irregularity;²¹ and in another state was held not to invalidate the stock when it falsely recited payment of subscriptions which was afterwards made.²²

Under the statutes regulating public utility corporations and their issues, an increase as well as an original issue must have approval;²³ and the same rule would apply in some measure, doubtless, under the so-called Blue Sky Laws. As to both these classes of laws other chapters should be consulted.²⁴ The right to make a new issue necessary to a public utility corporation will not be denied solely because it might not have been needed if dividends had been abstained from.²⁵

§ 3460. — How and by whom increase must be made or authorized.

Since legislative authority is necessary to enable a corporation to increase its capital stock, the increase can only be accomplished legally in the mode and subject to the limitations, if any, prescribed by the legislature in authorizing the increase.²⁶ If no mode of issuing the

²⁰ The payment of such fee by a foreign corporation cannot be defeated by failing to file a certificate where the statute fixes such filing as the time for payment. *State v. St. Louis & S. F. R. Co.*, 81 Kan. 404, 105 Pac. 685.

²¹ *Man v. Boykin*, 79 S. C. 1, 128 Am. St. Rep. 830, 60 S. E. 17.

The payment of the fee and the filing of the certificate required by L. O. L. §§ 6701, 6708, after the stock has been issued is an irregularity only, although prepayment and prefiling are required. The holder can claim dividends as such. *Zobrist v. Estes*, 65 Ore. 573, 133 Pac. 644.

²² The statutory certificate that fifty per cent. of increase was paid, though false at time of filing, did not invalidate the stock or make it fictitious where payment was subsequently made (constitution and statute construed). *Scott v. Abbott*, 160 Fed. 573.

²³ The public utility laws requiring approval of stock issues apply alike to original and subsequent issues. *Fall River Gas Works Co. v. Board of Gas & Electric Light Com'rs*, 214 Mass. 529, 102 N. E. 475.

With respect to power of railroad commission to pass upon action of a railway corporation in increasing its stock, see *State v. Great Northern R. Co.*, 100 Minn. 445, 10 L. R. A. (N. S.) 250, 111 N. W. 239.

²⁴ See chapter on Governmental Regulation, *infra*.

²⁵ Issuing new stock for the making of improvements is not unlawful as a stock dividend because of the fact that large dividends in cash were made which might have been used for the intended improvements, obviating any new issue. *Fall River Gas Works Co. v. Board of Gas & Electric Light Com'rs*, 214 Mass. 529, 102 N. E. 475.

²⁶ **United States.** *Laredo Improvement Co. v. Stevenson*, 66 Fed. 633; *Winters v. Armstrong*, 37 Fed. 508.

Illinois. *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, *aff'g* 63 Ill. App. 593.

Indiana. *Ohio Ins. Co. v. Nunne-macher*, 15 Ind. 294; *McCord v. Ohio & M. R. Co.*, 13 Ind. 220.

Louisiana. *Lincoln v. New Orleans Exp. Co.*, 45 La. Ann. 729, 12 So. 937.

Missouri. *State v. McGrath*, 86 Mo. 239; *Nichols v. Stephens*, 32 Mo. App.

increased stock is prescribed by the legislature, it may be fixed by the stockholders.²⁷ An increase of the capital stock of a corporation beyond the limit fixed by its charter or articles of association is so organic and fundamental a change that a general power to make the increase granted by the charter must be exercised by the stockholders, or with their consent. It cannot be exercised by the directors without the consent of the stockholders, unless it is expressly so provided,²⁸ and the consent must be unanimous.²⁹ Such power is not conferred upon the directors by provisions in the charter of a corporation that its capital stock may be increased from time to time, at the pleasure of the corporation, and that "all the corporate powers of the said corporation shall be vested in and exercised by a board of directors and such officers and agents as said board shall appoint," for such general power to perform corporate acts refers to the ordinary business transactions of the corporation, and does not extend to a reconstruction of the body itself, or to an enlargement of its capital stock.³⁰ Authority to increase the capital stock may be expressly conferred upon the directors of a corporation by its charter,³¹ or by charter amendments.³²

330; *Schierenberg v. Stephens*, 32 Mo. App. 314.

New Hampshire. *Jones v. Concord & M. R. R.*, 67 N. H. 119, 234, 68 Am. St. Rep. 650, 38 Atl. 120, 30 Atl. 614.

Pennsylvania. *Shepp v. Norristown Passenger Ry. Co.*, 13 Pa. Co. Ct. 254.

Tennessee. *Union Ry. Co. v. Sneed*, 99 Tenn. 1, 47 S. W. 89, 41 S. W. 364.

Texas. *Kampman v. Tarver*, 87 Tex. 491, 29 S. W. 768.

Canada. *Page v. Austin*, 10 Can. Sup. Ct. 132.

But informalities or irregularities will not necessarily render the increase void. See § 3468, *infra*.

²⁷ See *Stephenson v. Vokes*, 27 Ont. (Can.) 691.

²⁸ **United States.** *Chicago City Ry. Co. v. Allerton*, 18 Wall. 233, 21 L. Ed. 902.

Illinois. *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, *aff'g* 63 Ill. App. 593; *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90.

Louisiana. *Percy v. Millaudon*, 3 La. 568.

Michigan. *Finley Shoe & Leather Co. v. Kurtz*, 34 Mich. 89.

Nebraska. *Humboldt Driving Park Ass'n v. Stevens*, 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568.

Tennessee. *Newport Cotton Mill Co. v. Mims*, 103 Tenn. 465, 53 S. W. 736. See also Chap. 39, *supra*.

A resolution passed by the board of directors of a corporation cannot fix, in advance, the time for increasing its capital stock, without reference to the action of the stockholders. *McNulta v. Corn Belt Bank*, 164 Ill. 427, 56 Am. St. Rep. 203, 45 N. E. 954, *aff'g* 63 Ill. App. 593.

²⁹ Unanimous consent to increase over charter amount is requisite because it is fundamental. *Macon Gas Co. v. Richter*, 143 Ga. 397, 85 S. E. 112.

³⁰ *Chicago City Ry. Co. v. Allerton*, 18 Wall. (U. S.) 233, 21 L. Ed. 902.

³¹ See *Payson v. Withers*, 5 Biss. 269, Fed. Cas. No. 10,864; *Payson v. Stoeber*, 2 Dill. 427, Fed. Cas. No. 10,863; *Sutherland v. Olcott*, 95 N. Y. 93.

³² Charter amendments may fix mode

Or, in the absence of charter or statutory provisions to the contrary, if the power exists in the corporation, it may be conferred upon the directors by the stockholders by a formal vote at a corporate meeting.³³ Or if the directors have exercised the power, and made the increase, without previous authority from the stockholders, the stockholders may render the increase valid by ratification, and if they acquiesce in such action on the part of the directors, it is equivalent to a ratification.³⁴

A vote of the stockholders to increase the capital stock may be reconsidered and revoked at any time before the additional stock is actually issued, or at least subscribed for in pursuance thereof, for until then the stock is not increased.³⁵ No vote short of that prescribed by the statute will suffice to accomplish the increase,³⁶ or any other than the prescribed meeting regularly called.³⁷ As has al-

of increase and imposé limit of amount, where charter gives power without specific provisions. *Macon Gas Co. v. Richter*, 143 Ga. 397, 85 S. E. 112.

That an amendment of the charter of a corporation so as to authorize the directors, instead of the stockholders, to increase the capital stock, does not release dissenting stockholders, see Chapter 17, § 647, *supra*, as to release of subscribers by amendment of charter.

³³ *Sewell's Case*, 3 Ch. App. 131, and cases in the note following.

³⁴ *Payson v. Stoeve*, 2 Dill. 427, Fed. Cas. No. 10,863; *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *Sewell's Case*, 3 Ch. App. 131.

³⁵ *Terry v. Eagle Lock Co.*, 47 Conn. 141.

³⁶ A contract conditioned precedently on an increase in capital requires that the increase be legally made and is not satisfied by a majority vote in the face of Ky. St. § 553 requiring a two-thirds vote, or by a vote reconsidered and abrogated. *Sandy Valley Hardware Co. v. Allen*, 175 Ky. 433, 194 S. W. 351.

³⁷ It must be done at a duly called special meeting (*Hurd's Rev. St.* 1905, p. 507) and stockholders acting in

some other way cannot increase it. *Chicago Sign Printing Co. v. Wolf*, 135 Ill. App. 366, rev'd on other grounds 233 Ill. 501, 13 Ann. Cas. 369, 84 N. E. 614.

There is a distinction between a meeting of directors held to discuss and act upon the ordinary business transactions and such emergencies as incidentally arise in connection therewith, and a meeting to consider an increase of capital stock, with respect to the notice of the holding thereof required. While a mere formal notice may suffice for such routine meeting, a special notice, stating the object, should be given of a meeting called to consider an increase of stock, so that each director may be apprised of the importance of being present. *Wall v. Utah Copper Co.*, 70 N. J. Eq. 17, 62 Atl. 533.

By declaration of the constitution of California, provisions of the constitution are mandatory and prohibitory unless declaration otherwise is made. By another provision of the constitution a corporation is prohibited from increasing its capital stock unless consent thereto is given by a majority of the stockholders at a meeting called for that purpose of the holding of which a public notice of sixty days

ready been seen, the increase may be accomplished by means of a stock dividend.³⁸ Constructions of statutes upon assent to issue³⁹ and the filing of certificates⁴⁰ are cited in the footnote.

National banks have no authority to increase their capital stock except as provided by the national banking laws; and where an increase is attempted to be made without obtaining the consent of the holders of two-thirds of the stock, the payment in full of the amount of the increase, and the approval and certificate of the comptroller of the currency, as required by those statutes, the proceedings are invalid, and preliminary subscriptions to such increase cannot be enforced, in the absence of elements of estoppel. Such a subscription is impliedly conditioned on the subscription of the whole amount of the proposed increase and on compliance by the corporation with all the requirements of the statutes necessary to make the increased stock valid; and in case of noncompliance with such requirements, there is a failure of consideration.⁴¹

must be given. By a statutory enactment substantially the same provision is made. Under these constitutional and statutory provisions an increase of stock, though consented to by all the stockholders at a corporate meeting, is invalid where the sixty days' notice has not been given. *Navajo Mining & Development Co. v. Curry*, 147 Cal. 581, 109 Am. St. Rep. 178, 82 Pac. 247. See further, in general, *State v. Cook*, 178 Mo. 189, 77 S. W. 559.

³⁸ The increase may be by way of a stock dividend made from accumulated profits. *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

³⁹ The assent to an increase need not identify the classes of stock to be increased if there are no classes. Civil Code, § 359. *California Telephone & Light Co. v. Jordan*, 19 Cal. App. 536, 126 Pac. 598.

Under Missouri statutes a railroad corporation could by consent of all stockholders, common and preferred without distinction make a further increase of preferred. (Numerous statutes construed.) *Pollitz v. Wabash R. Co.*, 167 Fed. 145.

⁴⁰ Under Wisconsin Rev. St. 1898, § 1774, providing that an amendment making an increase shall be of no "effect until so recorded, and such amendment shall be void until" the certificate of the adoption of it shall be recorded as provided, the filing does not relate back to adoption and make stock valid from then. *Fishback v. Fond Du Lac & N. E. Ry. Co.*, 158 Fed. 88.

Where a corporation has increased its capital stock in compliance with statute, that a certificate had been issued previously by the secretary of state upon a defective statement does not save him from the duty of issuing a certificate based on a correct statement. *State v. Swanger*, 195 Mo. 539, 93 S. W. 932.

⁴¹ U. S. Rev. St. § 5142, and Act of Congress, May 6, 1886. *Winters v. Armstrong*, 37 Fed. 508. See also the provisions of the Federal Reserve Bank Act.

An attempted increase to a sum followed by a reduction of the proposed increase to a lesser sum which was subscribed under the first proposal but not certified and approved till after

§ 3461. Subscription for, and allotment of increase. When an increase of stock is authorized, subscriptions for the new stock are, with a few exceptions, subject to the same rules of law as subscriptions for original stock. Thus, the same principles apply to the formation of the contract as apply to the formation of a contract for original stock after organization of the corporation.⁴² And subscriptions for new stock, like subscriptions for original stock, may be rescinded, subject to the same qualifications, for false and fraudulent representations.⁴³ But it cannot be avoided for defects and irregularities in making the increase if the subscriber knew of such defects and irregularities at the time he subscribed, or if he has paid upon his subscription, or otherwise recognized it as binding, since acquiring such knowledge.⁴⁴

There are some differences, however, between subscriptions for original stock and subscriptions for new stock on an increase of the capital stock after the formation of the corporation. In the absence of provisions to the contrary, a subscriber for original stock in a corporation becomes a stockholder as soon as his subscription is accepted and becomes a binding contract, whether he has paid the amount of the subscription or not.⁴⁵ But when a corporation increases its capital

the second resolution is legal. *Bailey v. Tillinghast*, 99 Fed. 801.

An increase based on fictitious assets and notes not intended to be paid is illegal. "The National Bank Act does not sanction any shifts or devices whereby the stock of a bank is increased without a corresponding increase of actual capital." *Cockrill v. Abeles*, 86 Fed. 505.

A subscription pro rata by a stockholder to authorized new stock cannot be repudiated because not all of it was so subscribed. And issue of as much as was paid in is not violative of Rev. St. § 5142. *Aspinwall v. Butler*, 133 U. S. 595, 33 L. Ed. 779.

Numerous decisions on or involving increased issues of national banks will be found cited in other appropriate parts of this work. Most of them exhibit no features distinguishing such stock from that of any other corporation, so far as affects the controlling principles of law. Liability of holders of such shares is discussed elsewhere in this chapter,

⁴² As to these principles, see Chap. 17, *supra*.

⁴³ *Newbegin v. Newton Nat. Bank*, 66 Fed. 701, *aff'd* 74 Fed. 135, 33 L. R. A. 727. See Chap. 17, *supra*.

It was actionable fraud for directors to invite subscriptions without disclosure of the facts when the subscribers were ignorant that the corporation was actually insolvent and the proceeds were to be used to pay the directors as creditors. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

Such a fraudulent subscription may be rescinded without returning the new stock if worthless, and the price paid may be recovered from the corporation as a claim prior to that of the directors. *King v. Livingston Mfg. Co.*, 192 Ala. 269, 68 So. 897.

⁴⁴ *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126.

⁴⁵ See Chap. 17, *supra*, as to necessity for prepayment.

stock after its organization, subscribers for the additional shares do not become stockholders with respect to such shares, or acquire any title to the stock, until they have paid for it.⁴⁶

A subscription for original stock is upon the implied condition that the full amount of the required capital stock shall be subscribed before there shall be any liability on the subscription, unless there is some provision or stipulation to the contrary.⁴⁷ But, by the weight of authority, in the absence of an express provision or stipulation, liability upon a subscription for new stock, when the capital stock of a corporation is increased, is not conditional upon the taking of all the new shares.⁴⁸

If a person subscribes for increased stock before the increase is made, and makes a payment on his subscription, and the contemplated increase is not made, he may recover back what he has paid, although the corporation has become insolvent.⁴⁹

Some questions relating to subscriptions for increased stock have been considered in preceding paragraphs. We have seen that subscriptions are absolutely void if the increase was entirely unauthorized by the legislature,⁵⁰ and that they may be void because of failure to comply with the provisions of the statute in voting or making the increase.⁵¹ Estoppel to deny subscription as against creditors of the corporation is considered in a subsequent section.⁵²

§ 3462. Rights and remedies of existing stockholders as to the increased stock—In general. As a general rule, when a corporation increases its capital stock under authority conferred by the legislature, stockholders at the time of the increase have the right, in preference to any other person, and as between themselves, to subscribe for or purchase the new stock in proportion to the number of shares of the original stock held by them respectively; and a majority of the stockholders or the officers of the corporation cannot lawfully deprive any stockholder of this right.⁵³ The rule applies, of course, to such persons

⁴⁶ *Baltimore City Passenger Ry. Co. v. Hambleton*, 77 Md. 341, 26 Atl. 279; *St. Paul, S. & T. F. R. Co. v. Robbins*, 23 Minn. 439.

⁴⁷ See Chap. 17, *supra*.

⁴⁸ *Avegno v. Citizens' Bank of Louisiana*, 40 La. Ann. 799, 5 So. 537; *Clarke v. Thomas*, 34 Ohio St. 46. See Chap. 17, *supra*.

It may be otherwise by express provision. *Brown v. Tillinghast*, 84 Fed. 71.

⁴⁹ *McFarlin v. First Nat. Bank of Kansas City*, 68 Fed. 868; *Winters v. Armstrong*, 37 Fed. 508. And see *Reed v. Boston Mach. Co.*, 141 Mass. 454, 5 N. E. 852; *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5, 29 N. E. 63.

⁵⁰ § 3458, *supra*, § 3467, *infra*.

⁵¹ See § 3460, *supra*, § 3468, *infra*.

⁵² See § 3469, *infra*.

⁵³ *United States. Gibbons v. Mahon*, 136 U. S. 549, 34 L. Ed. 525, 4

only as are stockholders, and entitled to be recognized as such by the

Mackey (D. C.) 136; **Snelling v. Richard**, 166 Fed. 635.

Illinois. **Eidman v. Bowman**, 58 Ill. 444, 11 Am. Rep. 90.

Maryland. **Baltimore City Passenger Ry. Co. v. Hambleton**, 77 Md. 341, 26 Atl. 279.

Massachusetts. **Gray v. Portland Bank**, 3 Mass. 364, 3 Am. Dec. 156.

Minnesota. **Jones v. Morrison**, 31 Minn. 140.

Missouri. **Knapp v. Publishers George Knapp & Co.**, 127 Mo. 53, 29 S. W. 885.

Nebraska. **Humboldt Driving Park Ass'n v. Stevens**, 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568.

New Jersey. **Way v. American Grease Co.**, 60 N. J. Eq. 263, 47 Atl. 44.

Pennsylvania. **Reading Trust Co. v. Reading Iron-Works**, 137 Pa. St. 282, 21 Atl. 169, 170; **Strickler v. McElroy**, 45 Pa. Super. Ct. 165.

Vermont. **State v. Smith**, 48 Vt. 286.

Wisconsin. **Wells v. Green Bay & M. Canal Co.**, 90 Wis. 442, 64 N. W. 69.

"The directors' duty in issuing new shares was to afford to the existing stockholders an opportunity to take the proposed new issue in the proportion in which the shares were held by them. In many cases corporations are incorporated, capitalized and organized by stockholders upon expectations based upon the maintenance of control by the existing majority of the holders of the stock. The power of distributing a new issue does not lie at the mere choice of directors. It is not a perquisite which they may use for their private advantage. They may not overthrow or secure for themselves the control of the corporation by means of a new issue of stock." **Way v. American Grease Co.**, 60 N. J. Eq. 263, 47 Atl. 44. See also **Crosby v.**

Stratton, 17 Colo. App. 212, 68 Pac. 130; **Wall v. Utah Copper Co.**, 70 N. J. Eq. 17, 62 Atl. 533; **Berger v. United States Steel Corporation**, 63 N. J. Eq. 506, 53 Atl. 14.

Stock Corporation Law, § 44 provides for increase or reduction in general terms, but the authority so given must be so exercised that the rights of stockholders will be preserved. **Stokes v. Continental Trust Co.**, 186 N. Y. 285, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738, 78 N. E. 1090; **Page v. American & B. Mfg. Co.**, 129 N. Y. App. Div. 346, 113 N. Y. Supp. 734.

Existing holders may subscribe pro rata for increase in preference to strangers. **Way v. American Grease Co.**, 60 N. J. Eq. 263, 47 Atl. 44.

A vote at a stockholders' meeting directing the new stock to be sold, without giving a stockholder an opportunity to subscribe therefor, is void as to him, unless he consents. **Jones v. Morrison**, 31 Minn. 140, 16 N. W. 854.

It was contended, in an early South Carolina case, that a corporation had no power to give its shareholders the preference in disposing of a new issue of stock; but it was held that it could do so if not prohibited by its charter or by statute. **State v. Bank of Charleston**, Dud. (S. C.) 187.

A mere vote to increase the capital stock does not give the proposed increase any existence, so as to give stockholders any vested right thereto, and if the vote is rescinded, no right is acquired. **Terry v. Eagle Lock Co.**, 47 Conn. 141.

Placing new stock "to the credit of" a stockholder is sufficient to show an intent to pass the title to him, as against the company. **Knapp v. Publishers George Knapp & Co.**, 127 Mo. 53, 29 S. W. 885.

As to the stockholders' right to any

corporation, at the time the new stock is created,⁵⁴ or, perhaps more accurately, when the issue is made.⁵⁵ This rule may be rendered inapplicable by the peculiar provisions of the charter of the corporation, under which the increase is made,⁵⁶ or by special agreements, assignments or other special circumstances.⁵⁷ And the conditions under

premium on a sale of new stock by the corporation, see *infra*, this section.

⁵⁴ *Miller v. Illinois Cent. R. Co.*, 24 Barb. (N. Y.) 312.

Additional stock issued by a corporation follows the title recognized by it, and does not pass to a buyer of stock under an executory contract, without an express stipulation to that effect. *Currie v. White*, 1 Sweeney (N. Y.) 166.

Persons holding corporate bonds or notes convertible into stock at their option are not entitled to the preference, for until the bonds or notes are converted into stock, they are not stockholders. *Pratt v. American Bell Tel. Co.*, 141 Mass. 225, 55 Am. Rep. 465, 5 N. E. 307.

Holders of preferred stock are entitled to the privilege. *Jones v. Concord & M. R. R.*, 67 N. H. 119, 234, 68 Am. St. Rep. 650, 38 Atl. 120, 30 Atl. 614.

As between the pledgor and pledgee of stock, the former is entitled to the privilege. *Miller v. Illinois Cent. R. Co.*, 24 Barb. (N. Y.) 312.

A right of subscription in stockholders of record on a day certain cannot be exercised by the assignee of one who though no longer a stockholder appeared of record as one. It was held a jury question, however, whether such one had ceased to be a stockholder. *Schmidt v. Marconi Wireless Tel. Co.*, 86 N. J. L. 183, 90 Atl. 1017.

Holder who paid nothing for paid up stock held not entitled to share in new issue which was a fraud on the corporation. *Proctor v. Piedmont Portland Cement & Lime Co.*, 134 Ga. 391, 67 S. E. 942.

⁵⁵ A holder at the time the remnant of an authorized increase is issued has a right to participate therein (increase was authorized in 1892 and last shares were issued in 1901). *Strickler v. McElroy*, 45 Pa. Super. Ct. 165.

⁵⁶ In an Indiana case it was held that under the charter of an insurance company, which provided that the directors should have the power to increase the capital stock to a certain limit on such terms and conditions, and in such manner, as to them should seem best, it was held that existing stockholders had no exclusive right to take the new stock in proportion to the original stock held by them. *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 294.

Where a mining and manufacturing corporation was organized for the purchase of property with stock, under the New Jersey law, it was held that such provision became a part of the contract between the stockholders and the corporation; and where new stock was issued for the purchase of mines, which would become a part of the common property, from which all of the stockholders would receive the same benefit, original holders could not insist that the new stock be issued to them in the proportion their holdings bore to the whole amount of stock before the increase. *Meredith v. New Jersey Zinc & Iron Co.*, 56 N. J. Eq. 454, 41 Atl. 1116, *aff'd* 55 N. J. Eq. 211, 37 Atl. 539.

⁵⁷ See *Einstein v. Rochester Gas & Electric Co.*, 77 Hun (N. Y.) 149, 146 N. Y. 46, 40 N. E. 631.

The right to take new shares may be lost by failure to comply with the terms upon which they are offered.

which preferred stock is issued may be such that holders thereof may be deprived of the right to subscribe to an increase of stock on the terms extended to holders of the common stock.⁵⁸

A reasonable time should be given the stockholders to exercise their rights to subscribe.⁵⁹ And a stockholder may waive the privilege or forfeit the same by laches or acquiescence.⁶⁰ If any formal demand

Sewall v. Eastern R. Co., 9 Cush. (Mass.) 5.

Where, under a resolution of the stockholders of a corporation, each stockholder is given the right to purchase increased stock at par, in proportion to his holdings, a stockholder who is unwilling or unable to take the stock on the terms offered cannot complain that the stockholders taking the stock gained an advantage over him, as his right to take the stock may be sold. *Jones v. Concord & M. R. R.*, 67 N. H. 119, 234, 68 Am. St. Rep. 650, 38 Atl. 120, 30 Atl. 614.

In a Washington case the stockholders having voted an increase which included surplus assets, pooled their rights to share therein with real property owned by them and another, and paid for the increase therewith, adjusting the allotment among themselves. *Lantz v. Moeller*, 76 Wash. 429, 50 L. R. A. (N. S.) 68, 136 Pac. 687.

⁵⁸ At the time a railroad company was reorganized, by resolution of the stockholders the preferred stock was expressly made subject to provision that such stock might be retired at the election of the company on specified dates. This condition was recited in each certificate. The court held that preferred stockholders became subject to this condition and were without right to participate in the issuance of a new stock put forth for the purpose of retiring the preferred stock, and that upon the retirement of the preferred stock a holder thereof during its existence ceased to sustain the relation of a stockholder to the

corporation. *Weidenfeld v. Northern Pac. R. Co.*, 129 Fed. 305.

⁵⁹ Five days held not a reasonable time to existing holders to subscribe. *Bennett v. Baum*, 90 Neb. 320, 133 N. W. 439.

⁶⁰ *Hart v. St. Charles St. R. Co.*, 30 La. Ann. 758.

Where the charter of a corporation provided for sixty days' notice of authorization of any increase of the capital stock, within which any stockholder might have the privilege of taking additional shares, it was held that any stockholder not applying and tendering payment within such time waived or forfeited his privilege. *Hart v. St. Charles St. R. Co.*, 30 La. Ann. 758.

In *Wilson v. Bank of Montgomery County*, 29 Pa. St. 537, it was held that a stockholder could not recover from the corporation the value of his proportionate share of an increase of stock for which the corporation refused to permit him to subscribe, where he made no offer to subscribe for the stock until six months after its issuance.

A stockholder entitled to subscribe to an increase of stock may lose his right by failure to make subscription within a reasonable time. *Crosby v. Stratton*, 17 Colo. App. 212, 68 Pac. 130; *Hoyt v. Shenango Valley Steel Co.*, 207 Pa. 208, 56 Atl. 422.

Right held waived by four years' delay and transferees did not take right. *Hall v. Hall*, 30 Ohio Cir. Ct. 826.

Taking part of what was due does not waive right to remainder. *Schmidt*

of the right to subscribe, beyond a direct offer, be necessary, such demand is waived by denial of the right.⁶¹

This doctrine of equality clearly applies when a corporation increases its capital stock by making a stock dividend. It cannot discriminate between stockholders, but each stockholder is entitled to receive new shares in proportion to the stock held by him at the time the dividend is made.⁶²

The doctrines already stated, as we have seen, do not apply to shares of its original stock undisposed of by the corporation when it commences business, nor to shares of original stock reacquired by a corporation by forfeiture of the same for nonpayment of assessments, or by purchase, or by compromise with the holders. Such shares constitute a part of its assets, and may be sold by it either to stockholders or to strangers, as it may deem best.⁶³

v. Pritchard, 135 Iowa 240, 112 N. W. 801.

Delay is not laches where payment was tendered by check and after holding it right was denied on ground that application was too late. *Schmidt v. Pritchard*, 135 Iowa 240, 112 N. W. 801.

Failure of the stockholder to pay for his allotment of new stock on the day set, September 12, and delay until October 4, does not bar his right, no forfeiture by delay having been stipulated or declared and the corporation still having the stock, though it has advanced in value. *Sommer v. Armor Gas & Oil Co.*, 71 N. Y. Misc. 211, 128 N. Y. Supp. 382, aff'd 147 N. Y. App. Div. 919, 131 N. Y. Supp. 1144.

One who refused to take up his allotment when money was needed by the corporation and it was a dubious and speculative concern cannot hold another stockholder and the corporation for selling him more than his share and set aside such sale. *Conklin v. United Construction Supply Co.*, 166 N. Y. App. Div. 284, 151 N. Y. Supp. 624. See also *Stokes v. Continental Trust Co.*, 186 N. Y. 285, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738, 78 N. E. 1090.

⁶¹ Tender of price of an aliquot

share of new stock is not required where the corporation denies the right to take it, asserting that such right has been lost by delay. *Sommer v. Armor Gas & Oil Co.*, 71 N. Y. Misc. 211, 128 N. Y. Supp. 382, aff'd 147 N. Y. App. Div. 919, 131 N. Y. Supp. 1144.

Formal demand held waived by refusal to accept subscription on ground of right. *Bates v. United Shoe Mach. Co.*, 216 Fed. 140, aff'g decree 206 Fed. 716.

No demand to participate need be made where there is no notice of intention to issue increase. *Strickler v. McElroy*, 45 Pa. Super. Ct. 165.

⁶² See the cases above cited; and see subd. xv, *infra*, this chapter.

⁶³ They are not entitled to a preferential right to take shares canceled and thus turned back into the corporation, such not being an increase of stock. That right applies only when new stock is to be issued for money only. *Archer v. Hesse*, 164 N. Y. App. Div. 493, 150 N. Y. Supp. 296.

After the stock has been issued and reacquired by the corporation, the preferential right of a stockholder to subscribe does not apply. *Crosby v. Stratton*, 17 Colo. App. 212, 68 Pac.

Where a statute provides that, where a corporation increases its capital stock, or the par value of its stock, the new shares shall be allotted *pro rata* to the stockholders according to their interests, stockholders cannot be charged a bonus on increased stock to which they are given a right to subscribe.⁶⁴ But a bonus demanded by a corporation of its stockholders for the privilege of subscribing to an issue of new stock, and paid by them under protest, cannot be recovered back, in the absence of duress. And it has been held that a denial of a stockholder's right to the new shares without payment of the bonus does not constitute duress, since, after a tender, he may sue and recover the market value of the stock, and with this sum buy other shares.⁶⁵

§ 3463. — Transfer or devolution of "rights" to allotment. A stockholder's right to a preference in subscribing for or purchasing the new

130. See also this chapter, § 3479 as to rights in unissued stock; and § 3522 as to disposal of treasury or forfeited stock.

⁶⁴In *re Cunningham's Appeal*, 108 Pa. St. 546.

Where a shareholder is entitled to subscribe to an increase of stock, he cannot be compelled to pay a bonus for the privilege. Action on the part of the directors in causing a new issue to be sold to the highest bidder is generally deemed to be in violation of the rights of stockholders. It is true that if the business has been profitable the stock may be worth more than par, but if this is so it is due to the original investment by the stockholders, and no hardship results from requiring the corporation to permit the stockholders to share proportionately in the fruits of the increase. *Hammond v. Edison Illuminating Co.*, 131 Mich. 79, 100 Am. St. Rep. 582, 90 N. W. 1040; *Electric Co. of America v. Edison Elec. Illuminating Co.*, 200 Pa. 516, 50 Atl. 164.

"Much might be said, and considerable force may be derived from the views of text-writers and from the expressions in opinions, in support of the proposition that a stockholder, as

against an outsider, has a primary or pre-emptive right to subscribe for any increase of stock made by the corporation. This primary or pre-emptive right, however, to subscribe at par for increased stock which is to be issued at par, or, where the value of the stock is greater than its par value, and it is proposed to issue it at its greater price, to subscribe for it at such price, in preference to outsiders, is quite different and distinct from the right here claimed, which is that of a stockholder to have at par stock which is worth or can be sold, in the interest and for the benefit of the corporation, to others, for four and a half times its par value. We do not think, in the absence of any statute of the state conferring such right, or provision in the charter of the corporation, or in the resolution authorizing the increase, or of fraud or illegality in making the increase, that this contention as to the right of a stockholder which the plaintiff here asserts can be sustained either in law or in reason." *Stokes v. Continental Trust Co.*, 99 N. Y. App. Div. 377, 91 N. Y. Supp. 239.

⁶⁵*De La Cuesta v. Insurance Co. of North America*, 136 Pa. St. 62, 658, 9 L. R. A. 631, 20 Atl. 505.

stock, when the capital stock of a corporation is increased, may be sold or assigned by him.⁶⁶ When shares of original stock are sold by the holder after an increase of the capital stock has been voted, the purchaser acquires, as an incident to the stock, the same right to a preference in subscribing for or purchasing the new stock as was possessed by the transferrer;⁶⁷ and one who holds a certificate with an unlimited power of attorney indorsed thereon may exercise the rights,⁶⁸ but the assignee of one who merely appears on the books as a stockholder, but is not one, cannot claim any right.⁶⁹

When shares of stock are transferred or bequeathed in trust to pay the income to a person for life (or for a term of years), and the corporation increases its capital stock, the privilege of subscribing for the new shares is appurtenant to the old stock, and does not belong to the life beneficiary.⁷⁰ If the trustee, being unable to subscribe for

⁶⁶ *Atkins v. Albree*, 12 Allen (Mass.) 359; *Hammond v. Edison Illuminating Co.*, 131 Mich. 79, 100 Am. St. Rep. 582, 90 N. W. 1040; *Jones v. Concord & M. R. R.*, 67 N. H. 119, 234, 68 Am. St. Rep. 650, 38 Atl. 120, 30 Atl. 614.

As to failure of a purchaser of the privilege to comply with the terms on which the stock is offered, see *Sewall v. Eastern R. Co.*, 9 Cush. (Mass.) 5.

⁶⁷ *Baltimore City Passenger Ry. Co. v. Hambleton*, 77 Md. 341, 26 Atl. 279.

Evidence held to show right by transfer. *Schmidt v. Pritchard*, 135 Iowa 240, 112 N. W. 801. See also as to the right to resist reduction, as passing by transfer, *Page v. American & B. Mfg. Co.*, 129 N. Y. App. Div. 346, 113 N. Y. Supp. 734.

A stockholder who transfers his shares is not entitled to subscribe for a subsequent increase of capital stock, but the transferee is entitled to do so, under a statute providing that stockholders at the time of an increase of stock shall be entitled to a pro rata share thereof. *Real Estate Trust Co. v. Bird*, 90 Md. 229, 44 Atl. 1048.

The transferee's rights are not affected by an agreement between the transferrer and the other stockholders, of which he has no notice, waiving the right to subscribe for a pro rata

share of the new stock. *Real Estate Trust Co. v. Bird*, 90 Md. 229, 44 Atl. 1048.

Where proceeds of increase to be sold to employees was to be distributable to old holders and it was in effect a mode of making a stock dividend, the transfer of old stock after making increase did not carry the subsequent accruals of payments by employees. *Bowers v. Post*, 209 Fed. 660.

⁶⁸ An unlimited power of attorney indorsed on the certificate enables the holder to claim a right of subscription voted to holders of record as of a day certain, and it should either be in the principal's name as registered holder or, after transfer on the books, in the attorney's name. *Bates v. United Shoe Mach. Co.*, 216 Fed. 140, aff'g decree 206 Fed. 716.

⁶⁹ *Schmidt v. Marconi Wireless Tel. Co.*, 86 N. J. L. 183, 90 Atl. 1017.

⁷⁰ *Hite's Devises v. Hite's Ex'r*, 93 Ky. 257, 40 Am. St. Rep. 189, 20 S. W. 778; *Atkins v. Albree*, 12 Allen (Mass.) 359. See also *Spooner v. Phillips*, 62 Conn. 62, 16 L. R. A. 461, 24 Atl. 524; *Gibbons v. Mahon*, 4 Mackey (D. C.) 130, 54 Am. Rep. 262; *Brown's Petition*, 14 R. I. 371, 51 Am. Rep. 397.

Where trustees exchanged stock, on

the new shares, sells his right to subscribe, the money received is to be treated as the new shares would be treated, and not as a profit on the original shares, and therefore the life beneficiary is only entitled to the income therefrom.⁷¹

The right to dividends, including stock dividends, as between life beneficiary and remainderman, is elsewhere considered.⁷²

§ 3464. — Remedies to enforce stockholder's "rights" to allotment or to preserve status. If the right to a preference in subscribing for new stock is denied to any stockholder by the corporation, he may maintain a special action of assumpsit against it to recover damages, for the case is within the established doctrine that most of the duties imposed upon a corporation by law raise an implied promise which, when broken, will sustain an action of assumpsit.⁷³ The measure of damages in such an action has been held to be the excess of the market value above the par value of the number of shares he was entitled to at the time he demanded his certificates and they were refused, with interest on such excess up to the time when judgment is rendered.⁷⁴

If a corporation denies to a stockholder the right to subscribe for or

the consolidation of the corporation with another, for stock in the consolidated company, and received additional certificates to represent the difference in value of the old stock over the new, it was held that the additional stock was capital, and not income, and did not go to the life beneficiary. *Clarkson v. Clarkson*, 18 Barb. (N. Y.) 646.

⁷¹ *Atkins v. Albree*, 12 Allen (Mass.) 359; *Biddle's Appeal*, 99 Pa. St. 278; *Moss' Appeal*, 83 Pa. St. 264, 24 Am. Rep. 164. Compare, however, *Wiltbank's Appeal*, 64 Pa. St. 256, 3 Am. Rep. 585.

⁷² See *infra*, this chapter, "Dividends."

⁷³ *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156. And see *Jackson's Adm'rs v. Newark Plank-Road Co.*, 31 N. J. L. 277; *Reading Trust Co. v. Reading Iron-Works*, 137 Pa. St. 282, 21 Atl. 169, 170; *Reese v. Bank of Montgomery County*, 31 Pa. St. 78, 72 Am. Dec. 726.

The stockholder may sue and hold directors in assumpsit for profits made by directors in taking an increase to themselves which he had a right to take. *Strickler v. McElroy*, 45 Pa. Super. Ct. 165.

In an action by a stockholder against the corporation to recover damages for depriving him of his right to subscribe for new shares, he must show that he demanded shares and offered to subscribe and pay for them in the regular manner. *Bonnet v. First Nat. Bank*, 24 Tex. Civ. App. 613, 60 S. W. 325.

⁷⁴ *Gray v. Portland Bank*, 3 Mass. 364, 3 Am. Dec. 156; *Stokes v. Continental Trust Co.*, 186 N. Y. 285, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738, 78 N. E. 1090.

Holder of bonus stock issued as paid up held to show no injury when deprived of his share in new stock. *Proctor v. Piedmont Portland Cement & Lime Co.*, 134 Ga. 391, 67 S. E. 942.

purchase his proportion of the new shares, there is undoubtedly a breach of trust, as well as a breach of implied contract, and if the corporation has the shares, there is no reason why the stockholder may not, instead of suing for damages, sue in equity for an injunction and to enforce his right to subscribe for or purchase the stock.⁷⁵ A bill for specific performance will also lie.⁷⁶ Limitation on such suits runs from the time of denial of the right, but not necessarily from the time of demand.⁷⁷ It is no defense that similar stock might have been bought in the market⁷⁸ or that a change in control will result, if plaintiff gets his rights.⁷⁹ Injunction against an increase which will derange the relative rights and status of stockholders wrongfully may be had.⁸⁰ Whenever the wrong is directly to the corporation, the stockholder must proceed by a stockholders' suit;⁸¹ but unless there is

⁷⁵ See *Wells v. Green Bay & M. Canal Co.*, 90 Wis. 442, 64 N. W. 69; *Dousman v. Wisconsin & L. S. Mining & Smelting Co.*, 40 Wis. 418. Compare, however, *Meredith v. New Jersey Zinc & Iron Co.*, 55 N. J. Eq. 211, 37 Atl. 539, aff'd 56 N. J. Eq. 454, 41 Atl. 1116.

Where the directors of a corporation, upon an increase of the capital stock, disregard the right of stockholders to subscribe for the new stock, and, for the purpose of securing themselves in office and in the control of the corporation, issue the stock to their friends for less than its par value, defrauded stockholders may sue in equity to set the issue aside and enforce their rights, and to enjoin the holders of the stock from voting at corporate elections, and the corporation from receiving their votes. *Way v. American Grease Co.*, 60 N. J. Eq. 263, 47 Atl. 44.

⁷⁶ Specific performance decreed, where a new company had meantime been formed but only to cure defective organization. *Bennett v. Baum*, 90 Neb. 320, 133 N. W. 439.

Specific performance will lie where the increased stock has no market value and cannot be purchased, and where hostile officers withhold it to retain control. *Schmidt v. Pritchard*,

135 Iowa 240, 112 N. W. 801. Evidence held sufficient to show seasonable application and right in plaintiff.

⁷⁷ The statute of limitations does not begin to run until the right is denied. *Wells v. Green Bay & M. Canal Co.*, 90 Wis. 442, 64 N. W. 69.

Limitations will run against a suit for a pro rata subscription even though the necessary demand for it was not made. *Stearns v. John H. Hibben Dry Goods Co.*, 31 Ohio Cir. Ct. 270.

⁷⁸ The stockholder is not deprived of his remedy by the fact that he might have bought similar stock in the market instead of enforcing his right to subscribe. *Bates v. United Shoe Machinery Co.*, 206 Fed. 716, aff'd 216 Fed. 140.

⁷⁹ *Schmidt v. Pritchard*, 135 Iowa 240, 112 N. W. 801.

⁸⁰ Injunction will not be granted against an illegal increase merely feared, or at the instance of a stranger. *Smyth-Wales v. John M. Smyth Co.*, 190 Ill. App. 66.

Stockholders may join in a bill to enjoin new issue without right to them to subscribe. *Snelling v. Richard*, 166 Fed. 635.

⁸¹ *Proctor v. Piedmont Portland Cement & Lime Co.*, 134 Ga. 391, 67 S. E. 942.

such a wrong the suit must be an individual one.⁸² An injunction may be had against exacting illegal conditions to the privilege of sharing in an increased issue;⁸³ or damages may be recovered for refusing the right to subscribe except on such conditions.⁸⁴

§ 3465. Sale of increase by corporation. Of course, the increased stock may be sold by the corporation, like its original unissued stock, if the stockholders consent or waive their privilege.⁸⁵ And a sale of the same is sometimes provided for by statute.⁸⁶ Thus it is sometimes provided that when a corporation increases its capital stock, and the new stock is worth more than par, it shall be sold at public auction to the highest bidders,⁸⁷ or that so much of the new stock as is not subscribed for or purchased by the stockholders in pursuance of their privilege shall be so sold. The statutory provisions in this respect must be followed.⁸⁸ It has been said, independently of any statutory provision, that new stock not taken by the stockholders should be sold at

Stockholders' suit for an injunction lies to prevent unlawful increase. *Maccon Gas Co. v. Richter*, 143 Ga. 397, 85 S. E. 112.

As to such suits, see *infra*, this chapter, subd. XXXII.

⁸² The corporation cannot complain that an increase was not allotted to holders entitled to share in it. *Waters v. Horace Waters & Co.*, 130 N. Y. App. Div. 678, 115 N. Y. Supp. 432, aff'd 201 N. Y. 184, 94 N. E. 602.

Stockholders cannot complain derivatively of a purchase of treasury stock which did not harm the corporation. *Dusenberry v. Sagamore Development Co.*, 164 N. Y. App. Div. 573, 150 N. Y. Supp. 229.

So where cancelled stock was reissued. *Archer v. Hesse*, 164 N. Y. App. Div. 493, 150 N. Y. Supp. 296.

⁸³ *Cunningham's Appeal*, 108 Pa. St. 546.

⁸⁴ *De La Cuesta v. Insurance Co. of North America*, 136 Pa. St. 62, 20 Atl. 508, 26 Wkly. Notes Cas. 384.

⁸⁵ This necessary and well accepted proposition is impliedly sustained by the citations in the preceding sections. § 3462, *supra*.

⁸⁶ *Ohio Ins. Co. v. Nunnemacher*, 15 Ind. 294; *Smith v. Franklin Park Land & Improvement Co.*, 168 Mass. 345, 47 N. E. 409; *Attorney General v. Boston & M. R. R.*, 109 Mass. 99; *Meredith v. New Jersey Zinc & Iron Co.*, 56 N. J. Eq. 454, 41 Atl. 1116, aff'g 55 N. J. Eq. 211, 37 Atl. 539.

⁸⁷ See *Attorney General v. Boston & M. R. R.*, 109 Mass. 99.

⁸⁸ Under a statute providing that, when a corporation increases its capital stock, the shares not taken by the stockholders shall be sold by the directors "at public auction," a private sale, so long as it is executory, is void, and a purchaser of shares at a private sale cannot compel the issue of certificates therefor. *Smith v. Franklin Park Land & Improvement Co.*, 168 Mass. 345, 47 N. E. 409.

Under a statute providing that, when a corporation shall increase its capital stock each stockholder may take his proportion, and the shares not so taken "may be sold or issued in such manner as its stockholders may by vote direct," etc., the stockholders must direct the manner of sale, and cannot delegate this power

public auction,⁸⁹ but it would seem that this is a matter within the discretion of the corporation unless it is controlled by some express statutory provision. To hold otherwise is judicial legislation. It is common to pass a resolution authorizing the directors to dispose of any such stock not taken up by the stockholders in such manner as the directors shall deem best for the corporation; but it has been held that directors cannot sell to themselves under such a resolution after a long time.⁹⁰

It has been held that, when new stock in a corporation is created and sold at a premium, the premium is the property of the stockholders,⁹¹ but this is not the law unless it is so agreed or provided by statute.⁹²

§ 3466. Status and liabilities of increased stock. Certain questions arise because of the manner of issuing the stock, which require treatment apart from that given generally to all stock.⁹³

The contract of subscription for increased stock has been considered in a former section,⁹⁴ and the liability of a corporation in damages arising out of an overissue of stock will be considered in subsequent sections.⁹⁵

Where a corporation has power to increase its stock, an additional issue under such power and a distribution thereof among existing stockholders, pro rata, although the stockholders make no payment therefor, does not in itself inflict injury either upon the corporate creditors or the corporation. Creditors will not be heard, therefore, to complain of such act.⁹⁶

to an officer. *Smith v. Franklin Park Land & Improvement Co.*, 168 Mass. 345, 47 N. E. 409.

⁸⁹ *In re Wheeler*, 2 Abb. Pr. N. S. (N. Y.) 361.

⁹⁰ A resolution for increase authorizing directors in their discretion to dispose of what remained undisposed of, does not sanction issuance to themselves at par of all that remains unissued nine years later when it has advanced to three or four times par value. *Strickler v. McElroy*, 45 Pa. Super. Ct. 165.

⁹¹ *State v. Franklin Bank of Columbus*, 10 Ohio 91, 97.

⁹² Under a statute providing that, whenever a corporation shall increase its capital stock, the shares not taken

by the stockholders may be sold or issued in such manner as the stockholders shall by vote direct, but no shares shall be sold for less than their par value, a stockholder who has not taken his proportion of new shares of stock so issued has no right to a premium obtained on a sale thereof pursuant to a vote of the stockholders, unless the vote so provides. *Mason v. Davol Mills*, 132 Mass. 76.

⁹³ See generally Chap. 17, on Subscriptions, and this chapter.

⁹⁴ § 3461, *supra*.

⁹⁵ See §§ 3467-3469, *infra*, this chapter, as to rights and liabilities arising out of overissue.

⁹⁶ *Great Western Min. & Mfg. Co. v. Harris' Estate*, 111 Fed. 38.

By statute in some jurisdictions,—New York, for example,—the stockholders of a corporation are subjected to individual liability for the debts of the corporation until the full amount of the capital stock is paid in and a certificate stating such fact recorded, and the statute applies to an increase of capital stock as well as to original stock. As to the increase, however, it only applies to the holders of that stock. When the original capital stock of a corporation is fully paid in, and a certificate filed stating the amount thereof and the fact of payment, as required by a statute imposing individual liability upon stockholders for debts of the corporation until this is done, the individual liability of the holders of the original stock is then at an end, and cannot be revived by a subsequent increase of the capital stock. The holders of the original stock of a corporation, therefore, are not liable thereon because of a failure to pay in the increased capital stock. The liability rests solely on the holders of the increased stock.⁹⁷

Even when a corporation is authorized to increase its capital stock, it may do so under such circumstances as to perpetrate a fraud upon the public, and in such a case, not only the corporation, but its original stockholders and officers as well, may be liable therefor. If the directors and a majority of the stockholders of a corporation, knowing it to be insolvent, enter into a scheme to fraudulently increase its capital stock, representing and pretending that it is not indebted, and that the increase is for the purpose of enabling it to enlarge its business, and that it has been and is prosperous and successful, and thereby induce persons to purchase and pay for the new stock, the corporation and the guilty directors and stockholders are liable for the damages sustained by the purchasers by reason of the conspiracy and fraud. The corporation is liable because the increase is a corporate act, and the directors and stockholders are liable because of their participation.⁹⁸

In respect to national bank shares, it has been held that they are not “stock” subject to taxation until the increase has been certified by the comptroller.⁹⁹

When new members have been inducted into a corporation they have a right to sue for unlawful alienation of its property.¹

⁹⁷ Griffith v. Green, 129 N. Y. 517, 29 N. E. 838; Veeder v. Mudgett, 95 N. Y. 295.

⁹⁸ Dorsey Mach. Co. v. McCaffrey, 139 Ind. 545, 47 Am. St. Rep. 290, 38 N. E. 208.

⁹⁹ Charleston v. Peoples Nat. Bank, 5 S. C. 103, 22 Am. Rep. 1.

¹ New members of nonstock society held entitled to sue for rescission of unlawful alienation of its property. German Corp. of Negaunee v. Negaunee.

§ 3467. Overissues and unauthorized increase—In general. Where the corporation has previously issued stock to the entire authorized limit, it cannot of course issue additional stock.² And an agreement to issue stock when there is no power to issue the same is illegal and void.³ What does so issue is not stock.⁴

To constitute an overissue, within this rule, there must be an issue of stock in excess of the amount authorized. When a corporation which has already issued the full amount of its stock accepts a surrender of, or purchases, or forfeits the shares of one of the stockholders, and afterwards reissues the same, this does not constitute an overissue.⁵ Nor is there an overissue where a corporation issues new certificates of stock in lieu of other certificates, properly issued, which have been lost or destroyed,⁶ or when issue is made without permitting shareholders to subscribe.⁷

The first issue must really be an issue to put this rule into force.⁸ If a corporation undertakes to increase its capital stock without authority, and issues certificates for the additional stock, or if its officers or agents fraudulently issue certificates in excess of the amount authorized, the corporation, as we shall hereafter see, may be liable in damages to bona fide purchasers of the certificates.⁹ The increase and

nee German Aid Society, 172 Mich. 650, 138 N. W. 343.

² First Ave. Land Co. v. Parker, 111 Wis. 1, 87 Am. St. Rep. 841, 86 N. W. 604.

Stock beyond the charter limit is invalid (Comp. Laws 1909, § 1285). Pruitt v. Oklahoma Steam Baking Co., 39 Okla. 509, 135 Pac. 730.

³ Anthony v. Household Sew. Mach. Co., 16 R. I. 571, 5 L. R. A. 575, 18 Atl. 176.

⁴ A certificate for which another has been issued and which thus amounts to an overissue is not stock. New York & E. Telegraph & Telephone Co. v. Great Eastern Tel. Co., 74 N. J. Eq. 221, 69 Atl. 528, aff'd 75 N. J. Eq. 297, 72 Atl. 1119.

A fraudulently overissued certificate cannot be regarded as a certificate of stock, and estoppel of the corporation to deny that it was goes only to a right of action and does not make it a certificate. Smith v. Worcester &

S. St. R. Co., 224 Mass. 564, 113 N. E. 462.

⁵ Wells v. Thompson Mfg. Co., 54 Mo. App. 41.

⁶ Kinnan v. Forty-Second St. M. & St. N. Ave. Ry. Co., 1 N. Y. Misc. 457, 21 N. Y. Supp. 789, 140 N. Y. 183, 35 N. E. 498.

⁷ It is not ultra vires for the corporation to sell unissued stock from its treasury without permitting shareholders to subscribe. Waters v. Horace Waters & Co., 130 N. Y. App. Div. 678, 115 N. Y. Supp. 432, aff'd 201 N. Y. 184, 94 N. E. 602.

⁸ A subscription and issue following a sham subscription for the whole amount is not thereby made an overissue. Gordon v. Cummings, 78 Wash. 515, 139 Pac. 489.

⁹ New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30. See this chapter, § 3486 et seq., infra, as to liability for overissues.

An innocent holder of an illegal

the certificates, however, are void because of the fact that it is beyond the powers of the corporation to create and issue the additional stock, and the holders of the certificates, therefore, whether they be the original holders or their bona fide transferees, do not become stockholders,¹⁰ except, under some circumstances, as to creditors,¹¹ nor can they be relieved by an issue of stock.¹² An unauthorized increase of

issue has a right of action against the corporation for reimbursement. *Hobson v. Marsh*, 69 Wash. 326, 124 Pac. 912.

One who loaned money to an officer on a fair looking but spurious over-issued certificate may recover from the corporation for resultant loss. *Davey v. Newell-Morse Royalty Co.*, 169 Mo. App. 565, 154 S. W. 147.

The corporation is liable in damages for tort to a bona fide taker of spurious overissued stock put out by its officers fraudulently and negligently. *National Bank of Webb City v. Newell-Morse Royalty Co.*, 259 Mo. 637, 168 S. W. 699.

Par value may be allowed where there is no market value and the assets equal or exceed the capital stock. *National Bank of Webb City v. Newell-Morse Royalty Co.*, 259 Mo. 637, 168 S. W. 699.

¹⁰ *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Page v. Austin*, 10 Can. Sup. Ct. 132.

If a statute authorizing an increase of capital stock requires that the full amount of the original capital stock shall be first paid in, an attempted increase before fulfillment of this condition is void. *Page v. Austin*, 10 Can. Sup. Ct. 132.

The fact that a person has paid money to a corporation for increased shares of capital stock does not make him a stockholder, where the increase was unauthorized. *Schierenberg v. Stephens*, 32 Mo. App. 314.

As to the effect of a statutory or constitutional provision that no cor-

poration shall issue stock except for money, labor done, or money or property actually received, and that a fictitious increase of stock shall be void, see *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347; *Grant v. East & W. R. Co. of Alabama*, 54 Fed. 569; *Knowlton v. Congress & E. Spring Co.*, 14 Blatchf. 364, Fed. Cas. No. 7,903; *Fitzpatrick v. Dispatch Pub. Co.*, 83 Ala. 604, 2 So. 727; *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662; *Michigan Southern & N. I. R. Co. v. Auditor General*, 9 Mich. 448.

Cemetery share certificates, analogous to stock, are good in a bona fide pledgee's hands, where an officer intrusted with signed blanks to facilitate reissue on surrender of original certificates, fraudulently makes them out in his own name without any corresponding surrender and pledges them. The liability of the corporation is that of respondeat superior for tort. *American Exch. Nat. Bank v. Woodlawn Cemetery*, 120 N. Y. App. Div. 119, 105 N. Y. Supp. 305, rev'd 194 N. Y. 116, 87 N. E. 107, on the ground that such certificates were non-negotiable promises to pay money, and that the pledgee took subject to all equities.

¹¹ See § 3469, *infra*, as to estoppel and ratification.

¹² If all the authorized stock is outstanding, new stock in lieu of that unlawfully transferred cannot be awarded to the rightful owner. *Leurey v. Bank of Baton Rouge*, 131 La. 30, Ann. Cas. 1913 E 1168, 58 So. 1022.

Courts will not decree relief which would entail an overissue; but a credi-

capital stock is none the less void because made by unanimous agreement among the stockholders, and under an honest misapprehension as to their powers.¹³

It follows that, when an increase of the capital stock of a corporation is unauthorized, the holders of certificates for the new stock cannot vote the same at corporate meetings. If they undertake to do so, the votes are void.¹⁴ And subscriptions for the new stock are absolutely void, both as between the corporation and the subscribers,¹⁵ and, subject to some limitation, even as against creditors.¹⁶

Certificates of stock issued by the officers or agents of a corporation in excess of its authorized capital stock will be canceled at the suit of the corporation, or at the suit of a stockholder on behalf of himself and the other stockholders, if the corporation refuses to sue,¹⁷ unless the remedy is barred by laches or elements of estoppel.¹⁸

An unauthorized increase of stock does not affect the validity of the original stock,¹⁹ and the shares first transferred and reissued are good, where a double reissue is made;²⁰ but where an increase is attempted

tor can be relieved against his debtor by a conditional issue of surrenderable certificates to be held by the corporation. *Parkhurst v. Almy*, 222 Mass. 27, 109 N. E. 733.

¹³ *People v. Parker Vein Coal Co.*, 10 How. Pr. (N. Y.) 543.

¹⁴ *Humboldt Driving Park Ass'n v. Stevens*, 34 Neb. 528, 33 Am. St. Rep. 654, 52 N. W. 568.

¹⁵ *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed. 957; *Laredo Improvement Co. v. Stevenson*, 66 Fed. 633; *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030; *Kampman v. Tarver*, 87 Tex. 491, 29 S. W. 768. See also *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Clark v. Turner*, 73 Ga. 1; *Burrows v. Smith*, 10 N. Y. 550; *Lathrop v. Kneeland*, 46 Barb. (N. Y.) 432; *Union R. Co. v. Sneed*, 99 Tenn. 1, 47 S. W. 89, 41 S. W. 364; *Level Land Co. No. 3 v. Hayward*, 95 Wis. 109, 69 N. W. 567; *Mackley's Case*, 1 Ch. Div. 247.

¹⁶ § 3469, *infra*.

¹⁷ *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30. As to stock-

holders' suits see *infra* this chapter, subds. XXXI and XXXII.

The corporation may sue for cancellation of stock which defendant as its counsel and chairman of its board caused to be issued to himself without authority. In such action the reorganization committee which formed the corporation is not a necessary party. *United States Light & Heat Corporation v. Walker*, 94 N. Y. Misc. 687, 158 N. Y. Supp. 664, *aff'd* 175 N. Y. App. Div. 929, 161 N. Y. Supp. 1148.

¹⁸ Where the holder of a portion of the preferred stock of a bridge company failed to complain of an over-issue of stock, greatly in excess of the amount required to build the bridge, for nearly six years after the issue of the stock, it was held that his right to have the excessive stock canceled was lost by laches. *Jutte v. Hutchinson*, 189 Pa. St. 218, 42 Atl. 123.

See § 3469, *infra*.

¹⁹ *Byers v. Rollins*, 13 Colo. 22, 21 Pac. 894.

²⁰ The reissue of a certificate in full for one hundred and fifty-nine shares

beyond the authorized amount, the whole of such increase is void.²¹

§ 3468. — Effect of informalities and irregularities in increase. As was stated before, since legislative authority is necessary to enable a corporation to increase its capital stock, the increase, when authorized, cannot be legally accomplished except in the mode and subject to the limitations, if any, prescribed by the legislature.²² To be legal as against the state, the increase must be voted and made in the mode and with the formalities prescribed by the legislature in authorizing it. Thus, if the statute authorizing an increase of stock requires notice of the intended increase to be published, and this formality is omitted, the secretary of state may properly refuse to file the certificate which the statute requires to be filed.²³ Informalities and irregularities may also render an increase of stock invalid as against original stockholders who are not estopped by participation or acquiescence.²⁴

There is a distinction between issues without compliance with imperative or prohibitory laws, and those which deviate from statutes which merely prescribe a procedure without making it obligatory. The former is void and the latter is voidable as to the subscriber or purchaser.²⁵ And if the rights of creditors are not involved,²⁶ informalities or irregularities, if they consist in the omission of essential steps prescribed by the statute authorizing the increase, will entitle subscribers for the increased stock to avoid their subscriptions and recover what they have paid thereon, unless they are estopped.²⁷

after ten shares had been sold and transferred and reissued does not affect the validity of the ten shares or the title to them. *O'Dwyer v. Verdon*, 115 N. Y. App. Div. 37, 100 N. Y. Supp. 588, *aff'd* 190 N. Y. 505, 83 N. E. 1128.

²¹ If a corporation is authorized to increase its capital stock to an amount not exceeding double its originally authorized stock, and it increases it to a larger amount, the entire increase is void. *Laredo Improvement Co. v. Stevenson*, 66 Fed. 633; *Kampman v. Tarver*, 87 Tex. 491, 29 S. W. 768.

²² §§ 3459, 3460, *supra*.

²³ *State v. McGrath*, 86 Mo. 239.

²⁴ See *Jones v. Concord & M. R. R.*, 67 N. H. 119, 234, 68 Am. St. Rep. 650, 38 Atl. 120, 30 Atl. 614, and cases in the notes following.

²⁵ *Steele v. Hughes*, 104 Ark. 517, 149 S. W. 336; *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5, 29 N. E. 63.

Where an amendment of the articles of incorporation is necessary to authorize an increase of capital stock, and a statute declares that an amendment of articles of incorporation shall be inoperative until a certificate of the same is left for record in a certain office, an increase before such a certificate is left for record is invalid. *Wood v. Union Gospel Church Bldg. Ass'n*, 63 Wis. 9, 22 N. W. 756.

²⁶ See § 3469, *infra*.

²⁷ *Tillinghast v. Bailey*, 86 Fed. 46; *Brown v. Tillinghast*, 84 Fed. 71; *Lincaln v. New Orleans Exp. Co.*, 45 La. Ann. 729, 12 So. 937; *Union R. Co. v.*

In any case, a substantial compliance with the provisions of the statute in voting or making an increase of stock is all that is required.²⁸ Mere technical objections cannot be set up by a subscriber for the additional stock, to escape liability on his subscription.²⁹

Sneed, 99 Tenn. 1, 47 S. W. 89, 41 S. W. 364; *Page v. Austin*, 10 Can. Sup. Ct. 132.

In an action on a subscription for stock, where the amount of stock was fixed by the charter of the corporation, with a proviso that additional stock might be issued when directed by the president and directors, it was held that the fact that the whole amount of the original stock had been issued, and that the issue of additional stock had not been directed by the president and directors, was a good defense. *McCord v. Ohio & M. R. Co.*, 13 Ind. 220.

The increase must be authorized by the stockholders as required by the statute, or it will be invalid. *Winters v. Armstrong*, 37 Fed. 508; *Nichols v. Stephens*, 32 Mo. App. 330.

Where a statute provided that the capital stock of a corporation could be increased only upon public notice for thirty days of a meeting of stockholders, a stockholders' meeting held in accordance with the notice, a vote on the proposed increase, a certificate of proceedings duly signed and verified, and a filing of the certificate in the office of the secretary of state, and declared that, when the certificate should be so filed, the capital stock should be increased as therein set forth, it was held that increased stock could have no validity until full compliance with the provisions of the statute, and, therefore, that a purchaser of the increased stock could rescind and recover the price paid. *Lincoln v. New Orleans Exp. Co.*, 45 La. Ann. 729, 12 So. 937.

In the absence of any evidence that due and sufficient notice was not given to all the stockholders of a meeting to increase the capital stock of a cor-

poration, as required by statute, the book of minutes of the meeting, and the certificate, showing that more than two-thirds of the stockholders appeared in person or by proxy, and voted for the increase, was held sufficient to establish regularity of the meeting as against a subscriber for the increased stock. *Cuykendall v. Douglas*, 19 Hun (N. Y.) 577.

The Connecticut statute requiring a corporation, on increasing its capital stock, to file a certificate of the increase with the secretary of state and town clerk, is intended primarily for the benefit of the public, and its failure to file the same does not render a subscription for increased stock invalid as between the corporation and the subscriber. *Barrows v. Natchaug Silk Co.*, 72 Conn. 658, 45 Atl. 951.

As to ratification, waiver and estoppel, see § 3469, *infra*.

²⁸ Where a statute required a certificate of a meeting of stockholders for the purpose of increasing the capital stock of a corporation to be "acknowledged" by the chairman, it was held sufficient where a certificate recited that it was "subscribed and sworn to" before a justice of the peace, by the chairman, instead of being "acknowledged." *Cuykendall v. Douglas*, 19 Hun (N. Y.) 577.

Under a statute providing that, in proceedings to increase the capital stock of a corporation, a certificate shall be filed showing "the amount of capital actually paid in," it was held that a certificate that the whole of the capital stock "has been sold, and all but \$ — paid in," was sufficient. *Moosbrugger v. Walsh*, 89 Hun (N. Y.) 564, 35 N. Y. Supp. 550.

²⁹ *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126.

When a national bank increases its capital stock, as authorized by the National Bank Act, the certificate of the comptroller of the currency is conclusive as to the regularity of the proceedings, and a subscriber for the increased stock cannot avoid his subscription and recover what he has paid, merely on the ground of irregularities.³⁰ The presumption favors regularity.³¹

§ 3469. — Ratification and estoppel. The legislature may ratify and render valid an increase of its stock by a corporation, which was unauthorized when made, or which was made without compliance with statutory requirements, although it cannot thereby impair vested rights.³²

An agreement to issue stock when there is no power to issue the same, if absolute and not conditional upon the power being subsequently conferred, is illegal and void, and is not rendered valid and binding by a subsequent grant of power to issue the stock.³³

Failure to comply with provisions in the statute which are intended merely for the benefit and protection of the stockholders may be waived by them.³⁴ And, generally, both original stockholders and subscribers for the increased stock are estopped to complain of irregularities or informalities in voting or making the increase, both as against creditors, and as against the corporation and other stockholders or subscribers, if they participated in the proceedings or subscribed for the

³⁰ *Tillinghast v. Bailey*, 86 Fed. 46; *Columbia Nat. Bank of Tacoma v. Mathews*, 85 Fed. 934, rev'g *Mathews v. Columbia Nat. Bank*, 79 Fed. 558; *Latimer v. Bard*, 76 Fed. 536.

³¹ In the absence of evidence to the contrary, performance of conditions, as the payment of a tax, for example, will be presumed. *Peck v. Elliott*, 79 Fed. 10, 38 L. R. A. 616.

³² *Turnbull v. Pomeroy Salt Co.*, 24 *Cinc. L. Bul. (Ohio)* 133.

³³ Where a corporation agreed to repay a loan in preferred stock to be subsequently issued, and it was afterwards ascertained that it had no power to issue such stock, it was held that the lender could maintain an action against the corporation for the return of the money, although an act was passed before the trial authorizing issue of such stock, as the contract

was illegal and a nullity. *Anthony v. Household Sew-Mach. Co.*, 16 R. I. 571, 5 L. R. A. 575, 18 *Atl.* 176.

³⁴ In Alabama it was held that a constitutional provision that the stock of corporations shall not be increased without the consent of the persons holding the larger amount in value of the stock, first obtained at a meeting held after thirty days' notice, and a statutory provision that, before holding such meeting, notice shall be given for four consecutive weeks in the newspaper published nearest to the place of business of the corporation, were intended for the benefit of the stockholders, and might be waived, and that insufficiency of a notice thereunder is waived where the stockholders disregard it. *Nelson v. Hubbard*, 96 *Ala.* 238, 17 L. R. A. 375, 11 *So.* 428.

increased stock with actual or constructive knowledge of the facts, or if they have been guilty of laches, or have acquiesced.³⁵ But stockholders have no power to ratify an issue beyond the charter limit.³⁶ Holders of one class of stock may be estopped where it would prejudice other stockholders if illegality of the issue was asserted.³⁷

If a corporation increases its capital stock when it has no power to do so under any circumstances, persons subsequently dealing with it are chargeable with notice of its want of power, and they cannot, as creditors of the corporation, contend that the holders of the unauthorized stock are estopped to deny its validity for the purpose of escaping liability as stockholders for the debts of the corporation.³⁸ It is other-

35 United States. *Western Nat. Bank v. Armstrong*, 152 U. S. 346, 38 L. Ed. 470; *Banigan v. Bard*, 134 U. S. 291, 33 L. Ed. 932; *Columbia Nat. Bank of Tacoma v. Mathews*, 85 Fed. 934; *Bard v. Banigan*, 39 Fed. 13; *Poole v. West Point Butter & Cheese Ass'n*, 30 Fed. 513.

Indiana. *Southern Plank-Road Co. v. Hixon*, 5 Ind. 165.

Michigan. *Hoeft v. Kock*, 123 Mich. 171, 81 Am. St. Rep. 159, 81 N. W. 1070.

Missouri. *Kansas City Hotel Co. v. Hunt*, 57 Mo. 126; *Kansas City Hotel Co. v. Harris*, 51 Mo. 464.

Wisconsin. *Bailey v. Champlain Mining & Prospecting Co.*, 77 Wis. 453, 46 N. W. 539.

A stockholder who takes part in a stockholders' meeting at which an increase of stock is voted, either personally or by proxy, cannot afterwards question the validity of the increase on the ground that the meeting was not properly called. *Columbia Nat. Bank of Tacoma v. Mathews*, 85 Fed. 934, rev'g 79 Fed. 558.

A person who purchases a certificate of increased stock which is not under the seal of the corporation and signed by the president, as required by the statute authorizing the increase, is chargeable with notice of the irregularity, and cannot complain. *Byers v. Rollins*, 13 Colo. 22, 21 Pac. 894.

Stockholders voting an increase of the capital stock, without specifying the time of issuance, waive irregularity on the part of the directors in issuing the same in various amounts from time to time during a period of six years, where they accept dividends and participate in stockholders' meetings during such time, without making any objection. *Barrows v. Natchaug Silk Co.*, 72 Conn. 658, 45 Atl. 951.

Regularity is strongly presumed where ten years went by without question. *Man v. Boykin*, 79 S. C. 1, 128 Am. St. Rep. 830, 60 S. E. 17.

36 An issue beyond the charter limit, which limit is not subsequently raised to admit of it, cannot be ratified. *Pruitt v. Oklahoma Steam Baking Co.*, 39 Okla. 509, 135 Pac. 730. Accordingly acceptance of dividends with knowledge will not work a ratification. *Id.*

37 Special dividend paying shares in a building-loan corporation, held to have been issued to provide a guarantee capital, hence holders were not entitled to deny legality of them after accepting benefits and when prejudice to other stockholders would result. *People v. New York Building-Loan Banking Co.*, 119 N. Y. App. Div. 830, 104 N. Y. Supp. 892, aff'd 189 N. Y. 547, 82 N. E. 1131.

38 *Scoville v. Thayer*, 105 U. S. 143,

wise, however, where a corporation is authorized to increase its capital stock under certain circumstances, and exceeds its powers, or if there are mere irregularities or informalities in voting or making the increase. In such a case, the holders of the new stock will be estopped to deny its validity as against persons who have become creditors of the corporation in reliance upon its validity.³⁹ Subscribers for

26 L. Ed. 968; *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed. 957; *Clark v. Turner*, 73 Ga. 1; *Kampman v. Tarver*, 87 Tex. 491, 29 S. W. 768.

This is true, even though the holder of such stock may have acted as a stockholder. *Ross-Meehan Brake Shoe Foundry Co. v. Southern Malleable Iron Co.*, 72 Fed. 957.

Where a corporation increased its capital stock \$1,100,000, when it was given the power to increase it \$100,000 only, it was held that the entire increase was void, and that subscribers thereto were not liable to creditors of the corporation. *Kampman v. Tarver*, 87 Tex. 491, 29 S. W. 768.

³⁹ **United States.** *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227, aff'g 41 Fed. 531; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Chubb v. Upton*, 95 U. S. 665, 24 L. Ed. 523; *Peck v. Elliott*, 79 Fed. 10, 36 L. R. A. 616; *Latimer v. Bard*, 76 Fed. 536; *Upton v. Jackson*, 1 Flip. 413, Fed. Cas. No. 16,802. Compare *Sayles v. Brown*, 40 Fed. 8.

Georgia. *Clark v. Turner*, 73 Ga. 1.

Michigan. *Hoelt v. Kock*, 123 Mich. 171, 81 Am. St. Rep. 159, 81 N. W. 1070.

Minnesota. *Fithian v. Weidenborner*, 72 Minn. 331, 75 N. W. 380; *Palmer v. Bank of Zumbrota*, 72 Minn. 266, 75 N. W. 380.

New York. *Veeder v. Mudgett*, 95 N. Y. 295.

England. In re *Miller's Dale & Ashwood Dale Lime Co.*, 31 Ch. Div. 211.

Where a director of a company took shares of increased stock issued under

a resolution passed and confirmed at meetings the interval between which was less than that required by statute, it was held that the defect only affected the position of the company and the shareholder inter se; and where the company went into liquidation, it was held that the shareholder was precluded from objecting to the validity of the increase as a ground for removing him from the list of contributors. In re *Miller's Dale & Ashwood Dale Lime Co.*, 31 Ch. Div. 211.

A subscriber for increased stock in a corporation cannot escape liability as against creditors on the ground that notice of the increase was not published as required by the statute under which it was made (*Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227, 41 Fed. 531); or on the ground that there was no proper notice or call of the meeting at which the increase was voted (*Stutz v. Handley*, 41 Fed. 531, 139 U. S. 417, 35 L. Ed. 227. Contra, In re *Wheeler*, 2 Abb. Pr. N. S. [N. Y.] 361); or that the meeting was held in another state (*Stutz v. Handley*, 41 Fed. 531, 139 U. S. 417, 35 L. Ed. 227).

Where, in amending articles of incorporation with a view to increasing the capital stock of a corporation, statutory requirements as to the execution, filing, and publication of the amendment are not complied with, but the amendment is voted for by the stockholders, the increased stock issued, and held by the new stockholders until the corporation becomes insolvent, and an action is commenced

increased stock are not estopped to set up that the increase was irregular and invalid, as against creditors who were managers and stockholders of the corporation, and participated in the increase.⁴⁰

for the appointment of a receiver, the holders of the new stock are estopped to deny the validity of the increase as against creditors who have become such on the faith of the same. *Fithian v. Weidenborner*, 72 Minn. 331, 75 N. W. 380. See also *Palmer v. Bank of Zumbrota*, 72 Minn. 266, 75 N. W. 380, where it was held that there is no estoppel as against persons who became creditors before the increase.

In *Page v. Austin*, 10 Can. Sup. Ct. 132, it was held that there was no estoppel, even in favor of creditors, where they sought to enforce a statutory liability against alleged stockholders, of the latter to show that the shares held by them were shares of increased stock, and that the increase was unauthorized because the whole of the original capital stock had not been paid in at the time of the increase, as was required by a statute.

A holder of certificates of stock in a national bank cannot escape liability as a stockholder to creditors under U. S. Rev. St. § 5151, on the ground that the shares of stock which the certificates represent are part of an increase which was made without compliance with the conditions of the Act of May 1, 1886 (24 St. at Large, p. 18, c. 73), which prohibits increase of capital stock until the whole amount of such increase is paid in, and the comptroller of the currency has certified to that fact. And this is true, even though he may have been induced to take the stock by fraud of the officers of the bank and of the comptroller. *Scott v. Deweese*, 181 U. S. 202, 45 L. Ed. 822.

A subscriber for a proposed increase of stock in a national bank, who has made payments on his subscrip-

tion, believing that the statutory requirements would be complied with so as to make a valid increase, is entitled to have the amount of such payments allowed as a claim against the assets of the bank in the hands of a receiver. *Winters v. Armstrong*, 37 Fed. 508.

In an action by the receiver of a national bank to enforce subscriptions to a proposed increase of its capital stock, an allegation that the bank, subsequent to the defendants' subscriptions, and with their knowledge, represented to the public, by means of circulars, letter heads, etc., that its capital stock had been increased, and that the defendants allowed their names to remain upon the list of those subscribing for and entitled to such increased stock, but without alleging that the public gave credit to the bank on the faith that the defendants were part owners of such increase of stock, or that the defendants allowed themselves to be held out as actual stockholders, does not show that they are estopped to plead the failure of the bank to comply with the statutory requirements in making the increase. *Winters v. Armstrong*, 37 Fed. 508.

One who knowingly took part of an increase made without the required notice of sixty days (Const. art. 12, § 8) is estopped to deny that he is a stockholder. *Steele v. Hughes*, 104 Ark. 517, 149 S. W. 336.

Stockholders are estopped as to creditors to deny regularity where they held out the increased amount as the capital stock. *Man v. Boykin*, 79 S. C. 1, 128 Am. St. Rep. 830, 60 S. E. 17.

⁴⁰ *Sayles v. Brown*, 40 Fed. 8.

One who subscribes and pays for a proposed increase of stock in a corporation, as a national bank, for example, is not subject to the statutory liability to creditors, as a "shareholder," where the increase is in fact never made, and the officers of the corporation, instead of the increased stock subscribed and paid for, transfer to him old stock of the bank, without his knowledge or consent.⁴¹

§ 3470. Reduction of capital stock. At the outset the distinction between reduction of capital stock and impairment or "reduction" (i. e., withdrawal) of capital must be emphasized. The former only is to be here treated. Withdrawal of capital or impairment of it may be accomplished in several ways, all of which leave the capital stock unchanged in amount. Thus a waste of assets reduces the capital assets; a dividend withdraws surplus assets; a stock dividend withdraws them from surplus and capitalizes them thus increasing the capital stock; and other instances might be cited.⁴²

⁴¹ *Stephens v. Follett*, 43 Fed. 842.

⁴² See distinctions pointed out in §§ 3413, 3414, *supra*, this chapter, on the nature of capital stock.

Mere withdrawal of assets is not a reduction. *Barnard Mfg. Co. v. Ralston Milling Co.*, 71 Wash. 659, 129 Pac. 389.

A reduction of liabilities by conveying real estate not needed, is not a reduction of capital injurious to a subsequent creditor, though later without fraud the corporation became insolvent. *Beardslee v. Shickler*, 219 Pa. 165, 68 Atl. 44.

The corporation cannot decrease capital in the way of dividends. *Bryan v. Aikin*, — Del. Ch. —, 82 Atl. 817. See also *infra*, this chapter, subd. xvi.

But distribution of a "stock" dividend, in reality a property dividend, payable in stock of another corporation held as a surplus investment, is not an impairment of capital. *Union & N. H. Trust Co. v. Taintor*, 85 Conn. 452, 83 Atl. 697.

Civil Code, § 309 prohibiting "directors" from withdrawing "capital stock" applies also to stockholders and means capital in the sense of

assets. *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914 B 1013, 129 Pac. 582.

Capital stock means actual property contributed to the corporation within a statute forbidding distribution of capital. *Tapscott v. Mexican Colorado River Land Co.*, 153 Cal. 664, 96 Pac. 271.

In a Maryland case, the court stated that "it seems perfectly manifest that a corporation, by the purchase of its own shares, in the absence of legislative authority permitting that to be done, diminishes its capital to the extent of the shares so purchased, and this, too, although the purchase was intended to serve only a temporary purpose, save in the instance where the stock is bought to secure the payment of an antecedent debt." *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 Atl. 70.

Forming a new corporation with \$20,000 stock to take over all the \$250,000 stock and assets (including patents) of the old does not show a fraudulent reduction of capital, the patents having been honestly but

As a general rule, when the amount of the capital stock of a corporation is fixed by its charter or articles of association, or by the general law, it has no more power, in the absence of authority from the legislature, to reduce the same, either directly or indirectly, than it has to increase the same. Any change, to be valid, must be expressly authorized.⁴³ In the absence of legislative authority, therefore, a corporation cannot reduce its capital stock from the amount fixed by its charter or articles to the amount actually paid in,⁴⁴ or make distribution of assets before dissolution.⁴⁵ A corporation cannot reduce its capital stock by purchasing its own shares for cancellation or retirement,⁴⁶ unless they were issued as retirable or redeemable stocks.⁴⁷

erroneously valued in both instances. *Alpha Portland Cement Co. v. Schratwieser*, 215 Fed. 982, aff'd 221 Fed. 258.

⁴³ **United States.** *Seignouret v. Home Ins. Co.*, 24 Fed. 332; *In re State Ins. Co.*, 14 Fed. 28. See also *Harri-man v. Northern Securities Co.*, 197 U. S. 244, 49 L. Ed. 739, where reduction of stock was provided for by resolution providing for the terms of distribution of surplus assets thereby created.

Colorado. *Kassler v. Kyle*, 28 Colo. 374, 65 Pac. 34.

Connecticut. *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560.

Indiana. *Ferris v. Ludlow*, 7 Ind. 517.

Maryland. *Maryland Trust Co. v. National Mechanics' Bank*, 102 Md. 608, 63 Atl. 70.

Massachusetts. See *Salem Mill Dam Corporation v. Ropes*, 6 Pick. 23.

Missouri. *Coquard v. St. Louis Cotton Compress Co.*, 7 S. W. 176.

Tennessee. *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

England. *Holmes v. Newcastle-upon-Tyne Abattoir Co.*, 45 L. J. Ch. 383; *Droitwich Patent Salt Co. v. Curzon*, L. R. 3 Exch. 35. See also *In re Direct Spanish Tel. Co.*, 34 Ch. Div. 307; *Bannatyne v. Direct Spanish Tel. Co.*, 34 Ch. Div. 287; *In re Ebbw Vale*

Steel, Iron & Coal Co., 4 Ch. Div. 827.

In England the reduction of stock is now regulated by the Companies Act of 1908, sections 40 and 46. See also *Halsbury's Laws of England*, vol. 5, p. 100.

⁴⁴ *Droitwich Patent Salt Co. v. Curzon*, L. R. 3 Exch. 35.

⁴⁵ Stockholders of a new corporation cannot complain that the issue of its stock for distribution among the stockholders of the old, which had sold all its assets to the new, was a distribution of capital before dissolution. *O'Dea v. Hollywood Cemetery Ass'n*, 154 Cal. 53, 97 Pac. 1.

A corporation lawfully formed to hold and sell property and distribute the proceeds thereof to its stockholders is not disabled to make a covenant with stockholders to distribute a fixed sum annually. Civil Code, § 309 forbidding directors to divide capital does not apply. *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030.

⁴⁶ *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560; *Cartwright v. Dickinson*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

⁴⁷ While assets cannot be used to buy in stock, the issuance of redeemable stock, redemption being originally a condition, is not prohibited. And it is not material that some was to be redeemed at a premium, there being

If it undertakes to do so, and pays for the shares out of the assets of the company, creditors of the company, on its becoming insolvent, may hold the directors or stockholders liable in equity to the extent of the assets so received by them.⁴⁸

It has been held that a corporation cannot purchase its own shares for the purpose of holding them, on the ground that the purchase by a corporation of its own shares in effect reduces its capital stock to that extent until the shares are reissued.⁴⁹ Strictly speaking, however, this is not in any sense a reduction of the capital stock,⁵⁰ and a late federal case declares that there is an inherent right to retire capital stock by purchase, as well as any right that may exist by statute.⁵¹ The power of a corporation to purchase and hold its own shares is elsewhere considered.⁵²

If the charter of a corporation does not fix the amount of the capital stock, and it is fixed by the stockholders or directors, and if the whole amount fixed is not taken, they may afterwards reduce it to the amount taken.⁵³

no fraud. *Schulte v. Boulevard Gardens Land Co.*, 164 Cal. 464, 44 L. R. A. (N. S.) 156, Ann. Cas. 1914 B 1013, 129 Pac. 582.

Preferred stock when issued with a retirement privilege can be retired only on payment of the amount agreed. A stock dividend was not payment pro tanto. *Sterling v. H. F. Watson Co.*, 241 Pa. 105, 88 Atl. 297.

⁴⁸ *Crandall v. Lincoln*, 52 Conn. 73, 52 Am. Rep. 560.

Directors held liable where assets were withdrawn. *McIver v. Young Hardware Co.*, 144 N. C. 478, 119 Am. St. Rep. 970, 57 S. E. 169.

Taking up stock by purchase and later giving a bond and mortgage for the unpaid balance of the price and other sums owing is not a reduction of capital. The directors are liable to creditors for the resultant loss, if any. *Moses v. Soule*, 63 N. Y. Misc. 203, 118 N. Y. Supp. 410, aff'd 136 N. Y. App. Div. 904, 120 N. Y. Supp. 1136.

For a case in which preferred stock was exchanged for bonds, see *Alabama Consol. Coal & Iron Co. v. Baltimore Trust Co.*, 197 Fed. 347.

⁴⁹ *Tulare Irrigation District v. Kaweah Canal & Irrigation Co.* (Cal.), 44 Pac. 662.

To transfer patent rights to a stockholder for his stock and his resignation as an officer, would be a reduction of capital violative of Stock Corporation Law, § 28, forbidding reduction except as authorized by law, where the remaining property is not shown to equal the capital stock. This is true though the stock was to go into the treasury. *Stevens v. Olus Mfg. Co.*, 72 N. Y. Misc. 508, 130 N. Y. Supp. 22, aff'd 146 N. Y. App. Div. 951, 131 N. Y. Supp. 1145.

⁵⁰ See *infra*, this section.

⁵¹ *Allen v. Francisco Sugar Co.*, 193 Fed. 825.

Such a reduction is not a withdrawal of capital by way of dividends. The reduction itself effects a surplus to the amount reduced. *Allen v. Francisco Sugar Co.*, 193 Fed. 825.

⁵² Chap. 30, *supra*.

⁵³ *Somerset & K. R. Co. v. Cushing*, 45 Me. 524.

As more fully shown in another section, the corporation, if the transaction is in good faith, may under some circumstances accept a surrender of the shares and release the holder from further liability.⁵⁴ This, however, is not a reduction of the capital stock, for the shares may be reissued to subscribers or purchasers.⁵⁵

When a corporation purchases shares of its own stock, as it may lawfully do under some circumstances, but may also do unlawfully,⁵⁶ the shares are not thereby merged or extinguished, unless such is the intention. If it does not intend to retire the shares, they merely remain in suspension, as if were, and may be at any time reissued. This is true, whether the purchase of the shares was *intra vires* or *ultra vires*.⁵⁷ Obviously the ultimate effect of a purchase of its own stock by a corporation will necessarily depend upon the purpose of the purchase.⁵⁸

§ 3471. Authority and procedure to effect reduction; consent of stockholders. Reduction of the capital stock can be effected only in

⁵⁴ By resolution without objection a certificate issued for property may be recalled and subscription canceled. *Misenheimer v. Alexander*, 162 N. C. 226, 78 S. E. 161. As to withdrawal of subscriptions, see *supra*, Chapter 17.

⁵⁵ See footnote following.

⁵⁶ As to the power to deal in its own stocks, see Chapter 30, *supra*.

⁵⁷ *United States*. *Chillicothe Branch State Bank of Ohio v. Fox*, 3 Blatchf. 431, Fed. Cas. No. 2,683.

Alabama. *Draper v. Blackwell*, 138 Ala. 182, 35 So. 110.

California. *Bank of San Luis Obispo v. Wickersham*, 99 Cal. 655, 34 Pac. 444.

Georgia. *Hartridge v. Rockwell*, R. M. Charl. 260.

Iowa. *Western Improvement Co. v. Des Moines Nat. Bank*, 103 Iowa 455, 72 N. W. 657.

Louisiana. *Belknap v. Adams*, 49 La. Ann. 1350.

Maryland. *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418.

Massachusetts. *Leonard v. Draper*,

73 N. E. 644; *Com. v. Boston & A. R. Co.*, 142 Mass. 146, 7 N. E. 716; *American Railway-Frog Co. v. Haven*, 101 Mass. 398, 3 Am. Rep. 377.

Montana. *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938.

New York. *City Bank of Columbus v. Bruce*, 17 N. Y. 507.

Vermont. *State v. Smith*, 48 Vt. 266.

No reduction is effected where the corporation merely buys a holder's stock with intention not to merge it but merely to preserve the corporation, intending a resale of the stock, and its assets being ample. *San Antonio Hardware Co. v. Sanger*, — Tex. Civ. App. —, 151 S. W. 1104.

⁵⁸ *Booth v. Dodge*, 60 N. Y. App. Div. 23, 69 N. Y. Supp. 673, where the court points out that whether such purchase operates as a reduction of stock is a matter of corporate intent. To same effect, *Porter v. Plymouth Gold Min. Co.*, 29 Mont. 347, 101 Am. St. Rep. 569, 74 Pac. 938.

the manner provided by statute or charter, at least so far as affects the rights of creditors.⁵⁹

It is within the power of the legislature to authorize a corporation to reduce the amount of its capital stock by a provision to that effect in its charter or the general law in force at the time it is organized, or by an amendment after its creation or organization. But a grant to a corporation of authority to increase its capital stock does not include the power to reduce the same.⁶⁰

When a corporation is authorized to reduce its capital stock, it may do so by purchasing its shares and canceling or retiring the same.⁶¹ Or it may accept a surrender of shares, and give the holders in exchange therefor a proportionate amount of its assets, provided no rights of creditors are involved,⁶² or issue bonds for that purpose⁶³ or exchange another class of stock for that retired.⁶⁴ Or it may do so by canceling shares which have not yet been issued.⁶⁵

A statute providing that a corporation, "at any meeting called for the purpose, may increase or reduce its capital stock and the number of shares therein," does not authorize a corporation to reduce its capital stock by purchasing the shares of a particular stockholder, unless all consent. In order that such a reduction may operate justly to all the stockholders, each stockholder should be allowed to surrender such proportion of his stock as the amount of the proposed reduction bears to the whole amount of the capital stock.⁶⁶

⁵⁹ The statutory provision (Revisal, § 1164) for published notice is for protection from creditors. As among themselves stockholders may reduce stock without it. *Misenheimer v. Alexander*, 162 N. C. 226, 78 S. E. 161.

⁶⁰ *Seignouret v. Home Ins. Co.*, 24 Fed. 332; *Sutherland v. Oleott*, 95 N. Y. 93; *Droitwich Patent Salt Co. v. Curzon*, L. R. 3 Exch. 35.

⁶¹ *Shoemaker v. Washburn Lumber Co.*, 97 Wis. 585, 73 N. W. 333; *British & A. Trustee & Finance Corporation v. Couper*, [1894] App. Cas. 399; *In re Gatling Gun*, 43 Ch. Div. 628.

⁶² *Shoemaker v. Washburn Lumber Co.*, 97 Wis. 585, 73 N. W. 333.

⁶³ Under New Jersey Gen. Corp. Law (1896), § 27 a corporation may buy in and retire its common stock in part, by means of bonds to be issued for that purpose. That act was not

repealed by Act of March 28, 1902, relating to preferred stock reductions. *Allen v. Francisco Sugar Co.*, 193 Fed. 825.

Reduction may be effected by a conversion of preferred stock into bonds. See § 3648, *infra*, as to convertible stocks.

⁶⁴ Under N. J. Corp. Act 1896, §§ 27, 29 stock can be reduced by retiring preferred for an exchange of common as well as by paying cash. *Lazear v. American Steel Foundries*, 86 N. J. Eq. 21, 98 Atl. 642.

⁶⁵ *In re Gatling Gun*, 43 Ch. Div. 628.

⁶⁶ *Currier v. Lebanon Slate Co.*, 56 N. H. 262.

Nor can the stock be reduced, without the consent of all the stockholders, by allowing a particular stockholder to withdraw his subscription. *Niagara Shoe Co. v. Tobey*, 71 Ill. App. 250.

A corporation cannot, by a by-law or otherwise, force a stockholder to sell his shares for the purpose of canceling and retiring them, and thereby reducing the capital stock.⁶⁷

In order that there may be a reduction of the capital stock of a corporation, action upon the part of the corporation to that end is necessary, and, as a rule, the special requirements of the statute, if any, must be substantially complied with.⁶⁸

A resolution of a corporation to reduce its capital stock is sometimes required to be approved and confirmed by some court; and when the power thus conferred upon a court is a discretionary power, a resolution to reduce capital stock will not be confirmed where it will work injustice between different classes of stockholders, as between common and preferred stockholders.⁶⁹ Unless there is consent, a reduction by cancellation or release must accord equal privilege to all subscribers or holders.⁷⁰ A reduction of one class of stock to the detriment of the existing representation which another class has in corporate affairs cannot be made without consent or previous statutory authority binding on the latter class,⁷¹ but a mere division of the

⁶⁷ *Bergman v. St. Paul Mut. Bldg. Ass'n*, 29 Minn. 275, 13 N. W. 122.

⁶⁸ *Gade v. Forest Glen Brick & Tile Co.*, 165 Ill. 367, 46 N. E. 286, aff'g 55 Ill. App. 181; *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398; *Ferris v. Ludlow*, 7 Ind. 517.

An informality in the vote taken to reduce the capital stock of a corporation, as authorized by a statute, does not affect the existence of the corporation. *Brown v. Wyandotte & S. E. Ry. Co.*, 68 Ark. 134, 56 S. W. 862.

Under the statute owning its own stock held not a reduction of stock in a national bank. *United States v. Morse*, 161 Fed. 429, aff'd 174 Fed. 539, 20 Ann. Cas. 938.

⁶⁹ See, as to confirmation by the court under the English statute, *In re Direct Spanish Tel. Co.*, 34 Ch. Div. 307; *Bannatyne v. Direct Spanish Tel. Co.*, 34 Ch. Div. 287; *In re Hyderabad (Deccan) Co.*, 75 L. T. (N. S.) 23.

⁷⁰ "It must be conceded that liability to pay a subscription indebtedness for stock in a corporation can

only be rightfully satisfied as to a stockholder not consenting, by payment according to the subscription contract. No reduction of authorized and subscribed for capital stock can be accomplished except by voluntary surrender by subscribers pro rata, or some method which will not prefer one stockholder over another." *Theis v. Durr*, 125 Wis. 651, 1 L. R. A. (N. S.) 571, 110 Am. St. Rep. 880, 104 N. W. 985, where the court stated that while a decree made canceling the record was perhaps not the best procedure, it might be deemed to secure the desired result.

⁷¹ The amount of one class of voting stock (common) cannot be reduced in comparison with another (preferred) so as to alter the representative ratio which their votes have in corporate affairs, unless there is consent or a statutory provision for it binding them. *Page v. American & B. Mfg. Co.*, 129 N. Y. App. Div. 346, 113 N. Y. Supp. 734.

stocks into different classes is not regarded as a reduction of it.⁷² Reduction cannot be made fraudulently to gain control of the corporation,⁷³ and the stockholders may have relief against such a transaction,⁷⁴ if injured,⁷⁵ and if the right to complain is not barred by consent, laches or the like,⁷⁶ which right passes to a transferee⁷⁷ though he too may be barred by having had notice.⁷⁸ Although a reduction of its capital stock by a corporation may be irregularly made, however, as where the proceedings for the reduction are begun before filing of its certificate of organization, and completed after it is filed, the reduction is not necessarily void, and persons who afterwards become creditors of the corporation, not being injured, cannot com-

⁷² *California Telephone & Light Co. v. Jordan*, 19 Cal. App. 536, 126 Pac. 598.

⁷³ Reduction plan examined and held not a fraudulent scheme to gain control. *Allen v. Francisco Sugar Co.*, 193 Fed. 825.

Reducing common stock from 10,000 to 1,000, preferred remaining at 2,000, and then increasing common to its original amount to raise funds cannot be complained of by the minority though the subscription rights to both classes being alike entails a loss of voting power. *Page v. Whittenton Mfg. Co.*, 211 Mass. 424, 97 N. E. 1006.

⁷⁴ Such an attempt will warrant an individual suit or a stockholders' suit in right of the corporation, according to which is the party directly wronged. See *infra*, this chapter "Actions by Stockholders," "Remedies of Stockholders, etc."

⁷⁵ A reduction of both common and preferred whereby control is transferred to the preferred stock, both voting classes, cannot be complained of by one whose only injury is that he will not receive his full share, which, however, the company agrees to make up. *Morganster v. American Malting Co.*, — N. J. Eq. —, 100 Atl. 166.

A holder of one per cent. cannot complain of a reduction assented to by

ninety-nine per cent. of the holders to bring the capital stock down to the appraised value of corporate property. *Ecker v. Kentucky Refining Co.*, 144 Ky. 264, 138 S. W. 264.

⁷⁶ Holders held barred by laches to object to retirement of preferred by way of a reduction. *Lazear v. American Steel Foundries*, 86 N. J. Eq. 21, 98 Atl. 642.

A holder who waived his primary right to share in an exchange by which a reduction was effected cannot complain that his pledgee, also another holder, exchanged other shares at a profit. *Wellner v. Gerth*, 81 N. J. L. 10, 79 Atl. 895.

A nonconsenting stockholder cannot claim a dividend on his original holdings after substantially all others have accepted reduced certificates and the dividend is declared on the reduced basis. *Woodruff v. Columbus Inv. Co.*, 135 Ga. 215, 68 S. E. 1103.

⁷⁷ A transferee of stock succeeds to rights of the transferor to resist a reduction which will derange detrimentally his relative rights towards other classes of stock. *Page v. American & B. Mfg. Co.*, 129 N. Y. App. Div. 346, 113 N. Y. Supp. 734.

⁷⁸ Transaction by which corporation assumed liability for price of stock sold by holders to others. *Shumpert v. National State Bank of Columbia*, 231 Fed. 82.

plain of the irregularity, and hold the released shareholders liable.⁷⁹ In pleading a reduction it suffices, under the codes, to allege that it was "duly" done.⁸⁰

§ 3472. Effect of reduction; rights of creditors. When a corporation reduces its capital stock under legislative authority, the shares retired or reduced no longer exist for any purpose. Thus, neither the remaining shareholders nor the former holders of the retired shares are subject to the statutory liability to creditors attaching to such shares,⁸¹ or in the case of cumulative preferred stock to dividends on the shares extinguished by the reduction,⁸² but remaining subscriptions are not thereby released.⁸³

An executor takes new shares, issued by reason of an exchange to facilitate a reduction, in right of the decedent holder with his attendant liabilities.⁸⁴ When a corporation reduces its capital stock under proper authority by purchasing some of its shares, and paying therefor by a proportionate amount of its assets, a person who afterwards becomes a creditor of the corporation cannot complain.⁸⁵

⁷⁹ *Gade v. Forest Glen Brick & Tile Co.*, 165 Ill. 367, 46 N. E. 286, aff'g 55 Ill. App. 181.

⁸⁰ Allegation that reduction was "duly" effected is good on demurrer. *Myers v. Sturgis*, 123 N. Y. App. Div. 470, 108 N. Y. Supp. 528, aff'd 197 N. Y. 526, 90 N. E. 1162.

⁸¹ *Moon Bros. Carriage Co. v. Waxahachie Grain & Implement Co.*, 13 Tex. Civ. App. 103, 35 S. W. 337.

It is otherwise if the purchase is not authorized. *Currier v. Lebanon Slate Co.*, 56 N. H. 262.

⁸² Certain preferred stock held by plaintiff was entitled to six per cent. dividends prior to dividends on the common stock, the dividends on the preferred stock being interest-bearing from the date of any nonpayment. A period of three years elapsed during which no dividends were declared, there being no profits from which to pay them, and, with the consent of the plaintiff, the entire stock, both preferred and common, was reduced by one-third. When, later, the corporation made profits, plaintiff claimed dividends on the amount of her origi-

nal stock for the time during which dividends had been omitted. The court denied her claim, indicating her status, after the stock had been reduced, to be the same as if the amount of the reduction had been transferred to another in which case plaintiff would have no claim to any dividends subsequently declared. *Roberts v. Roberts-Wicks Co.*, 102 N. Y. App. Div. 118, 92 N. Y. Supp. 387.

⁸³ A subscription is not released by a reduction of capital made pursuant to the law of incorporation. The subscriber assents to that possibility. *Myers v. Sturgis*, 123 N. Y. App. Div. 470, 108 N. Y. Supp. 528, aff'd 197 N. Y. 526, 90 N. E. 1162.

See also Chap. 17, §§ 638-641, *supra*, as to release of subscriptions.

⁸⁴ An executrix is liable for an assessment on national bank shares received in exchange for those held by testator when stock was reduced. She holds them as executrix, deriving title from testator. *Brown v. Ellis*, 103 Fed. 834.

⁸⁵ *Shoemaker v. Washburn Lumber Co.*, 97 Wis. 585, 73 N. W. 333. And

The capital stock of a corporation, however, cannot be reduced to the prejudice of existing creditors. Thus, if a corporation undertakes to retire shares and release the subscribers from liability thereon for the amount unpaid on their subscriptions, the release is ineffectual as against existing creditors.⁸⁶ Nor can a corporation, as against existing creditors, purchase shares for the purpose of reducing its capital stock, and pay the holders therefor from the assets of the corporation.⁸⁷ If it attempts to do so, creditors may maintain a suit in equity to enjoin the transaction, even though their claims are not yet due.⁸⁸

When all the shares of stock of a corporation are of the same class, and the capital stock is reduced because of losses, the loss on the reduction must be borne by all the stockholders alike in proportion to their shares. But when there are different classes of shares, the loss on such reduction must fall upon those who would have to bear it if there was a winding up.⁸⁹

When the amount of the capital stock of a corporation is lawfully reduced under legislative authority, the corporation is not required to keep the excess of its actual capital over the amount of its nominal capital as reduced, nor has it any right to do so; but the stockholders have the right to have it divided among them, as in the case of a dividend, in proportion to their shares.⁹⁰ In making such distribution,

see *Cooper v. Frederick*, 9 Ala. 738; *Palfrey v. Paulding*, 7 La. Ann. 363; *Hepburn v. Commissioners of Exchange & Banking Co.*, 4 La. Ann. 87.

One becoming a creditor several years after a subscription to capital stock was reduced will not be permitted to complain thereof where the meeting at which the reduction was had was attended by all stockholders except one, and the absent stockholder thereafter surrendered his unpaid stock and accepted full paid stock of a less face value in exchange. *Vrooman v. R. P. Vansant Lumber Co.*, 215 Pa. 75, 64 Atl. 394.

⁸⁶ *In re State Ins. Co.*, 14 Fed. 28; *Dane v. Young*, 61 Me. 160; *Roberts v. Roberts-Wicks Co.*, 184 N. Y. 257, 3 L. R. A. (N. S.) 1034, 112 Am. St. Rep. 607, 6 Ann. Cas. 213, 77 N. E. 13; *Bedford R. Co. v. Bowser*, 48 Pa. St. 29.

⁸⁷ *In re Telegraph Const. Co.*, L. R. 10 Eq. 384.

⁸⁸ *In re Telegraph Const. Co.*, L. R. 10 Eq. 384.

⁸⁹ *In re London & N. Y. Inv. Corporation*, [1895] 2 Ch. Div. 860.

⁹⁰ *Strong v. Brooklyn Cross-Town R. Co.*, 93 N. Y. 426; *Seeley v. New York Nat. Exch. Bank*, 8 Daly (N. Y.) 400, 78 N. Y. 608.

While it is true that when capital stock has been reduced by reason of the fact that the capital has become impaired there can be no distribution among stockholders, yet, where the amount of the reduction is in excess of the impairment of capital, and the reduction is made by charging off assets of doubtful value to the amount of the reduction, parties who are stockholders of record at the time the reduction is made are entitled to the surplus so created. *Jerome v.*

however, regard must be had to the present value of the property, and the company, instead of distributing money or property equal in value to the excess of the original nominal capital and the reduced nominal capital, must retain property equal in present value to the reduced nominal capital, after deducting its debts. In other words, the surplus, if any, which a corporation may pay to its stockholders on reducing its capital stock, must in every case be ascertained, and depends upon the result of an examination into its affairs, and not upon the difference between the original amount of capital stock and the reduced amount.⁹¹ Where a corporation reduces its capital stock, and the surplus which thereby results is invested in the stock of railroad corporations, the stock itself may be distributed. It is not essential that the stock be reduced to cash and distributed in that form.⁹² Whenever, by sales of property, or by means of earnings, or otherwise, the corporation comes into the possession of funds which are in excess of the amount of its reduced capital stock, it can distribute that amount among the stockholders.⁹³

Where the stockholders in a national bank, the capital of which had become impaired by reason of past-due and suspended claims, to avoid a threatened assessment by the comptroller of the currency to make good the deficiency, lawfully reduced the capital stock in an amount equal thereto, and some of the suspended claims were afterwards realized upon and carried into the account as assets of the bank, it was held that a stockholder could not compel the bank to distribute a share of the money so realized in proportion to the amount of stock surrendered by him.⁹⁴ If and when the capital stock of a national bank is reduced by vote of the stockholders, the comptroller of the currency giving his approval upon the promise of the president and directors that assets of doubtful value will be charged off and put aside for the benefit of existing stockholders, the directors may charge off such assets, and the right to participate in any proceeds arising

Cogswell, 204 U. S. 1, 51 L. Ed. 343.

But see that upon reducing its capital stock, a corporation may under proper conditions reduce its assets in part and retain the balance as its property. *Continental Securities Co. v. Northern Securities Co.*, 66 N. J. Eq. 274, 57 Atl. 876.

⁹¹ *Strong v. Brooklyn Cross-Town R. Co.*, 93 N. Y. 426; *Seeley v. New York Nat. Exch. Bank*, 8 Daly (N. Y.) 400, 78 N. Y. 608.

⁹² *Continental Securities Co. v. Northern Securities Co.*, 66 N. J. Eq. 274, 57 Atl. 876.

⁹³ See the cases above cited, and see also this chapter, subd. xvi, *infra*, as to the circumstances which will warrant declaration of a dividend.

⁹⁴ *McCann v. First Nat. Bank of Jeffersonville*, 112 Ind. 354, 131 Ind. 95, 14 N. E. 251.

therefrom becomes vested in parties irrevocably at the time the controller of the currency orders the reduction of the stock. It is not only true, further, that a transfer of the stock as reduced does not pass the interest of the transferrer in the funds so set apart, but one so having an interest in the assets so set apart may transfer such interest separately from a transfer of his stock.⁹⁵

§ 3473. Increase or reduction of number and par value of shares.

Although there is no reduction or increase of a corporation's capital stock where the number of shares into which it is divided is changed, and a corresponding change is made in the par value of the shares,—as where the number of shares is doubled, and the par value of each share reduced one-half,—yet, if the charter of a corporation fixes the number and par value of its shares, such a change cannot be made without express authority from the legislature.⁹⁶ There is nothing to prevent such a change, however, if the number and par value of the shares have not been so fixed, but have been left to be fixed by the corporation.⁹⁷

An increase or reduction in the number of shares without any change in the par value, or an increase or reduction in the par value without any change in the number, is an increase or reduction of the capital stock, as the case may be, and is invalid unless expressly authorized.⁹⁸ This is not true, however, where the change is in reality a formation of a new corporation with different number and value of the shares.⁹⁹

⁹⁵ *Cogswell v. Second Nat. Bank*, 78 Conn. 75, 60 Atl. 1059, aff'd as *Jerome v. Cogswell*, 204 U. S. 1, 51 L. Ed. 343.

⁹⁶ *Tschumi v. Hills*, 6 Kan. App. 549, 51 Pac. 619; *Salem Mill Dam Corporation v. Ropes*, 6 Pick. (Mass.) 23; *In re Financial Corporation*, 2 Ch. App. 714; *Droitwich Patent Salt Co. v. Curzon*, L. R. 3 Exch. 35.

A corporation has no power to change the number or the par value of the shares of its capital stock as fixed by its charter. Shares of stock purporting to be of the par value of five dollars each, when the charter provides that they shall be of the par value of one dollar, are void. *Tschumi v. Hills*, 6 Kan. App. 549, 51 Pac. 619.

As to amount of capital stock and par value of authorized shares, see §§ 3455, 3456, *supra*.

⁹⁷ *Somerset & K. R. Co. v. Cushing*, 45 Me. 524; *In re County Palatine Loan & Discount Co.*, 9 Ch. App. 54; *Ambergate, N. & B. & E. J. Ry. Co. v. Mitchell*, 4 Exch. 540. Compare *In re European Cent. Ry. Co.*, L. R. 8 Eq. 438.

⁹⁸ See *Droitwich Patent Salt Co. v. Curzon*, L. R. 3 Exch. 35.

⁹⁹ After an association was incorporated with a specific number of shares of a specified par value and but eleven of such shares had been subscribed and paid for, a resolution was passed reducing the par value of the shares and greatly increasing

VII. ISSUE OF STOCK

§ 3474. Power of corporation to create and issue stock. When it is intended to create or authorize the formation of a joint-stock corporation, the legislature generally, if not always, expressly provides for the creation of a fixed capital stock, and the issue of shares thereof. But the right to issue stock is not one of the implied or incidental powers of a corporation, and no such right exists unless it is expressly conferred by the charter or by the statute under which the company is incorporated.¹ "The powers of every corporation, like

the number thereof. Defendant then subscribed for a certain number of shares on the new basis and thereafter the charter was duly changed in accordance with the resolution. The court held that the shares on the new basis must be deemed original or formative, and not increased stock as affecting the liability of the subscriber where a distinction was drawn in the state between original and increased stock as determining liability. *Gettysburg Nat. Bank v. Brown*, 95 Md. 367, 93 Am. St. Rep. 339, 52 Atl. 975.

¹ *Reno Oil Co. v. Culver*, 60 N. Y. App. Div. 129, 69 N. Y. Supp. 969, rev'g 33 N. Y. Misc. 717, 68 N. Y. Supp. 303; *Cooke v. Marshall*, 191 Pa. St. 315, 64 L. R. A. 413, 43 Atl. 314, on rehearing, 196 Pa. St. 200, 64 L. R. A. 413, 46 Atl. 447. See also *Detroit Chamber of Commerce v. Gardner*, 109 Mich. 691.

In *Cooke v. Marshall*, 191 Pa. St. 315, 64 L. R. A. 413, 43 Atl. 314, on rehearing, 196 Pa. St. 200, 64 L. R. A. 413, 46 Atl. 447, the legislature had, by a special act, created certain persons, and other persons who might become their associates, a corporation for the purpose of establishing and maintaining a cemetery, for profit, with authority to purchase the necessary land within certain limits as to acreage, and to lay it out into lots and dispose of the same, etc., but nothing was said one way or the other

as to the creation of a capital stock. It was held that, since there was no express authority for creating a capital stock, and since a capital stock was not necessary to enable the corporation to accomplish its authorized objects, so that its creation might be regarded as among the powers impliedly granted, there was no power whatever to create a capital stock and issue shares. The court said, after referring to authorities holding it ultra vires for a corporation to increase or reduce its capital stock without legislative authority: "It is extremely difficult to understand, under the foregoing decisions, how any issue of capital stock by this company can be regarded as valid. The company was chartered to establish a cemetery. While a cemetery company is not necessarily a religious or charitable corporation, yet in many instances it is of that character, and perhaps as a rule this is so. Yet they may be established as merely private enterprises, and carried on for profit. But in either case, if the charter confers no right or power to create capital stock, it is difficult to understand how any right to create and issue such stock has any existence. If capital stock may neither be increased nor diminished without an express power to that effect, how can any stock be created or issued when there is no capital stock fixed by the charter, and no power is given to create it?

its corporate existence, are derived from some legislative act, and to determine whether it or its officers have the power to do a given act, binding upon it, resort must be had to its charter or the statute under which it was created.”² “The power to create corporate capital stock is a legislative function, and in any given case, in order that such stock may have a legal existence, the function must be exercised.”³ All the definitions of “capital stock” assume that it is provided for or authorized by the legislature,⁴ and it is well settled, as we shall hereafter see, that when the amount of the capital stock of a corporation is fixed by the legislature, the corporation has no power to increase or reduce the same without legislative authority.⁵

Of course, a corporation cannot create a capital stock and issue shares when a capital stock is inconsistent with its nature as fixed by the charter creating it. This has been held to be true, for example, in the case of a savings bank organized under a statute providing that the profits of the business should inure entirely to the benefit of the depositors⁶ and also in the case of incorporated cemetery associations, especially where the statute makes them public or quasi public corporations.⁷

* * * If the doctrine of these cases be true, and the act of increasing or decreasing the capital stock of a corporation with specific charter power to do so, is a void act, because it is ultra vires, how can it be true that a corporation may issue any capital stock without having specific legislative authority to do so? We cannot see. If it is ultra vires to increase, it is ultra vires to issue any stock where no power to do so is conferred by the charter. The power to create corporate capital stock is a legislative function, and in any given case, in order that such stock may have a legal existence, the function must be exercised.”

² *Reno Oil Co. v. Culver*, 60 N. Y. App. Div. 129, 69 N. Y. Supp. 969, rev'g 33 N. Y. Misc. 717, 68 N. Y. Supp. 303.

As to the powers of corporations generally, see Chap. 21, supra.

³ *Cooke v. Marshall*, 191 Pa. St. 315, 64 L. R. A. 413, 43 Atl. 314, on rehear-

ing, 196 Pa. St. 200, 64 L. R. A. 413, 46 Atl. 447.

⁴ See § 3413, supra.

⁵ See § 3458, supra.

⁶ Where a statute incorporating a savings bank provided that the corporation might receive on deposit, for the use and benefit of depositors, money offered for that purpose, and invest the same in the manner provided by the statute, and that the income from the deposits should be divided among the depositors or their legal representatives according to the terms stipulated, it was held that the corporation was not authorized to issue or create capital stock, since the profits, after deducting necessary expenses, inured entirely to the benefit of the depositors, either as dividends or reserved surplus. *Huntington v. Savings Bank*, 96 U. S. 388, 24 L. Ed. 777.

⁷ *Osage City Cemetery Ass'n v. Hanslip*, 82 Kan. 20, 107 Pac. 785; *Davis v. Coventry*, 65 Kan. 557, 70

§ 3475. How stock may be issued. There are several ways in which stock may be issued by a corporation:

(1) The usual mode is upon subscriptions therefor, made either before or after the corporation is organized. Ordinarily, when it is proposed to organize a corporation, a paper is signed by a number of persons, by which they promise to take a certain number of shares in the corporation when formed. The corporation is then formed, and expressly or impliedly accepts the subscriptions, and upon such acceptance they become binding contracts between the corporation and the subscribers, making the subscribers members or stockholders in the corporation to the extent of their subscriptions, and giving them all the rights, and subjecting them to all the liabilities, which attach to stockholders.⁸ Certificates of stock are usually issued to the subscribers as evidence of their rights, but they are not necessary to make them stockholders.⁹ Subscriptions for stock may also be received by a corporation after it has been formed, provided it has unissued stock, and the subscribers will become stockholders as soon as the subscriptions are accepted.¹⁰

(2) Instead of issuing its stock upon subscriptions, a corporation, after it has been formed, may sell its unissued stock for money, or exchange it for property, labor or services, or issue it in payment of a valid debt which it has contracted.¹¹ Stock issued by a corporation, but reacquired lawfully by surrender, forfeiture or purchase, may be reissued by selling the same.¹² A sale of stock and a subscription for stock are to some extent governed by different rules. Thus, as we have elsewhere seen, an action may generally be maintained by a corporation on a subscription without issuing or tendering a certificate, whereas, if it has sold stock, it must issue or tender a certificate before

Pac. 583; American Exch. Nat. Bank v. Woodlawn Cemetery, 194 N. Y. 116, 87 N. E. 107. See also Reno Oil Co. v. Culver, 60 N. Y. App. Div. 129, 69 N. Y. Supp. 969, rev'g 33 N. Y. Misc. 717, 68 N. Y. Supp. 303.

⁸ See § 523, supra.

⁹ See § 3427, supra.

¹⁰ See § 522, supra.

¹¹ Handley v. Stutz, 139 U. S. 417, 35 L. Ed. 227; Clark v. Bever, 139 U. S. 96, 35 L. Ed. 88; Lake Superior Iron Co. v. Drexel, 90 N. Y. 87; Van Cott v. Van Brunt, 82 N. Y. 535; Kohlmetz v. Calkins, 16 N. Y. App. Div. 518, 44 N. Y. Supp. 1031; Con-

siderant v. Brisbane, 14 How. Pr. (N. Y.) 487.

The corporation has a right to issue and sell its unissued stock. Griffith v. Sprowl, 45 Ind. App. 504, 91 N. E. 25.

That stock may be paid for in property, labor or services, see § 3502 et seq., infra.

That stock may be issued in payment of a debt, see § 3515, infra.

As to sales of stock generally, see subd. xxv, infra, this chapter.

¹² Southern Life Insurance & Trust Co. v. Lanier, 5 Fla. 110, 58 Am. Dec. 448. See also § 3594, infra.

it can maintain an action for the price.¹³ Whether or not a particular transaction is a subscription for stock or a sale of stock depends, of course, upon the terms of the contract.¹⁴

(3) After a corporation has been formed, and all of its original stock has been issued, it may, if authorized by its charter, but not otherwise, increase the amount of its capital stock, and either offer the new stock for subscription, or sell the same for money, or for property, labor or services, or issue it in payment of debts.¹⁵

(4) Another mode in which a corporation may issue stock is by making a stock dividend. As we shall see at length in other sections, if a corporation has in reserve stock which it can lawfully issue, or if it is authorized to increase its capital stock, it may, subject to some limitations, retain surplus profits in its business, or as a surplus fund, to meet future needs, instead of dividing them among the stockholders as a dividend in cash or property, and pay a dividend by issuing reserved or additional stock.¹⁶

(5) As we shall see in a subsequent section, a corporation, in the absence of express restriction, may pledge its unissued stock as collateral security for a debt previously contracted, or contracted at the time of the pledge.¹⁷

Rights with respect to the regularity of an issue of stock must be determined by the law of the state where the corporation was organized.¹⁸

§ 3476. In whom authority is vested. The power to authorize the issuance of stock is frequently vested in the board of directors,¹⁹ and when such is the case, its issuance can only be authorized at a valid meeting of the board, regularly called.²⁰ But although the

¹³ See §§ 593, 594, *supra*.

¹⁴ See § 520, *supra*.

¹⁵ See § 3455 et seq., *supra*.

¹⁶ See subd. xvi, *infra*, this chapter.

¹⁷ See subd. xxvi, *infra*, this chapter.

¹⁸ *McMillen v. Lamb*, — N. Y. Misc. —, 166 N. Y. Supp. 656.

¹⁹ *Griffith v. Sprowl*, 45 Ind. App. 504, 91 N. E. 25; *United Gold & Platinum Mines Co. v. Smith*, 94 N. Y. App. Div. 615, 88 N. Y. Supp. 67.

Where the power to authorize the issuance of stock rests with the board of directors, and the president, who

is one of two rival claimants for certain stock, without authority of the board, and by taking advantage of his official position, procures a certificate therefor to be issued to himself, the circumstances under which such certificate is issued deprive it of its force as a muniment of title. *Lakewood Gas Co. v. Smith*, 62 N. J. Eq. 677, 51 Atl. 152.

²⁰ The action *aquorum* of the board of directors in ordering the issuance of stock is null and void where no notice of the meeting was given to directors who were not present. *Hol-*

directors alone have power to issue stock, it has been held that formal action on their part is not necessary where all the stockholders and directors are present at a stockholders' meeting at which its issuance is authorized.²¹

The acts of de facto directors in this regard cannot be collaterally attacked,²² and neither the corporation nor stockholders who were present and took part in their election will be permitted to assert that the action of the board in issuing stock was void because of irregularities in their election, as against one who has acquired such stock in the usual course of business.²³

The rule that directors of a corporation act in a fiduciary capacity, and will be held to the standard of duty required of trustees in the management of the corporate affairs,²⁴ applies to their acts in issuing stock.²⁵ And they have no right to issue it to themselves or to their

comb v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069.

Where the record of the directors' meeting, at which the issuance of stock was authorized, recites that the directors were notified thereof, this is sufficient to show notice in the absence of a showing to the contrary. *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70.

See generally § 1854 et seq., supra.

²¹ Under such circumstances the board of directors will be deemed to have ratified the action of the stockholders. *Fitzpatrick v. O'Neill*, 43 Mont. 552, Ann. Cas. 1912 C 296, 118 Pac. 273.

See generally § 1855 et seq., supra.

²² *Ellsworth v. National Home & Town Builders*, 33 Cal. App. 1, 164 Pac. 14; *Morris v. Stevens*, 178 Pa. St. 563, 36 Atl. 151.

As to the powers and rights of de facto directors generally, see § 1841 et seq., supra.

²³ *Ellsworth v. National Home & Town Builders*, 33 Cal. App. 1, 164 Pac. 14.

The acts of a de facto board of directors in this regard are binding on the corporation as against a bona fide

purchaser. *Morris v. Stevens*, 178 Pa. St. 563, 36 Atl. 151.

²⁴ See § 2261 et seq., supra.

²⁵ *Alabama*. *Perry v. Tuskaloosa Cotton-Seed Oil-Mill Co.*, 93 Ala. 364, 9 So. 217.

Kansas. *Arkansas Valley Agr. Society v. Eichholtz*, 45 Kan. 164, 25 Pac. 613.

Maine. *Trask v. Chase*, 107 Me. 137, 77 Atl. 698.

Massachusetts. *Elliott v. Baker*, 194 Mass. 518, 80 N. E. 450.

New Jersey. *Way v. American Grease Co.*, 60 N. J. Eq. 263, 47 Atl. 44.

New York. *Whitaker v. Kilby*, 55 Misc. 337, 106 N. Y. Supp. 511, aff'd 122 App. Div. 895, 106 N. Y. Supp. 1149.

Pennsylvania. *Morris v. Stevens*, 178 Pa. St. 563, 36 Atl. 151.

Wisconsin. *Luther v. C. J. Luther Co.*, 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69.

"The law does not permit directors to manage the affairs of a corporation for their personal benefit, and this rule, we think, applies to the disposition of unsubscribed stock, as well as to other contracts. The character and relation of directors and officers of a

nominees, either for the purpose of making a profit for themselves out of the transaction, or for the purpose of obtaining or retaining control of the corporation.²⁶

§ 3477. Consent of public service commission; Blue Sky Laws.

Under the statutes of some states railroad corporations or public service corporations generally are prohibited from issuing stock until authorized to do so by a designated public service commission.²⁷ Such

corporation require of them the highest and most scrupulous good faith, in their transactions for the corporation and the stockholders." *Arkansas Valley Agr. Society v. Eichholtz*, 45 Kan. 164, 25 Pac. 613.

²⁶ See § 3461 and § 3464.

²⁷ *Indiana*. Acts 1913, c. 76, requires public utility corporations to procure a certificate of authority from the public service commission before issuing stock. *Public Service Commission of Indiana v. State*, 184 Ind. 273, 111 N. E. 10.

Maryland. Acts 1910, c. 180, § 27, requires common carriers, railroad corporations and street railroad corporations, before issuing stock, to secure from the public service corporation an order authorizing such issue and the amount thereof, and stating that, in the opinion of the commission, the use of the capital to be thereby secured is reasonably required for the purposes for which the statute authorizes the corporation to issue stock. *Laird v. Baltimore & O. R. Co.*, 121 Md. 179, 47 L. R. A. (N. S.) 1167, Ann. Cas. 1915 B 728, 88 Atl. 347, 348.

Massachusetts. St. 1913, c. 784, § 16, provides that before any railroad corporation shall issue any shares of capital stock it shall apply to the railroad commission for its approval of the proposed issue to such amount as the commission shall determine to be reasonable and proper. *Bulkeley v. New York, N. H. & H. R. Co.*, 216 Mass. 432, 103 N. E. 1033. *R. L. c.*

109, § 24, provided that railroad corporations and street railway companies, gas and electric light companies, corporations established for and engaged in the business of transmitting intelligence by electricity, and aqueduct and water companies, should issue only such amount of stock as the board of railroad commissioners in the case of railroad corporations and street railway companies, the board of gas and electric light commissioners in the case of gas and electric light companies, might from time to time vote, or the commissioner of corporations in the case of the other corporations specified might from time to time determine, to be reasonably necessary for the purpose for which such issue of stock was authorized. *Fall River Gas Works Co. v. Gas & Electric Light Com'rs*, 214 Mass. 529, 102 N. E. 475. St. 1894, c. 450, required gas and electric light companies to obtain the approval of the board of gas and electric light commissioners before issuing stock. *Attorney General v. Massachusetts Pipe Line Gas Co.*, 179 Mass. 15, 60 N. E. 389. Under St. 1894, c. 452, water companies were required to obtain the authorization of the commissioner of corporations before they could issue stock. *Inhabitants of Falmouth v. Falmouth Water Co.*, 180 Mass. 325, 62 N. E. 255. See *Bulkeley v. New York, N. H. & H. R. Co.*, 216 Mass. 432, 103 N. E. 1033, and *Fall River Gas Works Co. v. Gas & Electric Light Com'rs*, 214 Mass.

statutes have been held to be within the power of the legislature.²⁸

529, 102 N. E. 475, for a review of the Massachusetts legislation on this subject.

New Hampshire. Laws 1911, c. 164, § 14(a), provides that no public utility shall issue any stock without first procuring an order from the public service commission authorizing the same. Grafton County Elec. Light & Power Co. v. State, 77 N. H. 490, 93 Atl. 1028.

New Jersey. Laws 1911, c. 195, § 18(e), requires public utility corporations to obtain authority from the board of public utility commissioners before issuing stock or stock certificates. See Interstate Telephone & Telegraph Co. v. Board Public Utility Com'rs, 84 N. J. L. 184, 86 Atl. 363.

New York. The public service commission law, Laws 1907, c. 429, § 55, requires common carriers, railroad corporations, and street railroad corporations, before issuing stock, to procure from the proper commission an order authorizing such issue, and the amount thereof, and stating that, in the opinion of the commission, the use of the capital to be secured thereby is reasonably required for the purposes for which the statute authorizes such corporations to issue stock. *People v. Public Service Commission for First Dist.*, 203 N. Y. 299, 96 N. E. 1011, aff'g 145 N. Y. App. Div. 318, 130 N. Y. Supp. 97; *People v. Stevens*, 203 N. Y. 7, 96 N. E. 114, rev'g 143 App. Div. 789, 128 N. Y. Supp. 440; *People v. Stevens*, 197 N. Y. 1, 90 N. E. 60, aff'g 134 App. Div. 99, 118 N. Y. Supp. 969; *People v. Public Service Commission, First Dist.*, 167 App. Div. 286, 153 N. Y. Supp. 344; *Goldan v. Delaware & E. R. Co.*, 144 App. Div. 78, 128 N. Y. Supp. 936; *Westchester Fire Ins. Co. v. Syracuse, B. & N. Y. R. Co.*, 97 Misc. 471, 161 N. Y. Supp. 759. Laws 1907, c. 429, § 69, contains a

similar requirement in respect to the issuance of stock by gas and electrical corporations. *People v. Willcox*, 207 N. Y. 86, 45 L. R. A. (N. S.) 629, 100 N. E. 705, rev'g 151 App. Div. 832, 136 N. Y. Supp. 1031. And Laws 1905, c. 737, § 12, contained a similar provision with respect to the issuance of stock by gas companies. In re Watertown Gas Light Co., 127 App. Div. 462, 111 N. Y. Supp. 486. This provision was replaced and repealed by Laws 1907, c. 429. The condition that the stock and bonds must be reasonably required for the purposes of the corporation applies to an increase of stock and bonds by an existing company as well as to the issuance of stock and bonds by a new company. In re Watertown Gas Light Co., 127 App. Div. 462, 111 N. Y. Supp. 486.

Texas. *Vernon's Sayle's Civ. St.* 1914, art. 6723. *Davis v. San Antonio & G. S. Ry. Co.*, 92 Tex. 642, 51 S. W. 324; *Davis v. Watertown Nat. Bank*, — Tex. Civ. App. —, 178 S. W. 593; *United States & M. Trust Co. v. Delaware Western Const. Co.* (Tex. Civ. App.), 112 S. W. 447.

²⁸ In re Watertown Gas Light Co., 127 N. Y. App. Div. 462, 111 N. Y. Supp. 486. See also *Davis v. Watertown Nat. Bank*, — Tex. Civ. App. —, 178 S. W. 593.

In the exercise of its right to regulate the increase and disposition of the stock of railroad companies, the legislature "may pass a statute providing generally for what purposes and upon what terms, conditions, and limitations an increase of capital stock may be made, and confer upon the commission the administrative duty of supervising any proposed increase of stock. It may also delegate to the commission the duty of finding the facts in each particular case, and au-

But there is authority to the effect that any statute "which attempts to authorize the commission in its judgment to allow an increase of the capital stock of a corporation for such purpose and on such terms or conditions as it may deem advisable," is a delegation of legislative power and is void.²⁹

The purpose of such statutes is to prevent over-capitalization or stock watering, and to provide for a reasonable and proper financial return to the corporation for its securities, and that the amount so received shall be expended for the lawful purposes specified in the application;³⁰ and also to protect and enforce the rights of the public by enabling the commission to prevent the issue of stock if it is found that it is not for the purposes of the corporation enumerated by the statute, and reasonably required therefor.³¹ They do not change or affect the limit placed on the amount of stock which the corporation is authorized to issue by its charter or the general law, or do away with the necessity for complying with statutory provisions as to the manner in which the authorized capital may be increased, but merely deal with the issue of stock within that limit.³² They generally apply

thorize and require it, if it find the existence of facts that bring the case within the statute, to allow the proposed increase; otherwise to refuse it." *State v. Great Northern R. Co.*, 100 Minn. 445, 10 L. R. A. (N. S.) 250, 11 N. W. 289.

²⁹ *State v. Great Northern R. Co.*, 100 Minn. 445, 10 L. R. A. (N. S.) 250, 11 N. W. 289, holding *Rev. Laws 1905*, § 2872, to be void for this reason.

³⁰ *Bulkeley v. New York, N. H. & H. R. Co.*, 216 Mass. 432, 103 N. E. 1033; *Fall River Gas Works Co. v. Gas & Electric Light Com'rs*, 214 Mass. 529, 102 N. E. 475.

"As a check upon * * * wld financing it is entirely proper, even upon the basis of the exercise of the police power, to require all corporations conducting public utilities to lay before the local public service commission the facts relating to any such issue of stocks and bonds or debentures or certificates of indebtedness, thus placing such facts where they will be readily obtainable by anyone who has an interest therein other than

mere idle curiosity. Such statements as indicated in the acts passed should include the amount of the issue, in a general way the purposes for which it is desired to be made, and where the enterprise is one to be conducted wholly within a single state, it may well be, as the decisions seem to indicate, that the commission may sanction or disapprove of the proposition." *Laird v. Baltimore & O. R. Co.*, 121 Md. 179, 47 L. R. A. (N. S.) 1167, *Ann. Cas. 1915 B 728*, 88 Atl. 347, 348.

³¹ *Laird v. Baltimore & O. R. Co.*, 121 Md. 179, 47 L. R. A. (N. S.) 1167, *Ann. Cas. 1915 B 728*, 88 Atl. 347, 348; *People v. Public Service Commission for First Dist.*, 203 N. Y. 299, 96 N. E. 1011, *aff'g* 145 N. Y. App. Div. 318, 130 N. Y. Supp. 97; *People v. Stevens*, 197 N. Y. 1, 90 N. E. 60, *aff'g* 134 N. Y. App. Div. 99, 118 N. Y. Supp. 969; *People v. Public Service Commission, First Dist.*, 167 N. Y. App. Div. 286, 153 N. Y. Supp. 344.

³² *Fall River Gas Works Co. v. Gas & Electric Light Com'rs*, 214 Mass. 529, 102 N. E. 475.

to every issue of stock, whether it be the first or any subsequent issue,³³ including stock issued on reorganization of a corporation.³⁴ And it has been held that, if an attempt is made to receive subscriptions before the required authorization is obtained, and payments are made as payments of capital stock, such payments are payments of money without consideration, and not payments on capital stock.³⁵

Under some statutes the commission is a quasi judicial tribunal.³⁶ And its decision is generally made final unless it has clearly exceeded its jurisdiction,³⁷ or unless such decision is based upon some error of law,³⁸ or, under some statutes, unless there was no evidence before it to support reasonably its order.³⁹ Under the New Hampshire statute the orders of the commission are to be taken as *prima facie* correct and are not to be disturbed on an appeal taken to the court, as authorized by the act, unless it plainly appears beyond reasonable controversy that they are either unjust or unreasonable.⁴⁰

If the power of the commission extends to the approval of the issue of the proposed stock and not merely its amount,⁴¹ "when application is made to it for approval, it becomes its duty to determine whether as matter of law it is empowered to approve such an issue as is proposed by the corporation."⁴²

The New York statute does not make the commissioners the financial managers of the corporation, or empower them to substitute their

³³ Fall River Gas Works Co. v. Gas & Electric Light Com'rs, 214 Mass. 529, 102 N. E. 475.

³⁴ People v. Public Service Commission for First Dist., 203 N. Y. 299, 96 N. E. 1011, aff'g 145 N. Y. App. Div. 318, 130 N. Y. Supp. 97.

³⁵ Inhabitants of Falmouth v. Falmouth Water Co., 180 Mass. 325, 62 N. E. 255; Attorney General v. Massachusetts Pipe Line Gas Co., 179 Mass. 15, 60 N. E. 389.

³⁶ Bulkeley v. New York, N. H. & H. R. Co., 216 Mass. 432, 103 N. E. 1033.

In acting upon an application it is engaged in the performance of a quasi judicial function. Fall River Gas Works Co. v. Gas & Electric Light Com'rs, 214 Mass. 529, 102 N. E. 475.

³⁷ Interstate Telephone & Telegraph Co. v. Board of Public Utility Com'rs, 84 N. J. L. 184, 86 Atl. 363.

³⁸ Fall River Gas Works Co. v. Gas

& Electric Light Com'rs, 214 Mass. 529, 102 N. E. 475.

³⁹ Interstate Telephone & Telegraph Co. v. Board of Public Utility Com'rs, 84 N. J. L. 184, 86 Atl. 363.

⁴⁰ Grafton County Elec. Light & Power Co. v. State, 77 N. H. 490, 73 Atl. 1028.

⁴¹ The Massachusetts railroad commission has such authority. Bulkeley v. New York, N. H. & H. R. Co., 216 Mass. 432, 103 N. E. 1033.

The effect of R. L. c. 109, § 24, was to take away from the corporation and invest in the designated public officers the right to determine the general question of the reasonable necessity of the issue. Fall River Gas Works Co. v. Gas & Electric Light Com'rs, 214 Mass. 529, 102 N. E. 475.

⁴² Bulkeley v. New York, N. H. & H. R. Co., 216 Mass. 432, 103 N. E. 1033.

judgment for that of its board of directors or stockholders as to the wisdom of issuing stock for purposes authorized by law.⁴² The duty of the commission "is to determine whether the proposed issue is necessary for the proper purposes of the company, is authorized by law, and is to be used in a proper manner. If such are the facts it cannot withhold its certificate; otherwise it cannot grant it."⁴⁴ So it has no power to authorize the issue of stock by a corporation which has not received the permission and approval required by the statute to be obtained from the commission before it can lawfully begin the construction of its plant or the exercise of any franchises granted it.⁴⁵

The New Jersey statute makes it the duty of the board of public utility commissioners to approve the proposed issue of stock "when satisfied that the same is to be made in accordance with the law and the purpose of such issue be approved by said board." Under this provision it has been held that it is the duty of the board to ascertain both the legality of the proposed issue and its purpose, and that it may investigate and take into consideration the conditions under

⁴² *People v. Public Service Commission for First Dist.*, 203 N. Y. 299, 96 N. E. 1011, aff'g 145 N. Y. App. Div. 318, 130 N. Y. Supp. 97; *People v. Stevens*, 203 N. Y. 7, 96 N. E. 114, rev'g 143 N. Y. App. Div. 789, 128 N. Y. Supp. 440; *People v. Stevens*, 197 N. Y. 1, 90 N. E. 60, aff'g 134 N. Y. App. Div. 99, 118 N. Y. Supp. 969; *People v. Public Service Commission, First Dist.*, 167 N. Y. App. Div. 286, 153 N. Y. Supp. 344; *Westchester Fire Ins. Co. v. Syracuse, B. & N. Y. R. Co.*, 97 N. Y. Misc. 471, 161 N. Y. Supp. 759. See also *Laird v. Baltimore & O. R. Co.*, 121 Md. 179, 47 L. R. A. (N. S.) 1167, Ann. Cas. 1915 B 728, 88 Atl. 347, 348.

The commission has no right to refuse permission to issue bonds and stock to a corporation formed on reorganization of a corporation whose property and franchises have been sold on foreclosure, on the ground that the value of the mortgaged property and the amount of new capital to be in-

vested are less than the amount of securities to be issued by the corporation. *People v. Public Service Commission for First Dist.*, 203 N. Y. 299, 96 N. E. 1011, aff'g 145 N. Y. App. Div. 318, 130 N. Y. Supp. 97.

⁴⁴ *People v. Stevens*, 203 N. Y. 7, 96 N. E. 114, rev'g 143 N. Y. App. Div. 789, 128 N. Y. Supp. 440.

"The duties of the commission are administrative to enforce upon the companies the observance of the provisions of the law." *In re Watertown Gas Light Co.*, 127 N. Y. App. Div. 462, 111 N. Y. Supp. 486.

The commission is charged with the duty of determining whether the stock is to be issued for property, labor done, or money, and for the reasonable requirements of the company. *In re Watertown Gas Light Co.*, 127 N. Y. App. Div. 462, 111 N. Y. Supp. 486.

⁴⁵ *People v. Willcox*, 207 N. Y. 86, 45 L. R. A. (N. S.) 629, 100 N. E. 705, rev'g 151 N. Y. App. Div. 832, 136 N. Y. Supp. 1031.

which it is to be made, and practically the public policy and equity of permitting it.⁴⁶

The New Hampshire statute provides that the commission shall determine the amount of stock which in its opinion is reasonably requisite for the purpose for which the issue is to be made.⁴⁷

In Indiana the commission is required "to hear and determine the facts upon which the application is based, and the facts thus determined constitute the foundation upon which its order shall be based." If the facts thus found are such as to entitle the corporation to a certificate of authority, it is the duty of the commission to issue it, and mandamus will lie to compel it to do so. "Under such circumstances, the act required is ministerial and not discretionary."⁴⁸

In Texas the statute merely imposes on the commission certain ministerial duties with reference to the stock of railroad companies, and does not give it power to authorize or prohibit the issuance of stock, nor to annul shares which have been issued and delivered.⁴⁹

The general principles upon which the commission is to determine the reasonable necessity for the issue are the same as in cases where that question is left to the determination of the corporation.⁵⁰ It

⁴⁶ Interstate Telephone & Telegraph Co. v. Board Public Utility Com'rs, 84 N. J. L. 184, 86 Atl. 363.

⁴⁷ Laws 1911, c. 164, § 14(a). Graf-ton County Elec. Light & Power Co. v. State, 77 N. H. 490, 93 Atl. 1028.

⁴⁸ Public Service Commission of Indiana v. State, 184 Ind. 273, 111 N. E. 10.

"To hold that such act is discretionary would enable the commission, after the facts were determined, to grant the certificate of authority, or to withhold it at its will, or to grant such a certificate to one public utility and to withhold it from another under the same state of facts. Such is not the purpose of the statute." Public Service Commission of Indiana v. State, 184 Ind. 273, 111 N. E. 10.

⁴⁹ Vernon's Sayle's Civ. St. 1914, art. 6723 (Rev. St. art. 4584g), merely imposes upon the railroad commission the performance of two ministerial duties with reference to the stock of railroad companies: (1) to receive

and preserve the statement of the stock required to be made out by the directors, certified and presented to it by the president of the corporation; (2) to cause the aggregate amount of stock issued by the company to be registered in the office of the secretary of state. It does not give the commission power to authorize or prohibit the issuance of the stock nor to annul shares which have been issued and delivered, and the commission has no such power. Davis v. San Antonio & G. S. Ry. Co., 92 Tex. 642, 51 S. W. 324. But see Davis v. Watertown Nat. Bank, — Tex. Civ. App. —, 178 S. W. 593; United States & M. Trust Co. v. Delaware Western Const. Co., — Tex. Civ. App. —, 112 S. W. 447.

⁵⁰ Fall River Gas Works Co. v. Gas & Electric Light Com'rs, 214 Mass. 529, 102 N. E. 475.

"There is no change in the question nor of the principles upon which it is to be decided. The only change is in the party deciding it." Fall River

is not obliged to assume that the facts stated in the application are true, but may investigate and find the facts for itself.⁵¹

It is sometimes provided that the decision of the commission as to the amount of stock which is reasonably necessary for the purpose for which such stock is proposed to be issued shall be based upon the price at which such stock is to be issued, and that the commission shall refuse to approve any particular issue of stock, if, in its opinion, the price at which it is proposed to be issued is so low as to be inconsistent with the public interest.⁵² The approval by the commission must relate to the present and not to the remote future, and the price to be fixed must relate substantially to present conditions,⁵³ although, of course, there must be considerable flexibility as to the time within which stock may be sold after it is authorized, and reasonable limits of time may be considered in approving an issue of stock and putting it on the market.⁵⁴

Under some statutes the order approving the issue of stock may provide for the application of the proceeds thereof to such uses as the commission shall by that order or by some subsequent order

Gas Works Co. v. Gas & Electric Light Com'rs, 214 Mass. 529, 102 N. E. 475.

Upon the question whether there shall be an issue of additional stock to meet liabilities incurred in increasing the efficiency or value of the plant of a gas company, the amount of undivided profits on hand at the time when the liabilities were incurred or the expenditures made which afterwards, and before the application to the board, have been lawfully distributed as dividends, is immaterial. *Fall River Gas Works Co. v. Gas & Electric Light Com'rs*, 214 Mass. 529, 102 N. E. 475.

⁵¹*Fall River Gas Works Co. v. Gas & Electric Light Com'rs*, 214 Mass. 529, 102 N. E. 475.

⁵²Stat. 1913, c. 784, § 16. *Bulkeley v. New York, N. H. & H. R. Co.*, 216 Mass. 432, 103 N. E. 1033.

In *Bulkeley v. New York, N. H. & H. R. Co.*, 216 Mass. 432, 103 N. E. 1033, it is said that it is difficult to define the phrase "so low as to be in-

consistent with the public interest," but that it must at least be taken "to mean in any specific case an issue price materially lower than a price which would assure a ready market for the issue."

⁵³*Bulkeley v. New York, N. H. & H. R. Co.*, 216 Mass. 432, 103 N. E. 1033.

It has no authority to approve a proposed issue of convertible debentures exchangeable for stock at par at the option of the holder for a period of ten years beginning five years after their date, since it is impossible in the nature of things for the commission to form an intelligent opinion whether the price at which stock is to be issued during a period of ten years beginning five years in the future is so low as to be inconsistent with the public interest. *Bulkeley v. New York, N. H. & H. R. Co.*, 216 Mass. 432, 103 N. E. 1033.

⁵⁴*Bulkeley v. New York, N. H. & H. R. Co.*, 216 Mass. 432, 103 N. E. 1033.

specify, and the corporation is prohibited from applying such proceeds otherwise than as so specified.⁵⁵

The commission cannot be invested with any supervisory powers over expenditure of money by an interstate railroad in other states, nor over the apportionment of the expenditure of its moneys as between different states, nor can it pass upon to approve or condemn the wisdom or unwisdom of construction work to be performed in other states. "The final decision of matters of this nature must rest with the officers and directors of the corporation."⁵⁶

Most of the statutes of this character apply to issues of bonds as well as to issues of stock, and in that aspect have been considered in connection with the subject of corporate bonds.⁵⁷

The validity and effect of so-called "Blue Sky Laws," which regulate the sale of stocks, bonds and other securities by domestic or foreign corporations and dealers will be considered hereafter in the chapter treating of governmental regulations.

§ 3478. When stock is deemed issued. " 'To issue,' as defined by lexicographers, signifies to send out, to put in circulation."⁵⁸ "In a popular sense, a corporation engaged in organization is said to issue stock when it obtains subscriptions for it."⁵⁹

"To effectuate an issue of stock it is not necessary that a certificate issue."⁶⁰ So shares of stock may be "issued and outstanding"

⁵⁵ Stat. 1913, c. 784, § 16. *Bulkeley v. New York, N. H. & H. R. Co.*, 216 Mass. 432, 103 N. E. 1033.

R. L. c. 109, § 24, required the decision authorizing the issue to specify the amounts of stock which were authorized to be issued for the respective purposes to which the proceeds thereof were to be applied, and prohibited their application to any purpose not so specified. *Fall River Gas Works Co. v. Gas & Electric Light Com'rs*, 214 Mass. 529, 102 N. E. 475.

⁵⁶ *Laird v. Baltimore & O. R. Co.*, 121 Md. 179, 47 L. R. A. (N. S.) 1167, Ann. Cas. 1915 B 728, 88 Atl. 347, 348.

⁵⁷ See § 977, *supra*.

⁵⁸ *American Pig Iron Storage Co. v. State Board of Assessors*, 56 N. J. L. 389, 29 Atl. 160.

The word "issue," in its ordinary

commercial or financial sense, means to "emit," "put into circulation," or "dispose of securities" already authorized and prepared for disposition. Stock is issued when it is disposed of or put into circulation. *Scott v. Abbott*, 160 Fed. 573.

⁵⁹ The word was held to have been used in this sense in a statute providing for the payment by corporations of a tax on their capital stock "issued and outstanding," so that a corporation was taxable on the amount of stock subscribed although the subscriptions had not been paid in full and no certificates had been issued. *American Pig Iron Storage Co. v. State Board of Assessors*, 56 N. J. L. 389, 29 Atl. 160.

⁶⁰ *American Pig Iron Storage Co. v. State Board of Assessors*, 56 N. J. L.

where the corporation has accepted property under an agreement to give such shares therefor, although no certificates have been issued therefor.⁶¹ But it has been held that "an averment that stock has been issued amounts to no more than a statement that the stock certificates have issued."⁶² Such an averment does not amount to an averment that only the number of shares alleged to have been issued have been subscribed, since "it is a matter of common knowledge that stock is invariably subscribed for before it is issued."⁶³

It has been held that shares which have been issued to a stockholder and then repurchased by the corporation and which are held by it for resale cannot be regarded as unissued stock;⁶⁴ while on the other hand it has been said that such stock is the same as though it had never been issued.⁶⁵

A return to the holders of stock improperly surrendered and illegally cancelled has been held not to be an issuing of stock within the meaning of an order restraining corporate directors from issuing stock.⁶⁶

§ 3479. Right of stockholders to preference on issue of stock. As we have seen in a preceding section, when a corporation increases its capital stock under authority from the legislature, stockholders at the time are entitled, in preference to others, to subscribe for or purchase the new stock in proportion to their shares of the original stock.⁶⁷ And according to some courts this preference also exists in relation to original stock which remains untaken, and therefore un-

389, 29 Atl. 160. *Fidelity Trust Co. v. Federal Trust Co.*, — N. J. Eq. —, 100 Atl. 615.

That a certificate is not necessary to constitute a person a stockholder, see § 3427, *supra*.

⁶¹ *Flour City Nat. Bank v. Shire*, 88 N. Y. App. Div. 401, 84 N. Y. Supp. 810, *aff'd* 179 N. Y. 587, 72 N. E. 1141.

⁶² *San Francisco Commercial Agency v. Miller*, 4 Cal. App. 291, 87 Pac. 630.

⁶³ *San Francisco Commercial Agency v. Miller*, 4 Cal. App. 291, 87 Pac. 630.

⁶⁴ *Hartley v. Pioneer Iron Works*, 181 N. Y. 73, 73 N. E. 576, *rev'g* 87 N. Y. App. Div. 107, 84 N. Y. Supp. 79.

Stock once issued is and remains outstanding within the purview of the franchise tax act, although reacquired

by the corporation, until retired and canceled in the manner provided by statute for the reduction of capital stock. *Knickerbocker Importation Co. v. State Board of Assessors*, 74 N. J. L. 583, 7 L. R. A. (N. S.) 885, 65 Atl. 913, *rev'g* 73 N. J. L. 94, 62 Atl. 266.

⁶⁵ So long as stock repurchased by the corporation remains in its treasury, it is the same as though it had never been issued. *Tulare Irrigation Dist. v. Kaweah Canal & Irrigation Co. (Cal.)*, 44 Pac. 662.

⁶⁶ *In re Election of Directors of New York & W. Town Site Co.*, 145 N. Y. App. Div. 630, 130 N. Y. Supp. 419.

⁶⁷ See § 3462, *supra*.

issued, at the time of the incorporation,⁶⁸ especially where the corporate by-laws so provide.⁶⁹ Other courts, however, hold that the rule is limited to an increase of stock, and, in the absence of some express charter or statutory provision, a stockholder has no greater or different right than a stranger to subscribe for or purchase undisposed of shares of the original stock.⁷⁰

⁶⁸ *Snelling v. Richard*, 166 Fed. 635; *Crosby v. Stratton*, 17 Colo. App. 212, 68 Pac. 130. See also *Eidman v. Bowman*, 58 Ill. 444, 11 Am. Rep. 90; *Way v. American Grease Co.*, 60 N. J. Eq. 263, 47 Atl. 44; *Whitaker v. Kilby*, 55 N. Y. Misc. 337, 106 N. Y. Supp. 511, aff'd 122 N. Y. App. Div. 895, 106 N. Y. Supp. 1149; *Luther v. C. J. Luther Co.*, 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69.

In *Snelling v. Richard*, 166 Fed. 635, it was held that existing stockholders were entitled to an opportunity to subscribe for their proportionate share of unissued stock before it could be disposed of to others, and the directors were enjoined from issuing it without giving them such an opportunity. The only case cited by the court as authority for so holding is *Stokes v. Continental Trust Co.*, 186 N. Y. 285, 12 L. R. A. (N. S.) 969, 9 Ann. Cas. 738, 78 N. E. 1090, in which the sole question was as to the right to subscribe for new stock. It is also to be noted that in *Snelling v. Richard* it was alleged that the directors proposed to issue the stock to themselves or their nominees, or to some friendly person who would vote in their interest, in order to control the election of directors and to deprive the complainants, who were the majority stockholders, of their right of control.

"Such preference does exist in relation to original stock which remains untaken, and therefore unissued, at the time of the incorporation"; and also in the case of an increase of the capital stock. "One reason on which

the rule in either case rests, is that the stockholder has the right to preserve the proportionate interest in the corporation first acquired by him. To dispose of the unissued or added stock to strangers, or to other stockholders, without affording him an opportunity to take his pro rata share, would be, without his consent, to impair his interest and influence in the corporation, and diminish the relative value of his holdings; and this the directors, who are trustees for the stockholders, may not lawfully do." *Crosby v. Stratton*, 17 Colo. App. 212, 68 Pac. 130.

In *Jones v. Morrison*, 31 Minn. 140, 16 N. W. 854, it is said that in respect to the power of the directors to dispose of it, unissued stock would stand on the same footing as increased stock.

In *Kingston v. Home Life Ins. Co.*, — Del. Ch. —, 101 Atl. 898, it is said: "In some cases it has been held that the right does not exist as to the original authorized capital, but only as to an increase of authorized capital. But this is not clear, and it is difficult in particular cases to determine what can rightfully be called a new issue of stock, as for instance, where the authorized capital stock was not increased by authority of law, and the new issue of shares were part of the capital stock as originally authorized, but issued after a substantially long period subsequent to the original issue of shares."

⁶⁹ *Trask v. Chase*, 107 Me. 137, 77 Atl. 698.

⁷⁰ *Curry v. Scott*, 54 Pa. St. 270, explaining and distinguishing *Reese*

Existing stockholders have no right to a preference where the corporation reacquires shares of its stock once issued, and reissues the same. Such shares are assets of the corporation, and may be disposed of by it either to stockholders or to strangers, as it may deem best.⁷¹

The unissued stock of a corporation, however, although part of the original stock, is held in trust for the stockholders in such a sense that it must be disposed of for the equal benefit of all.⁷² In disposing of it, the directors or majority of the stockholders cannot discriminate between the stockholders,⁷³ or issue it to themselves, or to their nom-

v. Bank of Montgomery Co., 31 Pa. St. 78, 72 Am. Dec. 726. Compare *Morris v. Stevens*, 178 Pa. St. 563, 36 Atl. 151. See also *Kingston v. Home Life Ins. Co.*, — Del. Ch. —, 101 Atl. 898; *Brown v. Florida Southern Ry. Co.*, 19 Fla. 472; *Sims v. Street R. Co.*, 37 Ohio St. 556.

In *Shellenberger v. Patterson*, 168 Pa. St. 30, 31 Atl. 943, it was held that if the stockholders should have been given a right to subscribe for undisposed-of stock, the complainants had waived their rights in this regard. And it was further held that even if such right exists and is violated, this does not invalidate the subscription of the person who takes the stock, but that the remedy of the injured stockholder is by an action for damages.

Stockholders cannot complain that undisposed-of stock was sold to an outsider at less than par where it does not appear that they, or any other person or persons, offered, or were ready, willing and able to buy it at par, or at any other price. *Griffith v. Sprowl*, 45 Ind. App. 504, 91 N. E. 25.

⁷¹ *Crosby v. Stratton*, 17 Colo. App. 212, 68 Pac. 130; *Hartridge v. Rockwell*, R. M. Charl. (Ga.) 260; *State v. Smith*, 48 Vt. 266. See also *San Antonio Traction Co. v. White* (Tex. Civ. App.), 60 S. W. 323.

"The issued stock of a corporation

represents its paid up capital. The holder owns it and disposes of it as he sees fit, and if it finds its way back into the treasury of the corporation, it becomes assets in the same sense that the corporation's other property is assets. It is still part of the paid up capital, and its sale no more affects the value of the other stock, or the standing of the stockholders in the corporation, than the sale of the corporation's tools or machinery. The relative value of all the stock is the same whether the particular stock of which we are speaking remains in the hands of the original holders or has been acquired from them by the corporation, and placed in its treasury." *Crosby v. Stratton*, 17 Colo. App. 212, 68 Pac. 130.

⁷² *Arkansas Valley Agr. Society v. Eichholtz*, 45 Kan. 164, 25 Pac. 613; *Shellenberger v. Patterson*, 168 Pa. St. 30, 31 Atl. 943; *Reese v. Bank of Montgomery*, 31 Pa. St. 78, 72 Am. Dec. 726.

⁷³ *Trask v. Chase*, 107 Me. 137, 77 Atl. 698; *Whitaker v. Kilby*, 55 N. Y. Misc. 337, 106 N. Y. Supp. 511, aff'd 122 N. Y. App. Div. 895, 106 N. Y. Supp. 1149; *Shellenberger v. Patterson*, 168 Pa. St. 30, 31 Atl. 943; *Reese v. Bank of Montgomery*, 31 Pa. St. 78, 72 Am. Dec. 726; *Luther v. C. J. Luther Co.*, 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69.

inees, either for the purpose of making a profit for themselves out of the transaction,⁷⁴ or for the purpose of obtaining or retaining control of the corporation.⁷⁵ And this is equally true though they believe

"It cannot be disposed of unequally to the corporators, and if so disposed of each corporator injured may have his action against the corporation." *Shellenberger v. Patterson*, 168 Pa. St. 30, 31 Atl. 943.

⁷⁴ Where the directors, knowing that unsubscribed shares are worth more than par, issue it to themselves at par without the knowledge or consent of the other stockholders and without giving them an opportunity to subscribe for it, and immediately thereafter declare a large dividend, their action is a violation of duty and a fraud on the rights of the other stockholders, and they will be enjoined from paying any dividends on such stock. *Arkansas Valley Agr. Society v. Eichholtz*, 45 Kan. 164, 25 Pac. 613.

⁷⁵ *United States*. *Snelling v. Richard*, 166 Fed. 635.

Delaware. See *Kingston v. Home Life Ins. Co.*, — Del. Ch. —, 101 Atl. 898.

Indiana. See *Griffith v. Sprowl*, 45 Ind. App. 504, 91 N. E. 25.

Maine. *Trask v. Chase*, 107 Me. 137, 77 Atl. 698.

Massachusetts. *Elliott v. Baker*, 194 Mass. 518, 80 N. E. 450.

Michigan. *Essex v. Essex*, 141 Mich. 200, 104 N. W. 622.

New Jersey. *Way v. American Grease Co.*, 60 N. J. Eq. 263, 47 Atl. 44. See also *Hilles v. Parrish*, 14 N. J. Eq. 380.

New York. *Whitaker v. Kilby*, 55 Misc. 337, 106 N. Y. Supp. 511, aff'd 122 App. Div. 895, 106 N. Y. Supp. 1149. See also *Witherbee v. Bowles*, 201 N. Y. 427, 95 N. E. 27, rev'g 142 App. Div. 407, 126 N. Y. Supp. 954.

Pennsylvania. *Morris v. Stevens*, 178 Pa. St. 563, 36 Atl. 151.

Wisconsin. *Luther v. C. J. Luther Co.*, 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69.

"Directors cannot, with secret knowledge of the existence of a contract which they claim to be of great value, issue treasury stock of the corporation and buy it in themselves, particularly when the transaction converts them from minority to majority stockholders. Such a transaction is in the highest degree inequitable. All stockholders should be given knowledge of contracts affecting the value of the stock, and should be allowed to subscribe for their proportional share of the new issue." *Whitaker v. Kilby*, 55 N. Y. Misc. 337, 106 N. Y. Supp. 511, aff'd 122 N. Y. App. Div. 895, 106 N. Y. Supp. 1149.

Directors have no right to issue unissued stock to themselves, or to their nominees or friends who will vote in their interest, in order to control the election of their successors and deprive the majority stockholders of their right of control, and they will be enjoined from doing so. *Snelling v. Richard*, 166 Fed. 635.

A majority of the directors who, at the time, represent a minority of the stock, have no right to issue to confederates a sufficient amount of stock to give to themselves, and to oust their opponents from, the control of the corporation, when the issuing of the stock is not required by the condition of the corporation or reasonably necessary for the proper prosecution of its business. *Elliott v. Baker*, 194 Mass. 518, 80 N. E. 450. See also *Griffith v. Sprowl*, 45 Ind. App. 504, 91 N. E. 25.

In an Alabama case it was held that a demurrer to a bill for the cancellation of certificates of stock was im-

that in so doing they are acting for the best interests of the corporation.⁷⁶ If they attempt to do so, they commit a fraud upon the other stockholders, against which a court of equity will grant relief,⁷⁷ unless the right to relief is barred by laches or acquiescence.⁷⁸ And stock so issued will be cancelled where the person to whom it is issued is a party to the fraud,⁷⁹ although not where it has come into the hands of a bona fide purchaser for value.⁸⁰ If the wrong consists in issuing the stock to some of the stockholders, to the exclusion of others, who were ready and offered to take their proportion of the shares, they may maintain assumpsit against the corporation to recover damages for breach of the contract implied from its duty to them.⁸¹ It has been held, however, that a bona fide sale for full value of previously issued stock belonging to the corporation is not vitiated because the motive of the directors in authorizing it is to enable the purchaser to vote to retain them in power.⁸²

properly sustained, where it showed that the president of the corporation, for the purpose of gaining control, convened a meeting of the directors, and presented his account for work done for the corporation, and the accounts of third persons for materials furnished under a contract made by him; that the certificates sought to be canceled were thereupon issued to him and to such third persons in payment of these accounts, without any auditing or investigation as to the correctness of the accounts; that such third persons agreed with the president to hold their shares for his benefit; and that there were present at the meeting, besides the president, only two other directors, both of whom owned little stock, and were his tools. *Perry v. Tuskaloosa Cotton-Seed Oil-Mill Co.*, 93 Ala. 364, 9 So. 217.

⁷⁶ *Elliott v. Baker*, 194 Mass. 518, 80 N. E. 450; *Luther v. C. J. Luther Co.*, 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69.

⁷⁷ *Trask v. Chase*, 107 Me. 137, 77 Atl. 698; *Essex v. Essex*, 141 Mich. 200, 104 N. W. 622; *Morris v. Stevens*, 178 Pa. St. 563, 36 Atl. 151; *Luther v. C. J. Luther Co.*, 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69.

⁷⁸ *Shellenberger v. Patterson*, 168 Pa. St. 30, 31 Atl. 943; *Keeney v. Converse*, 99 Mich. 316, 58 N. W. 325; *St. Croix Lumber Co. v. Mittlestadt*, 43 Minn. 91, 44 N. W. 1079.

In *Reese v. Bank of Montgomery Co.*, 31 Pa. St. 78, 72 Am. Dec. 726, it was held that a resolution of the directors of a corporation, distributing unissued stock among all the stockholders who were not in arrear on the shares already taken by them, and excluding those who were in arrear, was an unlawful imposition of a penalty on those in arrear, and a violation of the equal rights of the stockholders excluded.

⁷⁹ *Perry v. Tuskaloosa Cotton-Seed Oil-Mill Co.*, 93 Ala. 364, 9 So. 217; *Elliott v. Baker*, 194 Mass. 518, 80 N. E. 450; *Luther v. C. J. Luther Co.*, 118 Wis. 112, 99 Am. St. Rep. 977, 94 N. W. 69.

⁸⁰ *Rural Homestead Co. v. Wildes*, 54 N. J. Eq. 668, 35 Atl. 896, rev'g 53 N. J. Eq. 452, 32 Atl. 676; *Morris v. Stevens*, 178 Pa. St. 563, 36 Atl. 151.

⁸¹ *Reese v. Bank of Montgomery Co.*, 31 Pa. St. 78, 72 Am. Dec. 726.

⁸² *Rural Homestead Co. v. Wildes*, 54 N. J. Eq. 668, 35 Atl. 896, rev'g

VIII. ISSUE AND CANCELLATION OF CERTIFICATES OF STOCK

§ 3480. Power to issue; conditions precedent. A joint-stock corporation undoubtedly has the power to issue certificates to its stockholders as evidence of their ownership of shares, except in so far as there may be restrictions in its charter or the general law.⁸³

In the absence of restrictions, a corporation may issue a certificate of stock before the shares are paid for in full, or even before anything at all is paid,⁸⁴ for payment of a subscription, unless expressly required, is not necessary to render one a stockholder.⁸⁵ Charters or general laws sometimes require payment in full before a certificate is issued, however.⁸⁶ Payment in full has been held to be a condition precedent under a provision that no corporation shall issue stock except for money paid, labor done, or property actually received.⁸⁷ But, on

53 N. J. Eq. 452, 32 Atl. 676; State v. Smith, 48 Vt. 266, 290.

⁸³ In *Reno Oil Co. v. Culver*, 60 N. Y. App. Div. 129, 69 N. Y. Supp. 969, rev'g 33 N. Y. Misc. 717, 68 N. Y. Supp. 303, it is said that the right to issue certificates of stock is not one of the implied or incidental powers of a corporation, and that the right must exist, if at all, by virtue of the charter of the corporation or the statute under which it is incorporated. Later in the opinion, however, the court speaks of the "right to issue stock," and apparently it is the latter right that is referred to. Of course the corporation would have no right to issue certificates if it had no right to issue stock. See § 3474.

⁸⁴ *Green v. Abietine Medical Co.*, 96 Cal. 322, 31 Pac. 100; *German Mercantile Co. v. Wanner*, 25 N. D. 479, 52 L. R. A. (N. S.) 453, 142 N. W. 463.

⁸⁵ See § 3427, *supra*.

⁸⁶ *California*. *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

Iowa. Code Supp. 1907, § 1641b. *First Nat. Bank of Ottumwa v. Fulton*, 156 Iowa 734, 137 N. W. 1019.

Mississippi. *Lee v. Cutrer*, 96 Miss. 355, 27 L. R. A. (N. S.) 315, Ann. Cas. 1912 B 478, 51 So. 808.

Nevada. *Ross v. Bank of Gold Hill*, 20 Nev. 191, 19 Pac. 243.

South Carolina. S. C. Civ. Code 1912, § 2851, prohibits the issue of stock by any corporation until fully paid. *Granite Brick Co. v. Titus*, 226 Fed. 557.

A subscriber to whom a certificate has been issued before payment in full cannot escape liability on his subscription on that ground. *Ross v. Bank of Gold Hill*, 20 Nev. 191, 19 Pac. 243.

See also the cases cited in the following notes.

⁸⁷ *San Antonio Irrigation Co. v. Deutschmann*, 102 Tex. 201, 114 S. W. 1174, 105 S. W. 486; *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield*, — Tex. Civ. App. —, 184 S. W. 776; *Republic Trust Co. v. Taylor*, — Tex. Civ. App. —, 184 S. W. 772; *Commonwealth Bonding & Casualty Ins. Co. v. Hill*, — Tex. Civ. App. —, 184 S. W. 247; *Cattlemen's Trust Co. of Ft. Worth v. Turner*, — Tex. Civ. App. —, 182 S. W. 438; *General Bonding & Casualty Ins. Co. v. Mosely*, — Tex. Civ. App. —, 174 S. W. 1031; *Cope v. Pitzer*, — Tex. Civ. App. —, 166 S. W. 447; *Mason v. First Nat. Bank of Paint Rock*, — Tex. Civ. App. —, 156 S. W. 366; *McCarthy v. Texas Loan & Guaranty Co.*, — Tex. Civ. App. —, 142 S. W. 96.

Under such a provision stock cannot

the other hand it has been held that such a provision does not prevent the corporation from issuing certificates before payment in full,⁸⁸ even when coupled with a further provision that stock issued in violation thereof shall be void.⁸⁹

Under a statute providing that certificates of stock should be issued "for all stock paid up, from time to time, in compliance with the requirements of such directors," or that might "be fully paid in advance of such requirements by the voluntary act of any stockholder," it was held that payment in full for stock was a condition precedent to

be sold for money to be paid after it is issued, and a contract providing for payment in this manner is void, as, for example, an agreement that the purchaser may pay for it at such time as he could arrange. *San Antonio Irrigation Co. v. Deutschmann*, 102 Tex. 201, 114 S. W. 1174, 105 S. W. 486.

A voluntary payment of the unpaid portion of a subscription extinguishes the debt and renders the subsequent issuance of the stock valid. *General Bonding & Casualty Ins. Co. v. Mosely*, — Tex. Civ. App. —, 174 S. W. 1031.

But see *Houston Fire & Marine Ins. Co. v. Swain* (Tex. Civ. App.), 114 S. W. 149, where it is held that this provision does not declare void stock issued without payment therefor, but merely condemns fictitious increase of stock.

⁸⁸ *Scully v. Automobile Finance Co.*, — Del. Ch. —, 101 Atl. 908; *Whitewater Tile & Pressed Brick Mfg. Co. v. Baker*, 142 Wis. 420, 125 N. W. 984.

Such provisions do not prohibit the issuing of stock as partly paid for, but merely mean that stock cannot be issued as fully paid so as to relieve the holders from liability to the extent of the par value of the shares until it has been paid for in money or other form of property. *Scully v. Automobile Finance Co.*, — Del. Ch. —, 101 Atl. 908.

⁸⁹ Wis. Stat. 1898, § 1753, forbidding the issuance of stock "except in consideration of money or labor or property, estimated at its true money

value, actually received by it, equal to the par value thereof," and providing that all stock not so issued shall be void, "does not mean that every stock subscription must be paid in full before the subscriber becomes a stockholder, but only that the consideration paid or to be paid must be equal to the par value. The statutes contemplate that stock may be sold in part at least upon credit, and that the balance due may be called in from time to time, and even that such stock may be transferred and the original holder released from liability for the amount unpaid thereon." The word void, as so used, does not mean incapable of validation; that stock issued in violation of the statute may thereafter be validated by payment of full consideration therefor; and that, where the stock is not an overissue, the corporation may elect to ratify the transaction, treat the stock as validly issued, and sue for the balance due on the basis that the stock is valid. In such an action the defendant will not be permitted to say that the stock is void simply because of his own wrongful act, since in so doing he would be taking advantage of his own wrong. *Whitewater Tile & Pressed Brick Mfg. Co. v. Baker*, 142 Wis. 420, 125 N. W. 984. See also *Haynes v. Kenosha Elec. R. Co.*, 139 Wis. 227, 121 N. W. 124, 119 N. W. 568, where this was held to be true in the case of

the power to issue a certificate.⁹⁰ But a provision requiring corporations to issue certificates for stock when fully paid up does not prohibit the issue of the certificates before full payment.⁹¹

Of course a corporation has no power to issue certificates in excess of the amount of its authorized capital stock. If it does so, it may be liable in damages to bona fide purchasers of the pretended stock,⁹² but the certificates are void, and neither confer rights nor impose liabilities as a stockholder.⁹³

Certificates representing a fictitious increase of stock, in violation of a statutory or constitutional provision that no corporation shall issue stock except for money paid, labor done or property actually received, and that all fictitious increase of stock shall be void, are void as between the corporation and the holder, and in some jurisdictions as between the holder and subsequent creditors of the corporation.⁹⁴

§ 3481. How, where and by whom issued; proof of issuance. Certificates can only be issued by the officers specified in the charter or general law.⁹⁵ And statutes in some states forbid such officers to sign certificates without knowledge of the apparent title of the person to whom they are issued.⁹⁶

In order that a certificate may be regarded as issued, so as to confer rights, it must have been delivered.⁹⁷ So there is no issuance of a

⁹⁰ *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

⁹¹ A statute (Civ. Code Cal. § 323) providing that "all corporations for profit must issue certificates for stock when fully paid up, * * * and may provide, in their by-laws, for issuing certificates prior to the full payment, under such restrictions and for such purposes as their by-laws may provide," does not prohibit the issue of certificates before the stock is fully paid up. *Green v. Abietine Medical Co.*, 96 Cal. 322, 330, 31 Pac. 100.

⁹² See § 3493, *infra*.

⁹³ See § 3467, *supra*.

⁹⁴ See § 3579 et seq., *infra*.

⁹⁵ Where the charter provides that "the president and directors" shall cause a certificate to be issued to each subscriber for each share subscribed,

the president alone has no authority to issue certificates, especially to nonsubscribers. *Holbrook v. Fauquier & A. Turnpike Co.*, 3 Cranch C. C. 425, Fed. Cas. No. 6,591.

A certificate issued by de facto officers is legal and valid. *Sherwood v. Wallin*, 154 Cal. 735, 99 Pac. 191.

That certificates must be signed by the designated officers, see § 3482, *infra*.

⁹⁶ *Dennett v. Acme Mfg. Co.*, 106 Me. 476, 76 Atl. 922.

⁹⁷ *York v. Passaic Rolling-Mill Co.*, 30 Fed. 471; *Wolcott v. Waldstein*, 86 N. J. Eq. 63, 97 Atl. 951; *Cattlemen's Trust Co. of Ft. Worth v. Pruett*, — Tex. Civ. App. —, 184 S. W. 716; *Commonwealth Bonding & Casualty Ins. Co. v. Hill*, — Tex. Civ. App. —, 184

certificate where it is never detached from the stock book although the blanks therein are properly filled up, if the person whose name is inserted therein has no control over the books of the company.⁹⁸ But the contrary has been held to be true where the persons sought to be held as stockholders are officers or trustees of the company, and have the custody of the stock book and can detach the certificates at any time.⁹⁹ It has also been held that stock is not issued where a certificate made out in the name of the subscriber is never delivered to him but is retained by the corporation as security for notes given by him for the unpaid portion of his subscription; ¹ and this has been held to be true even though the subscriber votes the stock and though dividends are declared on it which are credited on the notes.² Making out a certificate and mailing it to a stockholder is an issue thereof.³

S. W. 247; *Cattlemen's Trust Co. of Ft. Worth v. Turner*, — Tex. Civ. App. —, 182 S. W. 438. See *Cattlemen's Trust Co. of Ft. Worth v. Turner*, — Tex. Civ. App. —, 182 S. W. 438, for various definitions of the term "issue." And see the cases cited in the following notes.

A stock issue is not consummated where stock certificates are issued and placed in escrow, but are never, in fact, acquired by the person for whom they were intended. *Wolcott v. Waldstein*, 86 N. J. Eq. 63, 97 Atl. 951.

It must be borne in mind, however, that, ordinarily, delivery of a certificate is not necessary to make a subscriber a stockholder. See § 3427.

⁹⁸ Where a certificate of stock was drawn up for a person by a corporation, but retained in the stock book, and a receipt was indorsed thereon by the corporation for him, it was held that there was no delivery. *York v. Passaic Rolling-Mill Co.*, 30 Fed. 471. See also *In re Grand Rapids Furniture Agency*, 209 Fed. 483.

⁹⁹ *In re Grand Rapids Furniture Agency*, 209 Fed. 483.

A certificate filled up and signed by the proper officers constitutes the person named therein a stockholder al-

though it is not detached from the books, where he is the secretary of the company and it is therefore in his control and he is at liberty to do with it as he pleases. *Halstead v. Dodge*, 1 How. Pr. N. S. (N. Y.) 170, 177, 51 N. Y. Super. Ct. 169.

¹ *Commercial Guaranty State Bank v. Crews*, — Tex. Civ. App. —, 196 S. W. 901; *Kanaman v. Gahagan*, — Tex. Civ. App. —, 185 S. W. 619; *Cattlemen's Trust Co. of Ft. Worth v. Pruett*, — Tex. Civ. App. —, 184 S. W. 716; *Commonwealth Bonding & Casualty Ins. Co. v. Hill*, — Tex. Civ. App. —, 184 S. W. 247; *Cattlemen's Trust Co. of Ft. Worth v. Turner*, — Tex. Civ. App. —, 182 S. W. 438; *Farmers' & Merchants' State Bank v. Falvey*, — Tex. Civ. App. —, 175 S. W. 833.

The transaction "is treated as a subscription for stock, the delivery of which is contingent upon the payment of the notes executed therefor." *Commercial Guaranty State Bank v. Crews*, — Tex. Civ. App. —, 196 S. W. 901.

² *Cattlemen's Trust Co. of Ft. Worth v. Pruett*, — Tex. Civ. App. —, 184 S. W. 716; *Cattlemen's Trust Co. of Ft. Worth v. Turner*, — Tex. Civ. App. —, 182 S. W. 438.

³ On the day when it is mailed.

Issue of a certificate of stock to a transferee of stock is one of the formalities in a transfer of stock,⁴ but the issue of a certificate to an original subscriber is in no sense a transfer of stock, and therefore it is not within a provision of the charter or by-laws that stock shall be transferable only on the books of the corporation.⁵

Certificates are not necessarily invalid because issued outside of the state where the corporation was incorporated.⁶

Where stock certificates are issued in contemplation of incorporation and before the incorporation is perfected, the issue of stock may be adopted by the corporation after it is formed and the holders thereby become stockholders without the issue of new certificates.⁷

The legality of a certificate cannot be determined in a suit to which the holder thereof is not a party.⁸

The issuance of stock should be proved by the production of the certificate, that being the best evidence of its issuance and existence.⁹ Parol evidence is not admissible for that purpose, in the absence of the proper predicate for the nonproduction of the certificate.¹⁰ But delivery of the certificate may be shown by parol.¹¹

§ 3482. Form and contents of certificate. With respect to form, certificates must comply with the provisions of the charter and valid by-laws. If they provide generally for certificates in a certain form, and signed by particular officers, all certificates, to whomsoever they may be issued, are to be in such form and signed by such officers.¹²

Jones v. Terre Haute & R. R. Co., 17 How. Pr. (N. Y.) 529, 531.

⁴ See subd. xxi, *infra*, this chapter.

⁵ Burr v. Wilcox, 22 N. Y. 551, 555.

"The issuing of the original certificates is in no sense a transfer of stock. The interest of the parties to whom they are issued is the same before as after such issue. The certificate is simply a written acknowledgment by the company of the interest of the subscribers in its property and franchises. It transfers nothing from the company to the subscriber, but simply affords to the latter evidence of his right." Burr v. Wilcox, 22 N. Y. 551, 555.

As to the validity and effect of provisions requiring transfers to be made on the books of the corporation see subd. xxi, *infra*, this chapter.

⁶ Courtright v. Deeds, 37 Iowa 503.

⁷ Thorpe v. Pennock Mercantile Co., 99 Minn. 22, 9 Ann. Cas. 229, 108 N. W. 940.

⁸ Willis v. Lauridson, 161 Cal. 106, 118 Pac. 530.

⁹ Commonwealth Bonding & Casualty Ins. Co. v. Hill, — Tex. Civ. App. —, 184 S. W. 247.

¹⁰ Commonwealth Bonding & Casualty Ins. Co. v. Hill, — Tex. Civ. App. —, 184 S. W. 247.

¹¹ Commonwealth Bonding & Casualty Ins. Co. v. Hill, — Tex. Civ. App. —, 184 S. W. 247.

¹² Where the charter or by-laws of a corporation authorize or require its certificates of stock to be issued in a particular form, and signed by particular officers, all certificates are properly issued in such form and signed

It is sometimes provided that certificates must have indorsed on the face thereof what amount or portion of the par value has been paid to the corporation, and whether such payment was made in money or property;¹³ or that the words "issued for property,"¹⁴ or "treasury stock" or "promotion stock"¹⁵ must be stamped on the face of certificates, when such is the case.

Words engraved on the margin or border of a certificate are as much a part of it as though contained in the body of the certificate.¹⁶

A corporation may insert in its certificates any stipulation or provision which does not violate its contract with the stockholder, and which is not contrary to the provisions of its charter, or to the general

by such officers, to whomsoever they may be issued. No other or different form is required in the case of certificates issued to one of the officers named. *Titus v. Great Western Turnpike Road*, 61 N. Y. 237.

Where the certificates provide on their face that they will not be valid unless countersigned by a designated company as registrar, its signature is necessary to the completion of the certificate although the statute contains no such requirement. The name of the company designated as registrar printed in the forms with a blank for the signature of its proper officer, is not a signature by the company until the blank is filled. *Dollar Sav. Bank & Trust Co. v. Pittsburg Plate Glass Co.*, 213 Pa. 307, 5 Ann. Cas. 248, 62 Atl. 916.

Irregularities in the form of the certificate, as that it is attested by the secretary instead of the treasurer, does not relieve the holder's responsibility as a shareholder. *Clevenger v. Moore*, 71 N. J. L. 148, 58 Atl. 88.

A subscriber is not excused from paying for his stock because the certificate does not comply with the provisions of Civ. Code, § 323. *Ferrochem Co. of Pennsylvania v. Danziger*, 23 Cal. App. 584, 138 Pac. 966.

¹³ Iowa Code 1897, § 1627, contains such a provision, and provides for the

fine or imprisonment of any person violating the provisions of the section, or knowingly making any false statement on a certificate.

Failure to comply with the statute does not invalidate the certificates. *French v. Northwestern Laundry*, 132 Iowa 81, 107 N. W. 430.

¹⁴ N. J. Rev. St. 1887, p. 186, § 55 contained such a requirement but there is no such requirement in the corporation law of 1896. See *Easton Nat. Bank v. American Brick & Tile Co.*, 70 N. J. Eq. 722, 64 Atl. 1095 aff'g 69 N. J. Eq. 326, 60 Atl. 54.

¹⁵ Act March 5, 1909 (Stats. 1909 c. 56) requiring certificates of stock issued by mining companies to be so stamped does not apply to certificates issued before the act took effect. *State v. Manhattan Verde Co.*, 32 Nev. 474, 109 Pac. 442.

Mandamus will issue to compel the proper corporate officers to stamp certificates issued after the taking effect of the act, in accordance with its provisions. *State v. Manhattan Verde Co.*, 32 Nev. 474, 109 Pac. 442.

¹⁶ This is true of words and figures showing the amount of the capital stock and the number and par value of the shares into which it is divided. *Fish v. Gilbert*, 73 Conn. 377, 47 Atl. 718.

law, and valid provisions or stipulations inserted therein will be binding upon the person to whom the certificate is issued, upon transferees thereof, and upon the corporation.¹⁷

Omission of the corporate seal from a certificate, which is otherwise in proper form, and signed by the proper officers, does not render it invalid.¹⁸ Nor does the absence of necessary revenue stamps, where the failure to attach them was due to inadvertence, since under such circumstances they may be attached at any time.¹⁹

§ 3483. Right to certificate. While a certificate of stock is not necessary to render one a stockholder in a corporation,²⁰ it is desirable to have one as evidence and for the purpose of transfer, etc., and every stockholder has a right to a proper certificate as soon as he has paid for his shares, unless there is some provision or agreement to the contrary.²¹ During the time in which the corporation fails or refuses

¹⁷ *Mannington v. Hocking Valley Ry. Co.*, 183 Fed. 133; *Heslin v. Eastern Building & Loan Ass'n of Syracuse*, 28 N. Y. Misc. 376, 59 N. Y. Supp. 572.

In *Heslin v. Eastern Building & Loan Ass'n of Syracuse*, supra, it was held that a provision in a certificate of stock that any action against the corporation should be brought in the county in which its principal office was located was binding.

One who purchases stock through a trust company, and takes a certificate to the effect that the shares are on deposit in trust, which, together with a deed of transfer thereof, are to be delivered on demand, cannot insist that he is entitled to original shares. *McClure v. Central Trust Co.*, 28 N. Y. App. Div. 433, 53 N. Y. Supp. 188.

¹⁸ *Halstead v. Dodge*, 1 How. Pr. N. S. (N. Y.) 170, 177, 51 N. Y. Super. Ct. 169.

See *Coddington v. Railroad Co.*, 103 U. S. 409, 26 L. Ed. 400, where it was held that the right of one who had exchanged interest coupons for stock on the ground of fraud because the corporate seal was omitted from the certifi-

cates was barred by the statute of limitations and laches.

¹⁹ *Jones v. Western Mfg. Co.*, 27 Wash. 136, 67 Pac. 586.

²⁰ See § 3427, supra.

²¹ *United States National Bank v. Watsontown Bank*, 105 U. S. 217, 26 L. Ed. 1039; *Citizens' Savings & Trust Co. v. Illinois Cent. R. Co.*, 182 Fed. 607, rev'g 173 Fed. 556; *Citizens' Savings & Loan Ass'n v. Belleville & S. I. R. Co.*, 117 Fed. 109.

Alabama. *Birmingham Nat. Bank v. Roden*, 97 Ala. 404, 11 So. 883.

California. *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 134 Pac. 981, 156 Cal. 373, 104 Pac. 695.

Illinois. *Davenport v. Plano Implement Co.*, 70 Ill. App. 161.

Indiana. *Fletcher v. McGill*, 110 Ind. 395, 11 N. E. 779, 10 N. E. 651.

Maine. Rev. St. c. 47, § 34. *Dennett v. Acme Mfg. Co.*, 106 Me. 476, 76 Atl. 922.

Minnesota. *Milnor v. Home Savings & Loan Ass'n*, 64 Minn. 500, 67 N. W. 346.

New Hampshire. *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N.

to issue him a certificate under such circumstances, it is, at most, merely the holder of the naked legal title to the stock in trust for the subscriber, who is the beneficial owner.²²

As a rule, a corporation is also under a duty to issue a certificate, or a new certificate, to a transferee of shares, unless it has a lien on the shares, or for some other reason is not bound to recognize the transfer.²³

S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

New Jersey. P. L. 1896, p. 277, § 19. *Gund v. Logan*, 187 Fed. 932.

New York. *Van Allen v. Illinois Cent. R. Co.*, 7 Bosw. 515. See *Buffalo & N. Y. City R. Co. v. Dudley*, 14 N. Y. 336.

Ohio. *State v. Carpenter*, 51 Ohio St. 83, 46 Am. St. Rep. 556, 37 N. E. 261; *Freon v. Carriage Co.*, 42 Ohio St. 30, 51 Am. Rep. 794; *Arbuckle v. Woolson Spice Co.*, 21 Ohio Cir. Ct. 356.

Pennsylvania. *Appeal of Rowley*, 115 Pa. St. 150, 9 Atl. 329.

Texas. *Rio Grande Cattle Co. v. Burns*, 82 Tex. 50, 17 S. W. 1043.

Utah. *Coray v. Perry Irrigation Co.*, 166 Pac. 672.

Washington. *Lacaff v. Dutch Miller Mining & Smelting Co.*, 31 Wash. 566, 72 Pac. 112.

Wisconsin. *Southwestern Slate Co. v. Stephens*, 139 Wis. 616, 29 L. R. A. (N. S.) 92, 131 Am. St. Rep. 1074, 120 N. W. 408; *Wells v. Green Bay & M. Canal Co.*, 90 Wis. 442, 64 N. W. 69.

Where a corporation sells shares of its stock; it is bound to deliver certificates therefor, and may be compelled to do so by appropriate proceedings in the courts in case it fails to deliver them. *Southwestern Slate Co. v. Stephens*, 139 Wis. 616, 29 L. R. A. (N. S.) 92, 131 Am. St. Rep. 1074, 120 N. W. 408.

A temporary receipt for stock subscriptions certifying the persons named therein to be the owners of a specified number of shares, and that a certificate will be issued therefor when

engraved and ready for delivery on presentation of the receipt, signed by the president and attested by the secretary, is not the certificate required by the New Jersey statute. *Gund v. Logan*, 187 Fed. 932.

A corporation will not be temporarily restrained from selling shares of its stock at the instance of one holding a certain number of shares where it has unissued stock in excess of the holdings of such member. *Quin v. Havenor*, 118 Wis. 53, 94 N. W. 642.

An agreement that certificates for so called "pool stock" shall not be issued for five years is binding on stockholders who are parties to it and on their assignees who take with notice. *Williams v. Ashurst Oil, Land & Development Co.*, 144 Cal. 619, 78 Pac. 28.

Under the statutes of West Virginia certificates of stock need not be issued unless a demand is made therefor. *Lipscomb's Adm'r v. Condon*, 56 W. Va. 416, 67 L. R. A. 670, 107 Am. St. Rep. 938, 49 S. E. 392.

²² *Citizens' Savings & Trust Co. v. Illinois Cent. R. Co.*, 182 Fed. 607, rev'g 173 Fed. 556.

The corporation is a mere trustee as to stock which has been paid for by a subscriber but has never been issued. Before being compelled to issue it to any other person it is entitled to be protected against any subsequent claim therefor by the subscriber. *Wait v. Kern River Mining, Milling & Developing Co.*, 157 Cal. 16, 106 Pac. 98.

²³ See subd. XXI, *infra*, this chapter.

In the absence of a provision or agreement to the contrary, a corporation is not bound to issue a certificate for stock until it is paid for in full,²⁴ although, as we have seen, it may do so unless prohibited.²⁵

The number of certificates to be issued to a single stockholder is, generally speaking, a matter for the discretion of the directors under the by-laws. In the absence of any provisions on the subject he has a right, within reason, to have his holdings in such amounts as he may desire.²⁶ But his demands in this regard must be reasonable. So it has been held that a demand by an owner of twenty-five shares of stock that twenty-five certificates be issued to him, one for each share, is unreasonable, and that the directors are justified in refusing to comply with it.

§ 3484. Remedies for refusal to issue certificates. If a corporation wrongfully refuses to issue a proper certificate of stock when it has the power and is under an obligation to issue the same, it may be compelled to do so by a suit in equity for specific performance of its express or implied contract,²⁷ at least where there is no adequate

²⁴ *California Southern Hotel Co. v. Callender*, 94 Cal. 120, 28 Am. St. Rep. 99, 29 Pac. 859; *Fulgam v. Macon & B. R. Co.*, 44 Ga. 597; *Baltimore City Passenger Ry. Co. v. Hambleton*, 77 Md. 341, 26 Atl. 279; *Babcock v. Schuykill & L. Val. R. Co.*, 133 N. Y. 420, 31 N. E. 30.

A corporation is not bound to issue a certificate to a subscriber until the subscription is fully paid. *Commonwealth Bonding & Casualty Ins. Co. v. Hill*, — Tex. Civ. App. —, 184 S. W. 247.

²⁵ See § 3480, *supra*.

²⁶ *Schell v. Alston Mfg. Co.*, 149 Fed. 439.

²⁷ **United States.** *Citizens' Savings & Trust Co. v. Illinois Cent. R. Co.*, 182 Fed. 607; *Citizens' Savings & Loan Ass'n v. Belleville & S. I. R. Co.*, 117 Fed. 109.

Alabama. *Birmingham Nat. Bank v. Roden*, 97 Ala. 404; 11 So. 883.

California. *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 134 Pac. 981, 156 Cal. 373, 104 Pac. 695; *Noble v.*

Learned, 153 Cal. 245, 94 Pac. 1047 (Cal. App.), 87 Pac. 402.

Colorado. *Mountain Water Works Const. Co. v. Holme*, 49 Colo. 412, 113 Pac. 501.

Georgia. *Blaisdell v. Bohr*, 68 Ga. 56.

Illinois. *Davenport v. Plano Implement Co.*, 70 Ill. App. 161.

Kansas. *Consolidated Mining & Prospecting Co. v. Huff*, 62 Kan. 405, 63 Pac. 442.

Maryland. *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418.

Minnesota. *Selover v. Isle Harbor Land Co.*, 100 Minn. 253, 111 N. W. 155, 91 Minn. 451, 98 N. W. 344. See also *Milnor v. Home Savings & Loan Ass'n*, 64 Minn. 500, 67 N. W. 346.

New Hampshire. *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

New York. *Kinnan v. Forty-Second St., M. & St. N. Ave. Ry. Co.*, 140 N. Y. 183, 35 N. E. 493, aff'g 1 Misc. 457, 21 N. Y. Supp. 789.

remedy at law such as an action at law to recover for the breach.²⁸

Ohio. *State v. Carpenter*, 51 Ohio St. 83, 46 Am. St. Rep. 556, 37 N. E. 261; *Iron R. Co. v. Fink*, 41 Ohio St. 321, 52 Am. Rep. 84; *Arbuckle v. Woolson Spice Co.*, 21 Ohio Cir. Ct. 356.

Pennsylvania. *Reading Iron Works' Estate*, 149 Pa. St. 182, 24 Atl. 202; *Rowley's Appeal*, 115 Pa. St. 150, 9 Atl. 329.

Utah. *Coray v. Perry Irrigation Co.*, 166 Pac. 672.

Washington. *Lacaff v. Dutch Miller Mining & Smelting Co.*, 31 Wash. 566, 72 Pac. 112.

West Virginia. *Snyder v. Charleston & S. Bridge Co.*, 65 W. Va. 1, 131 Am. St. Rep. 947, 63 S. E. 616.

Wisconsin. *Wells v. Green Bay & M. Canal Co.*, 90 Wis. 442, 64 N. W. 69.

If there is any valid reason why this relief cannot be granted, equity will grant alternative relief by way of damages. *Snyder v. Charleston & S. Bridge Co.*, 65 W. Va. 1, 131 Am. St. Rep. 947, 63 S. E. 616.

Where stock is without market value and has never been sold, equity will compel the specific performance of a contract by a corporation to issue stock in consideration of the transfer to it of certain property. *Selover v. Isle Harbor Land Co.*, 100 Minn. 253, 111 N. W. 155, 91 Minn. 451, 98 N. W. 344.

Judgment may be rendered for the issuance of the stock and in failure of the company to issue it to him, that he have judgment for its value. But a judgment which directs defendant corporation to issue certain shares of stock and place them in the hands of the clerk of court within a specified time, to be delivered to plaintiff, the order finding the value of the stock and providing that if the defendant shall fail to comply with the order

that then and in that case the plaintiff shall have judgment against defendant for the value thereof, is conditional both in its form and in its effect and should properly be vacated as to the entry of judgment. Judgment in such case should be entered in case of noncompliance with the first half of the order upon due proof of such noncompliance.

The evil of such conditional order is that it made necessary the determination of default with respect to the first half of the order and did not provide by whom such default should be determined. In an attempt to act under the order, if default had occurred, the clerk would naturally have been called upon to find that such default had occurred, and this would have been in effect an exercise of judicial powers. *Consolidated Mining & Prospecting Co. v. Huff*, 62 Kan. 405, 63 Pac. 442.

Of course a corporation cannot be compelled to perform a contract to issue stock which it did not make in a suit to which it is not a party. *Bivens v. Hull*, 58 Colo. 338, 145 Pac. 694.

See also subd. xxiii, *infra*, this chapter, as to the right of a transferee of stock to sue in equity to compel the corporation to register the transfer and to issue a new certificate to him.

²⁸ Where there is no averment and proof that stock has a peculiar value, or that in an action at law damages resulting from the breach of contract could not be fully recovered, a bill in equity to compel specific performance of a contract by a corporation to issue stock in payment of services cannot be maintained. *Kennedy v. Thompson*, 97 N. Y. App. Div. 296, 89 N. Y. Supp. 963.

See also *Selover v. Isle Harbor Land*

In some jurisdictions mandamus will lie to compel it to issue a certificate under such circumstances,²⁹ provided the legal right of the petitioner is clear and unquestionable,³⁰ although there is authority to the contrary.³¹

Instead of suing to compel the issuance and delivery of a certificate, the party may maintain against the corporation an action of assumpsit on its express or implied contract, to recover damages for the breach thereof;³² or, if he has title to the stock, he may treat the refusal

Co., 100 Minn. 253, 111 N. W. 155, 91 Minn. 451, 98 N. W. 344.

²⁹ *State v. Southern Mineral & Land Improvement Co.*, 108 La. 24, 32 So. 174; *State v. New Orleans Gaslight Co.*, 25 La. Ann. 413; *Dennett v. Acme Mfg. Co.*, 106 Me. 476, 76 Atl. 922; *State v. Cheraw & C. R. Co.*, 16 S. C. 524.

As to whether mandamus will lie to compel a corporation to register a transfer of stock and to issue a new certificate to the transferee, see subd. xxiii, *infra*, this chapter.

³⁰ *Townes v. Nichols*, 73 Me. 515. See also *State v. New Orleans Gaslight Co.*, 25 La. Ann. 413.

A writ of mandamus should be denied where there is a controversy between the parties as to their legal rights under an agreement referred to in the certificate under which the petitioner claims the right to stock, and the nature of such agreement does not appear. *Townes v. Nichols*, 73 Me. 515.

"All the authorities declare that the remedy by mandamus cannot be resorted to in a case like this unless the legal right of the petitioner to the possession of the thing sought for is clear and unquestionable. If there be doubt as to what his legal right may be, involving the necessity of litigation to settle it, mandamus must be withheld. Mandamus is the right arm of the law. Its principal office is, not to inquire and investigate, but to command and execute. It is not designed to assume a part in ordinary law-suits

or equitable proceedings. It is properly called into requisition in cases where the law has been settled, or in cases where questions of law or equity cannot properly and reasonably arise. Its very nature implies that the law, although plain and clear, fails to be enforced, and needs its assistance." *Townes v. Nichols*, 73 Me. 515.

See also subd. xxiii, *infra*, this chapter.

³¹ In Ohio, where a statute provides that the writ of mandamus "must not be issued in a case where there is a plain and adequate remedy in the ordinary course of the law," it has been held that mandamus will not lie to compel a corporation to issue a certificate of stock, but that the remedy is either at law to recover damages for refusal to issue the same, or in equity to compel the officers of the corporation to execute and deliver it. *State v. Carpenter*, 51 Ohio St. 83, 46 Am. St. Rep. 556, 37 N. E. 261. See also *Coray v. Perry Irrigation Co.*, — Utah —, 166 Pac. 672.

See also subd. xxiii, *infra*, this chapter.

³² *Alabama*. *Birmingham Nat. Bank v. Roden*, 97 Ala. 404, 11 So. 883.

Arizona. *Salt River Canal Co. v. Hickey*, 4 Ariz. 240, 36 Pac. 171.

Maryland. *Baltimore City Passenger Ry. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402.

Massachusetts. *Wyman v. American Powder Co.*, 8 Cush. 168; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90, 19 Am. Dec. 306.

to deliver a certificate as a conversion of the stock, and maintain an action of trover to recover damages.³³ A demand and refusal are essential prerequisites to an action for conversion.³⁴ The corporation is not obliged to carry the stock to the owner and place it in his hands, and if, after the corporation has notified him that his claim for stock has been allowed, he does not present himself and request the issuance and delivery of the stock, he cannot recover damages for failure to deliver it.³⁵ The measure of damages in such actions is considered in other sections.³⁶

A subscriber for stock may, as against the corporation, rescind his contract of subscription, if the corporation wrongfully refuses to deliver a certificate, and sue to recover back what he has paid; and the rescission, if made before insolvency of the company, is good even as against creditors if the company afterwards becomes insolvent.³⁷

Minnesota. See *Milnor v. Home Savings & Loan Ass'n*, 64 Minn. 500, 67 N. W. 346.

New York. *Van Allen v. Illinois Cent. R. Co.*, 7 Bosw. 515.

Utah. See *Coray v. Perry Irrigation Co.*, 166 Pac. 672.

Where the members of an unincorporated association become incorporated in pursuance of an agreement by which each of the associates is to have stock in proportion to his interest in the association, a person to whom one of the associates assigned his interest prior to incorporation may maintain an action against the corporation in his own name for refusal to issue to him certificates of stock for his interest. *Baltimore City Passenger Ry. Co. v. Sewell*, 35 Md. 238, 6 Am. Rep. 402.

The measure of damages in such an action is the value of the stock. *Milnor v. Home Savings & Loan Ass'n*, 64 Minn. 500, 67 N. W. 346. See also *Van Allen v. Illinois Cent. R. Co.*, 7 Bosw. (N. Y.) 515.

As to the right of a transferee of shares to maintain such an action where the corporation refuses to register the transfer and issue a new certificate to him, see subd. XXIII, *infra*, this chapter.

33 Colorado. *Mountain Water Works Const. Co. v. Holme*, 49 Colo. 412, 113 Pac. 501.

Iowa. *Teeple v. Hawkeye Gold Dredging Co.*, 137 Iowa 206, 114 N. W. 906.

Minnesota. See *Milnor v. Home Savings & Loan Ass'n*, 64 Minn. 500, 67 N. W. 346.

Ohio. *State v. Carpenter*, 51 Ohio St. 83, 46 Am. St. Rep. 556, 37 N. E. 261.

Pennsylvania. *Reading Iron Works' Estate*, 149 Pa. St. 182, 24 Atl. 202.

Utah. See *Coray v. Perry Irrigation Co.*, 166 Pac. 672, holding that the complaint in an action for damages was sufficient.

As to the right of a transferee of shares to maintain such an action where the corporation refuses to register the transfer and issue a new certificate to him, see subd. XXIII, *infra*, this chapter.

As to the conversion of shares of stock generally, see § 3445 et seq., *supra*.

³⁴ See § 3446, *supra*.

³⁵ *Teeple v. Hawkeye Gold Dredging Co.*, 137 Iowa 206, 114 N. W. 906.

³⁶ See § 3449 et seq., *supra*.

³⁷ *Potts v. Wallace*, 32 Fed. 272; *Swazey v. Choate Mfg. Co.*, 48 N. H. 200.

But he cannot rescind for the first time, and recover what he has paid, after the corporation has become insolvent, and the rights of creditors have intervened.³⁸

It has been held that a stockholder's right of action against a corporation to compel it to deliver to him a certificate of stock, or to recover damages for its refusal to do so, does not accrue until the corporation denies his right thereto, and the statute of limitations, therefore, does not begin to run until then.³⁹ But there is authority to the effect that the statute begins to run as soon as he is entitled to a certificate.⁴⁰

The right to relief in equity may be lost by laches.⁴¹ But it has been held that the right may be enforced without reference to the lapse of time if no loss or injury has resulted to innocent third persons by reason of the delay.⁴²

When a corporation has already issued valid certificates of stock to the full amount authorized by its charter, and has no authority to increase the amount, no court can compel it to issue further certificates, for this would be to compel it to exceed its powers by making an overissue of stock;⁴³ and in such a case, therefore, the only remedy

A rescission and demand for repayment before commencement of the action is necessary. *Cotter v. Butte & R. Val. Smelting Co.*, 31 Mont. 129, 77 Pac. 509; *Swazey v. Choate Mfg. Co.*, 48 N. H. 200.

Where a subscriber is recognized as a stockholder by the company and votes the stock for which he subscribed, this is equivalent to the delivery of such stock to him and an acceptance by him, and he is estopped to deny such delivery and acceptance and cannot rescind on the ground that the stock has never been delivered to him, although no certificate has been issued to him. *Cotter v. Butte & R. Val. Smelting Co.*, 31 Mont. 129, 77 Pac. 509.

See also § 593 et seq., *supra*.

³⁸ See *Butler v. Eaton*, 141 U. S. 240, 35 L. Ed. 713; *Thayer v. Butler*, 141 U. S. 234, 35 L. Ed. 711; *Pacific Nat. Bank v. Eaton*, 141 U. S. 227, 35 L. Ed. 702.

³⁹ *Com. v. Springfield, M. & H. Turnpike Co.*, 10 Bush (Ky.) 254; *Wells v.*

Green Bay & M. Canal Co., 90 Wis. 442, 64 N. W. 69.

⁴⁰ Since a subscriber is entitled to demand a certificate immediately upon payment therefor in full, the statute begins to run from the time of such payment. *Cortelyou v. Imperial Land Co.*, 166 Cal. 14, 134 Pac. 981. But see *id.*, 156 Cal. 373, 104 Pac. 695.

⁴¹ A delay of six years was held a bar to relief where the plaintiff had known for at least five years that he was not recognized by the company as a stockholder; where the rights of third parties would have been materially changed if he were permitted to prevail; and where the death of a witness in the meantime had resulted in the loss of evidence very material to the defendant. *Snyder v. Charleston & S. Bridge Co.*, 65 W. Va. 1, 131 Am. St. Rep. 947, 63 S. E. 616.

⁴² *Cortelyou v. Imperial Land Co.*, 156 Cal. 373, 104 Pac. 695. But see *id.*, 166 Cal. 14, 134 Pac. 981.

⁴³ *Parkhurst v. Almy*, 222 Mass. 27, 109 N. E. 733; *Allen v. South Boston*

of a person to whom it has expressly or impliedly contracted to issue stock is an action to recover damages.⁴⁴

The remedies of a transferee of shares are considered in subsequent sections.⁴⁵

§ 3485. Cancellation of certificates. If certificates of stock are issued illegally, or by an officer fraudulently or without authority, and the circumstances are such that they are either void or voidable, the corporation may cancel the same,⁴⁶ or they may be cancelled by a court of equity in a suit brought for that purpose⁴⁷ by the corpora-

R. Co., 150 Mass. 200, 5 L. R. A. 716, 15 Am. St. Rep. 185, 22 N. E. 917.

See also § 3467, *supra*.

44 Kentucky. Dupoyster v. First Nat. Bank of Wickliffe, 29 Ky. L. Rep. 1153, 96 S. W. 830.

Maryland. Williams v. Savage Mfg. Co., 3 Md. Ch. 418.

Michigan. Finley Shoe & Leather Co. v. Kurtz, 34 Mich. 89.

Nevada. Smith v. North American Min. Co., 1 Nev. 423.

New York. New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; President, etc., of Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599.

The fact that a corporation has issued some certificates to the wrong persons gives the court no power to compel it to issue other certificates to the persons entitled, where certificates for the whole amount of the capital stock have been issued. Smith v. North American Min. Co., 1 Nev. 423.

⁴⁵ See subd. xxiii, *infra*, this chapter.

⁴⁶ A court of equity will treat a cancellation by the company as having been properly made, if in equity and good conscience there was reason for such cancellation. Coffin v. Struthers, 169 Iowa 313, 151 N. W. 400.

⁴⁷ **Alabama.** Crow v. Florence Ice & Coal Co., 143 Ala. 541, 39 So. 401.

California. Noble v. Learned, 153 Cal. 245, 94 Pac. 1047 (Cal. App.), 87 Pac. 402.

Illinois. Stebbins v. Perry County, 167 Ill. 567, 47 N. E. 1048, rev'g judgment 66 Ill. App. 427.

New York. New York & N. H. R. Co. v. Schuyler, 17 N. Y. 592, 34 N. Y. 30.

Wisconsin. Bailey v. Champlain Mining & Prospecting Co., 77 Wis. 453, 46 N. W. 539; Wood v. Union Gospel Church Bldg. Ass'n, 63 Wis. 9, 22 N. W. 756.

"Equity jurisdiction to declare the issuance of fictitious stock in a corporation void, and to have the certificates representing such stock cancelled, cannot be questioned." Crow v. Florence Ice & Coal Co., 143 Ala. 541, 39 So. 401.

Equity has jurisdiction to cancel overissued stock, or stock the issuance of which was forbidden by law. Stebbins v. Perry County, 167 Ill. 567, 47 N. E. 1048, rev'g judgment 66 Ill. App. 427.

A proceeding to determine title to stock, to have canceled a wrongful certificate thereof, to have a new certificate issued, and to have payment on the wrongful certificate restrained, should be by suit in equity. Noble v. Learned, 153 Cal. 245, 94 Pac. 1047 (Cal. App.), 87 Pac. 402.

tion⁴⁸ or, in a proper case, by a stockholder of the corporation.⁴⁹

48 District of Columbia. *Las Ovas Co. v. Davis*, 35 App. Cás. 372, 373.

Michigan. *Cuba Colony Co. v. Kirby*, 149 Mich. 453, 112 N. W. 1133.

Missouri. *Vogeler v. Punch*, 205 Mo. 558, 103 S. W. 1001.

New Jersey. *Lakewood Gas Co. v. Smith*, 62 N. J. Eq. 677, 51 Atl. 152.

New York. *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30, 17 N. Y. 592; *B. & C. Electrical Const. Co. v. Owen*, 176 App. Div. 399, 163 N. Y. Supp. 31; *Travis v. Travis*, 140 App. Div. 191, 124 N. Y. Supp. 1021; *United States Light & Heat Corporation v. Walker*, 94 Misc. 687, 158 N. Y. Supp. 664.

Oregon. See *Pendleton Mfg. Co. v. Mahanna*, 18 Pac. 563.

Texas. *Davis v. San Antonio & G. S. Ry. Co.* (Tex. Civ. App.), 44 S. W. 1012.

Virginia. *Richlands Oil Co. v. Morris*, 108 Va. 288, 61 S. E. 762.

Washington. *Whitfield v. Nonpareil Consol. Copper Co.*, 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078.

Wisconsin. *Brahm v. M. C. Gehl Co.*, 132 Wis. 674, 112 N. W. 1097.

Where the president of the corporation, who is one of two claimants to stock, procures the treasurer to issue certificates therefor to him without authority of the board of directors, he will not be compelled to surrender it for cancellation if he can show that he in fact owned the stock, and hence was entitled to a certificate therefor. *Lakewood Gas Co. v. Smith*, 62 N. J. Eq. 677, 51 Atl. 152.

The corporation cannot sue to cancel stock issued to a county on the ground that the county's subscription was in violation of the constitution, since it would not be permitted to deny the validity of a subscription which it procured or accepted. *Stebbins v. Perry County*, 167 Ill. 567, 47

N. E. 1048, rev'g judgment 66 Ill. App. 427.

49 United States. *Howard v. National Tel. Co.*, 182 Fed. 215; *Hutton v. Joseph Bancroft & Sons Co.*, 83 Fed. 17.

Alabama. *Crow v. Florence Ice & Coal Co.*, 143 Ala. 541, 39 So. 401; *Perry v. Tuscaloosa Cotton-Seed Oil-Mill Co.*, 93 Ala. 364, 9 So. 217.

Delaware. *Scully v. Automobile Finance Co.*, — Del. Ch. —, 101 Atl. 908. *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 80 Atl. 666.

Illinois. *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048, rev'g judgment 66 Ill. App. 427; *Campbell v. Morgan*, 4 Ill. App. 100.

Massachusetts. *Elliott v. Baker*, 194 Mass. 518, 80 N. E. 450.

Minnesota. *Shaw v. Staight*, 107 Minn. 152, 20 L. R. A. (N. S.) 1077, 119 N. W. 951.

Missouri. *Vogeler v. Punch*, 205 Mo. 558, 103 S. W. 1001.

Nebraska. *Haskell v. Read*, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997.

New Hampshire. *Kimball v. New England Roller Grate Co.*, 69 N. H. 485, 45 Atl. 253.

New York. *McMillen v. Lamb*, — Misc. —, 166 N. Y. Supp. 656.

Wisconsin. *Brahm v. M. C. Gehl Co.*, 132 Wis. 674, 112 N. W. 1097; *Bailey v. Champlain Mining & Prospecting Co.*, 77 Wis. 453, 46 N. W. 539; *Wood v. Union Gospel Church Bldg. Ass'n*, 63 Wis. 9, 22 N. W. 756.

"A stockholder may maintain a bill for the cancellation of stock of the corporation where the issue was ultra vires and unlawful." *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 80 Atl. 666.

Stock improperly issued in violation of law creates a cloud upon the rights of other stockholders which they are entitled to have removed. *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E.

So stock may be cancelled where it is issued without consideration,⁵⁰ or for property or services which do not constitute a legal consideration for the issuance of stock;⁵¹ or where there is a total failure of the consideration upon which it is issued;⁵² or where it is issued

1048, rev'g judgment 66 Ill. App. 427.

Preferred stockholders have a right to question the legality of the issue of common stock, especially where the common stockholders alone have the right to vote. *Scully v. Automobile Finance Co.*, — Del. Ch. —, 101 Atl. 908.

Preferred stockholders will not be denied relief merely because they acquired their stock subsequent to the unlawful issue of common stock complained of, where they were then ignorant of its unlawful character, and have not consented to its issuance or by their consent cut themselves off from the remedy of stockholders in general. *Scully v. Automobile Finance Co.*, — Del. Ch. —, 101 Atl. 908.

In such a suit by stockholders the decree may provide for the protection and relief of creditors if it appears that they need protection or relief. *Scully v. Automobile Finance Co.*, — Del. Ch. —, 101 Atl. 908.

A stockholder may sue to cancel stock issued in violation of law without a previous demand on the corporation to sue, as, for example, stock issued to a county pursuant to a subscription which was void because in violation of the constitution. *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048, rev'g judgment 66 Ill. App. 427.

A bill by stockholders to cancel stock alleged to have been issued for patent rights of little or no value was held to be insufficient in failing to allege that the defendants knew it was of no value when the stock was issued, or to show that the corporation had not been exercising and operating under the patent rights in question.

Kimbell v. Chicago Hydraulic Press Brick Co., 119 Fed. 102.

Where a person purchases a block of stock in the open market, as a single transaction and at one time, and thereafter discovers that a certain part of the corporate stock has been fraudulently issued, but does not know which of the shares bought by him are valid and which invalid, equity will not cancel an aliquot part of the shares so purchased, in the proportion that the total valid issue of stock bears to the total invalid issue, and adjudge that the rest are valid. A purchaser of stock cannot repudiate the contract in part and affirm it in part. *Church v. Citizens' St. R. Co.*, 78 Fed. 526.

As to the circumstances under which a stockholder may sue in behalf of the corporation, see subd. XXXII, *infra*, this chapter.

⁵⁰ See § 3598, *infra*.

⁵¹ A certificate which is void because issued in consideration of future services may be ordered cancelled by the court in a suit instituted by the corporation for that purpose, where it is in the hands of the original holder. *B. & C. Electrical Const. Co. v. Owen*, 176 N. Y. App. Div. 399, 163 N. Y. Supp. 31.

As to the right to issue stock for labor services or property, see § 3502 *et seq.*, *infra*.

⁵² Where stock is issued for property which is never delivered to the company. *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 80 Atl. 666.

Where stock is issued to the defendant for services to be performed, and such services are not performed. *Hillside Cemetery Ass'n v. Holmes*, 97 Minn. 261, 105 N. W. 905.

through a mistake of fact;⁵³ or pursuant to a void contract;⁵⁴ or in fraud of the rights of the other stockholders;⁵⁵ or where the corporation was induced to issue it through fraud.⁵⁶ But authorized stock cannot be cancelled merely because it was issued for an unauthorized purpose.⁵⁷ And a corporation has no authority, at the instance of a minority stockholder, to decree a forfeiture of the stock of any stockholder to the corporation on the ground that his title thereto has been acquired and is held in violation of the corporate charter.⁵⁸

The right to procure a cancellation of stock illegally issued may be barred by the statute of limitations,⁵⁹ or lost by laches.⁶⁰ But

Where stock of a lightning rod company is issued to the promoters of a fire insurance company in consideration of their agreement to give reduced insurance rates on buildings equipped with the company's lightning rods, and the insurance company fails to obtain permission to do business in the state, and the lightning rod company therefore never received, and could not receive, any benefit or advantage from said agreement. *Coffin v. Struthers*, 169 Iowa 313, 151 N. W. 400.

If stock is issued to a person in consideration of his agreement to transfer a contract owned by him to the corporation, and it subsequently appears that he owns no such contract and hence is in no position to transfer it, the company may demand a return and cancellation of the stock. But if it fails to do so, and instead, as a result of such person's knowledge, advice and representations, procures an equally advantageous contract from the company with whom such person represented he had contracted, it is not entitled to have such stock surrendered and cancelled. *Fuller v. Corker Motor Car Co.*, 137 Ga. 370, 73 S. E. 647.

See *Dupoyster v. First Nat. Bank of Wickliffe*, 29 Ky. L. Rep. 1153, 96 S. W. 830, where the evidence was held to sustain a finding that stock was cancelled with the acquiescence or consent of the holder on his failure

to pay a note given therefor.

⁵³ See *Pendleton Mfg. Co. v. Mahanna (Ore.)*, 18 Pac. 563.

⁵⁴ Stock issued pursuant to a void contract to reimburse a stockholder for money expended in developing corporate property will be cancelled. *Jones v. Green*, 129 Mich. 203, 95 Am. St. Rep. 433, 88 N. W. 1047.

⁵⁵ See § 3479, *supra*.

⁵⁶ See § 3494, *infra*.

⁵⁷ *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115.

⁵⁸ *MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 428, 75 Pac. 89.

⁵⁹ *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115.

⁶⁰ *Jutte v. Hutchinson*, 189 Pa. St. 218, 42 Atl. 123; *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115.

A suit by stockholders to cancel stock alleged to have been issued for property of no value was held to have been barred by a delay of eleven years, where the complainants could have discovered the facts at any time by the exercise of the slightest diligence. *Kimbell v. Chicago Hydraulic Press Brick Co.*, 119 Fed. 102.

A delay of more than six years will bar relief, where the transaction was disclosed by the corporate books. *Calivada Colonization Co. v. Hays*, 119 Fed. 202.

there is authority to the effect that the right of a stockholder to have removed the cloud on his rights created by stock issued in violation of law is a continuing one, which may be asserted at any time during the continuance of the cloud.⁶¹

In a suit to cancel stock issued for property the plaintiff must do equity and offer to restore the consideration.⁶² But the contrary has been held to be true in a suit by a stockholder, where he was not a party to the wrongful issuing of the stock and was not benefited, but rather was injured, thereby.⁶³

A delay of five years was held a bar where the stock had been transferred in the meantime. *Com. v. Reading Traction Co.*, 204 Pa. 151, 53 Atl. 755.

A delay of eleven years was held not to be a bar to a suit by stockholders, where during all that time they were ignorant of the fraud, and the stock had not been transferred and the defendant was not injured by the delay. *Tooker v. National Sugar Refining Co. of New Jersey*, 80 N. J. Eq. 305, 84 Atl. 10.

⁶¹ *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048, rev'g judgment 66 Ill. App. 427.

⁶² Where a contract under which a person receives a certain amount of treasury stock in return for money expended by him in developing a mine belonging to the corporation is held to be void, a decree requiring the surrender of such stock for cancellation will be conditioned upon repayment by the corporation of the amount expended by the corporation, with interest. *Jones v. Green*, 129 Mich. 203, 95 Am. St. Rep. 433, 88 N. W. 1047.

Even if the law does not permit stock to be issued for services to be performed in the future, if it is so issued and the services are in fact performed, and are equal in value to the par value of the stock issued therefor, the corporation cannot procure a cancellation of the stock in equity without tendering to the holder the full value of the services so performed for its

benefit. *Vineland Grape Juice Co. v. Chandler*, 80 N. J. Eq. 437, Ann. Cas. 1914 A-679, 85 Atl. 213.

In *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838, it was held that the plaintiff had not made out a case which would warrant the court in canceling the shares and at the same time allowing the corporation to retain the property for which they were issued.

⁶³ In a suit by a stockholder to cancel stock alleged to have been fraudulently issued by the directors for the purpose of securing control of the corporation, the complainant need not tender or offer to pay back the consideration received for the stock by the corporation. Whether the corporation should refund the money under such circumstances is a matter to be determined by the court after hearing the case. *Trask v. Chase*, 107 Me. 137, 77 Atl. 698.

In a suit by a stockholder to cancel stock issued to a county for its bonds on the ground that the county's subscription and bonds were void under the constitution, it was held that he was not required to return or offer to return the bonds, which he did not procure to be issued and over which he had no control, and which were issued for the stock which was prejudicial to him. *Stebbins v. Perry County*, 167 Ill. 567, 47 N. E. 1048, rev'g judgment 66 Ill. App. 427.

It has been held that an action to procure a cancellation of certain certificates of stock of a foreign corporation alleged to have been wrongfully issued by its officers cannot be maintained in the absence of showing that the corporation had power to issue certificates, or that the alleged illegal certificates were executed by a corporate officer having authority in respect thereto, or that they bore some resemblance to certificates properly issued, or that injury had resulted or would result from purchase of the alleged illegal certificates.⁶⁴

All holders of invalid stock which has a common origin may be joined in one action for the cancellation thereof.⁶⁵ It has been held that the corporation is a necessary party to such a suit by a stockholder.⁶⁶

An attempt to cancel certificates legally issued upon a sufficient consideration is a nullity.⁶⁷ If the corporation wrongfully cancels a certificate and refuses to recognize the owner as a stockholder, it is guilty of a conversion of the stock, and liable in an action to recover damages therefor.⁶⁸ Or it may be compelled to issue a new certifi-

⁶⁴ *Reno Oil Co. v. Culver*, 60 N. Y. App. Div. 129, 69 N. Y. Supp. 969, rev'g 33 N. Y. Misc. 717, 68 N. Y. Supp. 303.

⁶⁵ *New York & N. H. R. Co. v. Schuyler*, 17 N. Y. 592, 34 N. Y. 30; *Reno Oil Co. v. Culver*, 60 N. Y. App. Div. 129, 69 N. Y. Supp. 969, rev'g on other grounds 33 N. Y. Misc. 717, 68 N. Y. Supp. 303.

⁶⁶ *Campbell v. Morgan*, 4 Ill. App. 100.

⁶⁷ *Fitzpatrick v. O'Neill*, 43 Mont. 552, Ann. Cas. 1912 C 296, 118 Pac. 273. See also *New York & E. Telegraph & Telephone Co. v. Great Eastern Tel. Co.*, 74 N. J. Eq. 221, 69 Atl. 528, aff'd 75 N. J. Eq. 297, 298, 72 Atl. 1119.

The unauthorized act of corporate officers in cancelling certificates and issuing new ones to a third person confers no legal right to the stock upon the latter. *Hill v. Kerstetter*, 43 Ind. App. 431, 87 N. E. 695, 86 N. E. 997.

An alleged stockholder whose stock, it appeared, had been issued by the corporation upon an order of court was excluded from a corporate meeting by the defendants, defendants committing

an assault in so excluding plaintiff. Action was brought on the assault, and therein it was required to be shown that the stock was invalid before evidence was permitted that the corporation had made a previous attempt to cancel the stock. *Noller v. Wright*, 138 Mich. 416, 101 N. W. 553.

See *Dupoyster v. First Nat. Bank of Wickliffe*, 29 Ky. L. Rep. 1153, 96 S. W. 830, where the evidence was held to sustain a finding that stock was cancelled with the acquiescence or consent of the holder on his failure to pay a note given therefor.

⁶⁸ *Factors' & Traders' Ins. Co. v. Marine Dry-Dock & Shipyard Co.*, 31 La. Ann. 149.

As to proof of cancellation, see *Topeka Mfg. Co. v. Hale*, 39 Kan. 23, 17 Pac. 601; *Humphreys v. Minnesota Clay Co.*, 94 Minn. 469, 103 N. W. 338; *Withers v. Lafayette County Bank*, 67 Mo. App. 115; *Knoxville, C. G. & L. R. Co. v. Knoxville*, 98 Tenn. 1, 37 S. W. 883.

Where a savings and loan association calls in, pays off and cancels certificates of stock without requiring a

cate.⁶⁹ And if a certificate is surrendered to a corporation by a mistake of fact, and canceled, a court of equity has power to compel the corporation to reissue it, or to issue a new certificate, if the authorized amount of capital stock will not be thereby exceeded.⁷⁰ But a stockholder is bound by his agreement to surrender his certificate and to accept a smaller number of shares in lieu of those previously issued to him, where the same is supported by a sufficient consideration,⁷¹ and by a resolution providing for such surrender and reduction, where he is present at the meeting at which it is adopted and votes in favor of it or does not protest against its adoption.⁷²

IX. UNAUTHORIZED AND FICTITIOUS STOCK AND CERTIFICATES

§ 3486. General principles. Stock issued without authority and in violation of law is void, and confers no rights on the person to whom it is issued and subjects him to no liabilities.⁷³ A contract to issue

return of the certificates and without notice to a pledgee thereof, the pledgee may maintain action against the association therefor, although he has not secured the title to the stock by legal process. *Brown v. Union Savings & Loan Ass'n*, 28 Wash. 657, 69 Pac. 383.

As to the conversion of stock generally, see § 3445 et seq., *supra*.

⁶⁹ See §§ 3483, 3484, *supra*.

⁷⁰ *Williams v. Savage Mfg. Co.*, 3 Md. Ch. 418.

⁷¹ The consent of one stockholder is a sufficient consideration for the consent of the others. *Meisenheimer v. Alexander*, 162 N. C. 226, 78 S. E. 161.

⁷² *Meisenheimer v. Alexander*, 162 N. C. 226, 78 S. E. 161.

⁷³ **United States.** *Seovill v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Lake St. El. R. Co. v. Ziegler*, 99 Fed. 114; *Winter v. Armstrong*, 37 Fed. 508.

Alabama. *Heide v. Capital Securities Co.*, 76 So. 313.

California. *Cortelyou v. Imperial Land Co.*, 156 Cal. 373, 104 Pac. 695; *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377.

Colorado. *Arkansas River Land, Town & Canal Co. v. Farmers' Loan &*

Trust Co., 13 Colo. 537, 22 Pac. 954.

Indiana. *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782.

Kansas. *Moses v. White*, 6 Kan. App. 558, 51 Pac. 622.

Louisiana. *Lincoln v. New Orleans Exp. Co.*, 45 La. Ann. 729, 12 So. 937.

Massachusetts. *Smith v. Worcester & S. St. R. Co.*, 224 Mass. 564, 113 N. E. 462; *Attorney General v. Massachusetts Pipe Line Gas Co.*, 179 Mass. 15, 60 N. E. 389.

New York. *Bruff v. Mali*, 36 N. Y. 200; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30.

Oklahoma. *Pruitt v. Oklahoma Steam Baking Co.*, 39 Okla. 509, 135 Pac. 730.

Oregon. *Zobrist v. Estes*, 65 Ore. 573, 133 Pac. 644.

Pennsylvania. *Kisterbock's Appeal*, 127 Pa. St. 601, 14 Am. St. Rep. 868, 18 Atl. 381.

Washington. *Hobson v. Marsh*, 69 Wash. 326, 124 Pac. 912.

The holder of the certificate is not a holder of shares in the capital stock of the corporation under such circumstances even though the company is

stock in violation of the provisions of the constitution or of the statute will not be enforced by the courts,⁷⁴ nor can damages be recovered for its breach.⁷⁵ A person may rescind his contract to subscribe for or purchase such stock and recover back what he has paid for it,⁷⁶

estopped to deny that he is the holder of the number of shares therein specified, but he merely has a right of action against the corporation based on such estoppel. *Smith v. Worcester & S. St. R. Co.*, 224 Mass. 564, 113 N. E. 462.

"Where the issue of shares is illegal for the want of power of the company to issue them, where the shares cannot legally exist, the person taking them cannot, by estoppel or otherwise, become a member in respect to them." *Pruitt v. Oklahoma Steam Baking Co.*, 39 Okla. 509, 135 Pac. 730. And see, to the same effect, *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5, 29 N. E. 63.

Since stock issued to a person without consideration, and simply upon the agreement that he shall sell the same and turn the proceeds over to the corporation is void, the effect of such issue is to leave such stock in the treasury subject to issue by the corporation, the same as if the void certificates had never been issued. *Cortelyou v. Imperial Land Co.*, 156 Cal. 373, 104 Pac. 695.

Stock issued in violation of a constitutional provision is void, even in the hands of a bona fide purchaser, and the corporation cannot call upon such a purchaser to account for what he received upon its sale, "since that would be to affirm a void transaction; to both reprobate and approbate." *Lake St. El. R. Co. v. Ziegler*, 99 Fed. 114.

⁷⁴ *Alabama*. *Minge v. Clark*, 190 Ala. 388, 67 So. 510.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Kentucky. *Bennett v. Stuart*, 161 Ky. 264, 170 S. W. 642.

Oklahoma. *Webster v. Webster Refining Co.*, 36 Okla. 168, 47 L. R. A. (N. S.) 697, 128 Pac. 261.

Texas. *McCarthy v. Texas Loan & Guaranty Co.*, — Tex. Civ. App. —, 142 S. W. 96.

⁷⁵ *Webster v. Webster Refining Co.*, 36 Okla. 168, 47 L. R. A. (N. S.) 697, 128 Pac. 261; *San Antonio Irrigation Co. v. Deutschmann*, 102 Tex. 201, 114 S. W. 1174, 105 S. W. 486; *McCarthy v. Texas Loan & Guaranty Co.*, — Tex. Civ. App. —, 142 S. W. 96.

⁷⁶ *United States*. *Congress & Empire Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347; *Winters v. Armstrong*, 37 Fed. 508.

Alabama. *Heide v. Capital Securities Co.*, 76 So. 313.

Kentucky. *Wilson v. Joplin*, 11 Ky. L. Rep. 308 (abstract).

Louisiana. *Lincoln v. New Orleans Exp. Co.*, 45 La. Ann. 729, 12 So. 937.

Massachusetts. *Reed v. Boston Mach. Co.*, 141 Mass. 454, 5 N. E. 852; *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5, 29 N. E. 63; *Allen v. Herrick*, 15 Gray 274.

Oklahoma. *Pruitt v. Oklahoma Steam Baking Co.*, 39 Okla. 509, 135 Pac. 730.

Washington. *Hobson v. Marsh*, 69 Wash. 326, 124 Pac. 912.

"An innocent purchaser of an illegal issue of stock has a right of action against the corporation for reimbursement." *Hobson v. Marsh*, 69 Wash. 326, 124 Pac. 912.

Money paid to the corporation for such stock is paid without consideration, and may be recovered back in an action for money had and received.

upon a tender back or surrender of the certificate,⁷⁷ and of any dividends which he has received;⁷⁸ or he may set up the illegality of the stock as a defense to an action by the corporation on his subscription.⁷⁹ And since such a contract is illegal and void, it is incapable of ratification.⁸⁰ If there is an inherent lack of power in the corporation to

Heide v. Capital Securities Co., — Ala. —, 76 So. 313.

The rule that neither party can rescind an ultra vires contract which has been fully executed has no application under such circumstances, since the certificate is worthless and the person to whom it is issued receives nothing for his money. Heide v. Capital Securities Co., — Ala. —, 76 So. 313.

A transfer of illegally issued stock to the corporation in return for a note for the amount of the purchase price is, in effect, a settlement of the purchaser's cause of action against the corporation and an extension of the time of payment of his demand, and such note is supported by a sufficient consideration as between the purchaser and an accommodation indorser. The retention of the void certificate as security for the payment of the note does not show that there was no consideration for the note. Hobson v. Marsh, 69 Wash. 326, 124 Pac. 912.

But in Knowlton v. Congress & Empire Spring Co., 57 N. Y. 518, it was held that a party to an illegal subscription agreement providing for the issuance of full paid stock on payment of less than par, whose stock had been forfeited for failure to pay calls, could not recover back what he had paid although the contract had not been fully executed, since he was in pari delicto.

⁷⁷ Heide v. Capital Securities Co., — Ala. —, 76 So. 313.

Where the stock is invalid, and nothing can be done by the corporation to make it valid, the certificates are valueless and need not be returned.

Reed v. Boston Mach. Co., 141 Mass. 454, 5 N. E. 852.

⁷⁸ Allen v. Herrick, 15 Gray (Mass.) 274.

An offer in the petition to restore such dividends is sufficient. Pruitt v. Oklahoma Steam Baking Co., 39 Okla. 509, 135 Pac. 730.

The failure to specifically offer to return the dividends when a rescission is demanded will not affect the stockholder's right of action, especially where it appears that such an offer would have been futile. The dividends will be deducted from the amount recovered. Heide v. Capital Securities Co., — Ala. —, 76 So. 313.

Dividends received need not be returned before proving a claim against the corporation in insolvency proceedings for money paid on account of illegal stock, but they may be deducted from the amount of the claim. Reed v. Boston Mach. Co., 141 Mass. 454, 5 N. E. 852.

⁷⁹ Winters v. Armstrong, 37 Fed. 508; Marion Trust Co. v. Bennett, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782; Merrill v. Gamble, 46 Iowa 615; Trent Import Co. v. Wheelwright, 118 Md. 249, 84 Atl. 543.

He may set up as a defense that the corporation has sold and delivered all the stock it was legally entitled to issue. Leigh v. Chattanooga, R. & C. R. Co., 104 Ga. 13, 30 S. E. 381.

Or that certificates for the full amount of the authorized capital have already been issued. Knoxville, C. G. & L. R. Co. v. Knoxville, 98 Tenn. 1, 37 S. W. 883.

See also § 589, supra.

⁸⁰ Winters v. Armstrong, 37 Fed.

issue the stock, neither the corporation nor the person to whom it is issued is estopped to question its validity.⁸¹

If, however, the corporation has authority to issue the stock, mere irregularities in issuing it, such as a failure to comply strictly with the statutory formalities, do not render the stock void, but it is merely voidable at the instance of the state.⁸² And both the corporation and the holder of such stock may be estopped to deny its validity.⁸³

The certificate itself is at least *prima facie* evidence that it was legally issued, in the absence of evidence to the contrary.⁸⁴ And while this presumption may be rebutted,⁸⁵ the burden of proving that a certificate was issued without authority is on the person so alleging.⁸⁶

The foregoing rules are most frequently applied in cases where stock is issued in excess of the amount fixed by the corporate charter or the general law,⁸⁷ or where the capital stock of a corporation is increased without authority of law, or without observing the charter or statutory formalities,⁸⁸ and reference should therefore be had to the sections dealing specifically with overissues and increases of stock.

§ 3487. Certificate as a representation of validity, ownership and power to convey. A certificate of stock issued by a corporation having power under its charter to issue certificates in the form in which such certificate is issued, is a continuing affirmation or representation that the stock therein described is valid and genuine,⁸⁹ and that the

508; *Pruitt v. Oklahoma Steam Baking Co.*, 39 Okla. 509, 135 Pac. 730.

Stockholders cannot ratify the acts of the directors in issuing stock without consideration, or their own act in authorizing its issuance, where the corporation has no power to issue such stock. *Tooker v. National Sugar Refining Co. of New Jersey*, 80 N. J. Eq. 305, 84 Atl. 10.

Hence the acceptance of advancements of dividends on spurious stock cannot be considered a ratification of a contract to purchase it. *Pruitt v. Oklahoma Steam Baking Co.*, 39 Okla. 509, 135 Pac. 730.

⁸¹ See § 3467 et seq.

⁸² *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Zobrist v. Estes*, 65 Ore. 573, 133 Pac. 644.

⁸³ See § 3488.

⁸⁴ *Harriage v. Daley*, 121 Ark. 23,

180 S. W. 333; *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231; *Hall v. Rose Hill & E. Road Co.*, 70 Ill. 673.

⁸⁵ *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231; *Hall v. Rose Hill & E. Road Co.*, 70 Ill. 673.

⁸⁶ *Harriage v. Daley*, 121 Ark. 23, 180 S. W. 333; *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231.

⁸⁷ See § 3467, *supra*.

⁸⁸ See § 3467 et seq., *supra*.

⁸⁹ *United States*. *Weniger v. Success Min. Co.*, 227 Fed. 548.

Iowa. See *Sykes v. Pure Food Cider Co.*, 157 Iowa 601, 138 N. W. 554.

Massachusetts. *Windram v. French*, 151 Mass. 547, 8 L. R. A. 750, 24 N. E. 914.

New York. *Fifth Ave. Bank of New York v. Forty-Second St. & G. St.*

person therein named is the owner of the stock represented thereby and has the capacity to transfer the same.⁹⁰ Such statements and representations are made for the express purpose of inducing, and with the expectation that they will induce, strangers to purchase the stock

Ferry R. Co., 137 N. Y. 231, 19 L. R. A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; **Bruff v. Mali**, 36 N. Y. 200.

Wisconsin. **First Ave. Land Co. v. Parker**, 111 Wis. 1, 87 Am. St. Rep. 841, 86 N. W. 604.

The statement in the certificate that the person named therein is the owner of the number of shares therein specified is a statement and representation that the stock described in the certificate is valid stock, and is not an over-issue or otherwise void. **Weniger v. Success Min. Co.**, 227 Fed. 548.

It is a continuing affirmation that it has been lawfully issued, and that all conditions precedent upon which the right to issue it depends have been lawfully observed. **Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co.**, 137 N. Y. 231, 19 L. R. A. 331, 33 Am. St. Rep. 712, 33 N. E. 378.

It is a representation that the stock is not spurious, and that it is not invalid by reason of the fraudulent or known acts of the officers signing and issuing the certificates. **Windram v. French**, 151 Mass. 547, 8 J. R. A. 750, 24 N. E. 914.

⁹⁰ **United States.** **Manhattan Beach Co. v. Harned**, 27 Fed. 484.

Colorado. **Central Sav. Bank v. Smith**, 43 Colo. 90, 95 Pac. 307.

Louisiana. **State v. Bank of Baton Rouge**, 125 La. 138, 136 Am. St. Rep. 332, 51 So. 95.

Maryland. See **Western Maryland R. Co. v. Franklin Bank**, 60 Md. 36.

Massachusetts. **Allen v. South Boston R. Co.**, 150 Mass. 200, 5 L. R. A. 716, 15 Am. St. Rep. 185, 22 N. E. 917.

Minnesota. **Joslyn v. St. Paul Distilling Co.**, 44 Minn. 183, 46 N. W. 337.

Missouri. **National Bank of Webb City v. Newell-Morse Royalty Co.**, 259 Mo. 637, 168 S. W. 699; **Davey v. Newell-Morse Royalty Co.**, 169 Mo. App. 565, 154 S. W. 147.

New Hampshire. **Westminster Nat. Bank v. New England Electrical Works**, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

New York. **Jarvis v. Manhattan Beach Co.**, 148 N. Y. 652, 31 L. R. A. 776, 51 Am. St. Rep. 727, 43 N. E. 68, aff'g 75 Hun 100, 26 N. Y. Supp. 1061; **Holbrook v. New Jersey Zinc Co.**, 57 N. Y. 616; **Lyman v. State Bank of Randolph**, 81 App. Div. 367, 80 N. Y. Supp. 901, aff'd 179 N. Y. 577, 72 N. E. 1145.

Ohio. **Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank**, 56 Ohio St. 351, 43 L. R. A. 777, 43 N. E. 249.

Pennsylvania. **Kisterbock's Appeal**, 127 Pa. St. 601, 14 Am. St. Rep. 868, 18 Atl. 381.

Utah. **Mundt v. Commercial Nat. Bank of Ogden**, 35 Utah 90, 136 Am. St. Rep. 1023, 99 Pac. 454.

Washington. See **Whitfield v. Nonpareil Consol. Copper Co.**, 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078.

By issuing the stock certificates, the corporation "affirms and advertises to the world that the person to whom they are issued is entitled to the stock. It holds out to anyone who may deal in good faith with the person named in the certificate that he is an owner and has capacity to transfer the shares, and this certificate is a continuing affirmation of the ownership of the stockholder and his power over the stock, until it is withdrawn in some

and the certificate,⁹¹ and address themselves to whoever thereafter acquires the certificates.⁹² And subsequent purchasers or pledgees of the stock have a right to rely upon them,⁹³ regardless of the number of transfers that may have been made in the meantime,⁹⁴ unless they have actual notice of the invalidity of the certificate, or the circumstances are such as to create suspicion, and put a reasonably prudent man upon inquiry.⁹⁵ It follows that the corporation is liable in damages to bona fide purchasers or pledgees of fictitious or unauthorized certificates who are deceived and injured by relying upon their genuineness,⁹⁶ provided they were issued by an officer or agent of the corporation acting within the apparent scope of his authority.⁹⁷ And

manner recognized by law." *Central Sav. Bank v. Smith*, 43 Colo. 90, 95 Pac. 307. And see to the same effect *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616.

"A certificate in common form purports to represent a perfect title to the stock." *Clews v. Friedman*, 182 Mass. 555, 66 N. E. 201.

⁹¹ *United States v. Weniger v. Success Min. Co.*, 227 Fed. 548.

Louisiana. *State v. Bank of Baton Rouge*, 125 La. 138, 136 Am. St. Rep. 332, 51 So. 95.

Minnesota. *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183, 46 N. W. 337.

New York. *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Bruff v. Mali*, 36 N. Y. 200.

Ohio. *Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 43 L. R. A. 777, 43 N. E. 249.

Wisconsin. *First Ave. Land Co. v. Parker*, 111 Wis. 1, 87 Am. St. Rep. 841, 86 N. W. 604.

⁹² *Windram v. French*, 151 Mass. 547, 8 L. R. A. 750, 24 N. E. 914. See also *Sykes v. Pure Food Cider Co.*, 157 Iowa 601, 138 N. W. 554.

⁹³ *United States v. Manhattan Beach Co. v. Harned*, 27 Fed. 484.

Iowa. See *Sykes v. Pure Food Cider Co.*, 157 Iowa 601, 138 N. W. 554.

Louisiana. *State v. Bank of Baton*

Rouge, 125 La. 138, 136 Am. St. Rep. 332, 51 So. 95.

Maryland. See *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 36.

Minnesota. *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183, 46 N. W. 337.

Missouri. *National Bank of Webb City v. Newell-Morse Royalty Co.*, 259 Mo. 637, 168 S. W. 699.

New Hampshire. *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

New York. *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616.

Ohio. *Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 43 L. R. A. 777, 43 N. E. 249.

Pennsylvania. *Kisterbock's Appeal*, 127 Pa. St. 601, 14 Am. St. Rep. 868, 18 Atl. 381.

Utah. *Brown v. Wright*, 48 Utah 633, 161 Pac. 448.

Wisconsin. *First Ave. Land Co. v. Parker*, 111 Wis. 1, 87 Am. St. Rep. 841, 86 N. W. 604.

⁹⁴ *Bruff v. Mali*, 36 N. Y. 200. See also *Sykes v. Pure Food Cider Co.*, 157 Iowa 601, 138 N. W. 554.

⁹⁵ See § 3497, *infra*.

⁹⁶ See § 3493, *infra*.

⁹⁷ See § 3491, *infra*.

it also follows that, as against such a purchaser or pledgee, the corporation is estopped to deny that the person named in the certificate is the owner of the stock represented by it,⁹⁸ or to deny the validity of the stock represented by the certificate provided it had authority and power to issue stock of the kind and character in question.⁹⁹

§ 3488. Estoppel to deny validity. If the corporation has power and authority to issue stock of the kind and character in question, a stockholder may be estopped to deny its validity as against the corporation or its creditors because of irregularities or informalities in issuing it.¹ So he is estopped where, with knowledge of the facts, he accepts the stock so issued or contracts with the corporation for it,²

98 Minnesota. *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183, 46 N. W. 337.

New York. *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616.

Pennsylvania. *Kisterbock's Appeal*, 127 Pa. St. 601, 14 Am. St. Rep. 868, 18 Atl. 381.

Utah. *Brown v. Wright*, 48 Utah 633, 161 Pac. 448.

Washington. See *Whitfield v. Nonpareil Consol. Copper Co.*, 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078.

This rule is not changed by a statutory provision to the effect that the delivery of a certificate with a written transfer of the same, "signed by the owner," to a bona fide purchaser or pledgee shall be a sufficient transfer of the title as against all persons. "Owner," as used in the statute, means not only the actual and legal owner, but also the apparent owner named and designated as such on the face of the certificate and the holder thereof in due and regular course of business." *Brown v. Wright*, 48 Utah 633, 161 Pac. 448.

⁹⁹ See § 3488, *infra*.

1 United States. *Seoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Pullman v. Upton*, 96 U. S. 328, 24 L. Ed. 818; *Chubb v. Upton*, 95 U. S. 665, 24 L.

Ed. 523; *Winters v. Armstrong*, 37 Fed. 508.

Alabama. *Heide v. Capital Securities Co.*, 76 So. 313.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Indiana. *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782.

Massachusetts. *American Tube Works v. Boston Mach. Co.*, 139 Mass. 5, 29 N. E. 63.

Oklahoma. *Pruitt v. Oklahoma Steam Baking Co.*, 39 Okla. 509, 135 Pac. 730.

² *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879; *German Mercantile Co. v. Wanner*, 25 N. D. 479, 52 L. R. A. (N. S.) 453, 142 N. W. 463.

One who accepts certificates of stock is liable to creditors of the corporation although its issuance was authorized at a meeting of the board of directors at which all the directors were not present and of which those absent had not been notified. *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, *aff'd* 82 N. J. Eq. 364, 91 Atl. 1069.

One who votes for an increase of stock accepts his proportion of such increase and dividends upon it, and

or where he consents to or has acquiesced in its issuance.³ He cannot set up informalities in the issue of stock which the corporation had the power to create, in order to escape liability as a stockholder.⁴ Nor can the corporation take advantage of technical irregularities in issuing stock in order to deny to its holders the rights of stockholders, where it has expressly acquiesced in and recognized their rights for a long period of time, and no rights of third persons have intervened.⁵ And the corporation and its officers are estopped to deny the validity of stock certificates as against bona fide purchasers or pledgees for

holds it out to those dealing with the corporation as an actual component part of its capital, is estopped to deny its validity as against creditors. *Veeder v. Mudgett*, 95 N. Y. 295.

³ A person who retains his stock for a number of years without objection, during which time he acts as a stockholder, and receives dividends, cannot recover the amount paid thereon from the receiver of the corporation because of irregularities in issuing the stock, where he knew, or had the means of knowing, the manner in which it was issued. *Barrows v. Natchaug Silk Co.*, 72 Conn. 658, 4 Atl. 951.

After the stock of a corporation has been issued and passed into the hands of a third party, the validity thereof cannot be questioned by a county which had owned a majority of the stock of the corporation for eleven years, had controlled the corporation, together with another county, for nearly half that period, it having been represented by the president of its board of supervisors during the entire time at all stockholders' meetings, and having been a participant in the issuance, pledge and sale of the stock in question. *Hinds & Adams Counties v. Natchez, J. & C. R. Co.*, 85 Miss. 599, 107 Am. St. Rep. 305, 38 So. 189.

The corporation is estopped to question the validity of stock on behalf of the stockholders on the ground that it was issued before it had been paid

for in full, where all the stockholders have assented to its issuance, and the contract under which it was issued has been fully performed and the corporation has received the benefit of such performance. *Granite Brick Co. v. Titus*, 226 Fed. 557.

But one who, by false representations, procures an overissue of stock to be made to himself without consideration has no standing to assert that a stockholder who voted for the overissue in reliance on such representations is estopped to question the validity of the shares. *Haskell v. Read*, 68 Neb. 107, 96 N. W. 1007, 93 N. W. 997.

⁴ *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Winters v. Armstrong*, 37 Fed. 508; *Heide v. Capital Securities Co.*, — Ala. —, 76 So. 313; *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782; *Moses v. White*, 6 Kan. App. 558, 51 Pac. 622.

⁵ *Yeaman v. Galveston City Co.*, — Tex. Civ. App. —, 173 S. W. 489.

Where the corporation has voted a share of stock to a person, recognized her rights as a stockholder, and granted to her the rights and privileges of a stockholder, it will be estopped to deny that she is one on the ground that the statute was not strictly complied with in issuing her stock. *Gowdy Gas Well, Oil & Mineral Water Co. v. Patterson*, 29 Ind. App. 261, 64 N. E. 485.

value on the ground that in some preliminary proceedings leading to their execution, or their execution itself, they failed to comply with some law or rule of action relative to the time or manner of their procedure with which they might have complied, but which they carelessly disregarded.⁶

A corporation which has issued and recognized two certificates for the same holding will not be heard to assert the validity of one and the invalidity of the other, and the rights of the two holders will not be settled in a suit brought by the corporation for that purpose.⁷ But the respective rights of the claimants as between themselves may be settled in a suit brought by one of them against the others.⁸

A corporation cannot procure a cancellation of stock on the ground that it was issued for a consideration growing out of an illegal scheme to suppress bidding at a public sale of lands to which it was a party, especially where it has passed into the hands of innocent third persons.⁹

⁶ *Wagner v. Success Min. Co.*, 227 Fed. 548. See also *Whitfield v. Nonpareil Consol. Copper Co.*, 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078.

Where the corporation has power to levy assessments upon stock, and to sell it for nonpayment and to transfer the stock to the purchaser and issue a new certificate to him, and it does so, it is estopped to deny the validity of the certificate because of irregularities in the proceedings looking to the forfeiture and sale. *Wagner v. Success Min. Co.*, 227 Fed. 548.

As against a bona fide holder the corporation is estopped to deny the validity of stock on the ground that it was issued without consideration. *Smith v. Martin*, 135 Cal. 247, 67 Pac. 779; *Westminster Nat. Bank v. New England Electrical Works*, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

See also § 3583, *infra*.

"A corporation is estopped to deny the validity of certificates issued in proper form under its seal, and duly signed by the officers authorized to issue certificates, if they are held by persons who took them for value without knowledge or notice that they had

been fraudulently issued." *Allen v. South Boston R. Co.*, 150 Mass. 200, 5 L. R. A. 716, 15 Am. St. Rep. 185, 22 N. E. 917.

"While the corporation may recover of the first transferee, or other purchaser with notice, stock unauthorized or issued on a stolen certificate, or on a forged assignment, or in lieu thereof the value of such stock, it is estopped by its certificate to the first transferee from maintaining a suit to recover the stock, its value, or the dividends thereon, from a second transferee, who was a bona fide purchaser for value without notice of any defect in the title to the stock, or the certificate, in reliance upon the certificate to the first transferee." *Weniger v. Success Min. Co.*, 227 Fed. 548.

⁷ *New York & E. Telegraph & Telephone Co. v. Great Eastern Tel. Co.*, 74 N. J. Eq. 221, 69 Atl. 528, aff'd 75 N. J. Eq. 297, 298, 72 Atl. 1119.

⁸ *New York & E. Telegraph & Telephone Co. v. Great Eastern Tel. Co.*, 74 N. J. Eq. 221, 69 Atl. 528, aff'd 75 N. J. Eq. 297, 298, 72 Atl. 1119.

⁹ *Southern Mut. Aid Ass'n v. Blount*, 112 Va. 214, 70 S. E. 487.

But where there is an inherent lack of power in the corporation to issue the stock, neither the corporation,¹⁰ nor the person to whom the stock is issued,¹¹ is estopped to question its validity, since an estoppel cannot operate to create stock which, under the law, cannot have existence,¹² and "no estoppel can properly arise in any case where the party's direct and affirmative act could not have made the transaction valid."¹³ Even under such circumstances, however, the corporation may be liable in damages to a bona fide purchaser or pledgee of the illegal stock.¹⁴

Specific applications of the foregoing rules to cases where there has been an overissue of stock,¹⁵ or where the stock of a corporation has been increased without authority or without complying with the pro-

¹⁰ *Trent Import Co. v. Wheelwright*, 118 Md. 249, 84 Atl. 543; *Pruitt v. Oklahoma Steam Baking Co.*, 39 Okla. 509, 135 Pac. 730; *First Ave. Land Co. v. Parker*, 111 Wis. 1, 87 Am. St. Rep. 841, 86 N. W. 604.

Where a subscription contract involves the issuing of bonus stock, the subscriber is not estopped to set up the illegality of the contract in an action on the subscription. *Trent Import Co. v. Wheelwright*, 118 Md. 249, 84 Atl. 543.

This is true where stock is issued without consideration and the statute declares that stock so issued shall be void. To hold otherwise "would give practical validity to stock which the statute declares shall be void." *First Ave. Land Co. v. Parker*, 111 Wis. 1, 87 Am. St. Rep. 841, 86 N. W. 604.

See also § 3583, *infra*.

¹¹ *United States*. *Seoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Winters v. Armstrong*, 37 Fed. 508.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

Indiana. *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782.

Kansas. *Moses v. White*, 6 Kan. App. 558, 51 Pac. 622.

Massachusetts. *American Tube*

Works v. Boston Mach. Co., 139 Mass. 5, 29 N. E. 63.

New York. *Veeder v. Mudgett*, 95 N. Y. 295.

North Dakota. *German Mercantile Co. v. Wanner*, 25 N. D. 479, 52 L. R. A. (N. S.) 453, 142 N. W. 463.

Oklahoma. *Pruitt v. Oklahoma Steam Baking Co.*, 39 Okla. 509, 135 Pac. 730.

"As between the corporation and its stockholders, subscriptions to a wholly unauthorized issue of stock cannot be validated on the principle of estoppel." *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782.

¹² *First Ave. Land Co. v. Parker*, 111 Wis. 1, 87 Am. St. Rep. 841, 86 N. W. 604.

"The doctrine of estoppel * * * is never invoked to confer corporate powers." *Winters v. Armstrong*, 37 Fed. 508.

An unconstitutional statute authorizing an increase of stock is a nullity, and "can afford no basis for an irregular, or as it might be termed, a de facto issue of stock." *Marion Trust Co. v. Bennett*, 169 Ind. 346, 124 Am. St. Rep. 228, 82 N. E. 782.

¹³ *Winters v. Armstrong*, 37 Fed. 508.

¹⁴ See § 3493, *infra*.

¹⁵ See § 3467 et seq., *supra*.

visions of the charter or statute,¹⁶ will be found in other sections.

§ 3489. Stolen certificates. It is a general principle that if a stock certificate is lost by the owner without negligence, or stolen, no title or right is acquired as against the owner either by the finder or thief or by a bona fide purchaser,¹⁷ and this principle applies where certificates are stolen from a corporation by one of its officers or employees, and fraudulently issued by him to a bona fide purchaser or pledgee. In such a case, if the officer or agent has no authority to issue certificates, and no negligence is imputable to the corporation, it is not liable to a bona fide purchaser of the certificates; and the fact that the officer or agent was intrusted with the custody of the certificates does not show negligence if the corporation had no reason to believe him to be untrustworthy.¹⁸

¹⁶ See § 3467 et seq., *supra*.

¹⁷ See subd. xxiv, *infra*, this chapter.

¹⁸ In *Knox v. Eden Musee American Co.*, 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988, the lower court held a corporation liable for injury caused by the act of its manager in fraudulently issuing surrendered but uncanceled certificates of stock, where the certificates, having upon them assignments in blank, had been surrendered to the corporation on the issue of new certificates in their stead, and were placed uncanceled in the safe of the corporation, to which the manager had access, with directions to him to cancel the same, as required by the by-laws, and the manager, instead of canceling them, took them from the safe and pledged them as collateral for a loan from the plaintiff, who took them in good faith, and where it appeared that the manager had been in the employ of the corporation for several years, and that it had perfect confidence in his integrity. The Court of Appeals reversed the judgment, and held that the corporation was not liable. The judgment could not be sustained, it was held, on the ground that the certificates were negotiable

instruments, for the negotiability of certificates of stock does not extend so far as to prevent the owner of certificates which have been lost or stolen without his negligence from claiming them even from a bona fide purchaser. Nor could the judgment be sustained on the ground of agency, for an officer of a corporation in whose custody surrendered certificates of stock are placed, with directions to cancel them, has no implied authority to reissue them. Nor could it be sustained on the ground of negligence, for an employer is not to be deemed negligent merely because he intrusts his property to the custody of his agent, and does not anticipate or provide against the possibility of criminal acts on the part of the agent, where he has no reason to doubt the latter's integrity. It was further held that negligence was not imputable to the corporation in this case merely because of the violation in a single instance of a by-law by issuing a new certificate of stock without first canceling the old certificate, which was surrendered, nor because the officers of the corporation omitted for the period of three weeks to ascertain whether a surrendered certificate of stock had been canceled by the manager in accord-

§ 3490. Forged certificates. Whether or not a corporation is liable to a bona fide purchaser of a false certificate of stock, where the officer or agent issuing the same forged the necessary signatures of the other officers, depends upon the circumstances. As a rule it will be held responsible where the forgery is committed by an officer having charge of the transfer and stock books of the company and having authority to issue certificates, and the certificate is apparently genuine,¹⁹ since the acts of the officer, under such circumstances, are within

ance with his duty, since the consequence for which a negligent person is answerable "must be the natural consequence of the alleged negligent act or one which might reasonably have been anticipated."

¹⁹ Where the treasurer of a corporation was charged with the duty, under the by-laws, of keeping the books relating to the ownership and transfer of stock, preparing and countersigning all certificates of stock, receiving and entering transfers, affixing the corporate seal to certificates properly issued by the company, and signed by the president, and issuing certificates, it was held that the corporation was liable for his act in fraudulently issuing a false certificate countersigned by himself, and sealed with the corporate seal, whether the signature of the president thereon was forged or not. *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 17 Am. Rep. 540.

In *Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co.*, 137 N. Y. 231, 19 L. R. A. 331, 33 Am. St. Rep. 712, 33 N. E. 378, a corporation was held liable for the act of its secretary and treasurer in fraudulently issuing a false certificate countersigned by him as secretary, and under the seal of the corporation, and upon which he had forged the necessary signature of the president, and signed his own name as treasurer, where it appeared that he was the transfer agent of the corporation, and had authority generally to countersign certificates of stock, when signed by

the president and treasurer, and to seal them with the corporate seal. The court held that his countersigning and sealing constituted an affirmation on the part of the corporation that all conditions precedent upon which the right to issue the certificate depended had been duly observed, and that the stock was lawfully issued.

In *Mutual Life Ins. Co. of New York v. Forty-Second St. & G. St. Ferry R. Co.*, 74 Hun (N. Y.) 505, 26 N. Y. Supp. 545, the corporation was held responsible where the secretary and transfer agent, who was authorized to countersign and issue certificates previously signed by the president and treasurer, forged the name of a former treasurer to a certificate signed by a former president, and then countersigned the certificate, dating it as of a time when both such former officers were in office.

In *Shaw v. Port Philip & C. Gold Min. Co.*, 13 Q. B. D. 103, a corporation was held responsible for the act of its secretary in fraudulently issuing a false certificate to a transferee, upon which he forged the necessary signature of a director, where it was part of the authorized and regular duty of the secretary to receive and examine transfers and certificates of shares, to have transfers registered, to procure the preparation, execution and signature of certificates, with all requisite and prescribed formalities, and thereupon to issue them to the persons entitled to receive them.

the apparent scope of his authority,²⁰ and the issue of the certificate in due form is a representation that the conditions precedent to his right to issue the same have been complied with and that the facts exist upon which his right to act depends, upon which representation the public has a right to rely.²¹

On the other hand the company is not responsible where a necessary signature is forged by an officer²² or employee,²³ who is not

²⁰ *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 17 Am. Rep. 540; *Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co.*, 137 N. Y. 231, 19 L. R. A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; *Mutual Life Ins. Co. of New York v. Forty-Second St. & G. St. Ferry R. Co.*, 74 Hun (N. Y.) 505, 26 N. Y. Supp. 545.

That a corporation is liable for the acts of its officers or agents within the apparent scope of their authority, see § 1916 et seq., supra.

²¹ *Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co.*, 137 N. Y. 231, 19 L. R. A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; *Mutual Life Ins. Co. of New York v. Forty-Second St. & G. St. Ferry R. Co.*, 74 Hun (N. Y.) 505, 26 N. Y. Supp. 545.

²² Where the by-laws of a corporation required certificates of stock to be under seal of the company, and signed by the president and treasurer, but gave the president nothing whatever to do with respect to the issuing of certificates except signing the same, it was held that the corporation was not liable at all upon certificates fraudulently issued by the president for his own benefit, and upon which he signed his own name, forged the name of the treasurer, and impressed the corporate seal, unless the corporation was chargeable with negligence. *Hill v. Jewett Pub. Co.*, 154 Mass. 172, 13 L. R. A. 193, 26 Am. St. Rep. 230, 28 N. E. 142.

In 1881 the then president of a corporation signed certificates of stock in

blank, and left them with the other officers of the corporation to be used, if necessary, in his absence. In 1888 a person who was transfer agent and secretary in 1881, but had since become the president, filled up and antedated one of these certificates to himself as stockholder, forging the name of the person who was treasurer of the corporation in 1881, and signing his own name as transfer agent, which he was in 1881, but had since ceased to be, and pledged the certificate as collateral security for a loan made to him personally. Under these circumstances, it was held that the corporation was not liable on the forged certificate, as the forger, as president, had no authority, actual or apparent, to issue a certificate, as his authority as transfer agent had ceased to exist, so that he was not empowered to sign as such, and antedate it as of the time when he held that office; and also because, when he borrowed the money and issued the certificate, he was not acting in the company's business, and the company was not responsible for any representations made by him as to the genuineness of the certificate. *Manhattan Life Ins. Co. v. Forty-Second St. & G. St. Ferry R. Co.*, 139 N. Y. 146, 34 N. E. 776, aff'g 64 Hun (N. Y.) 635, 19 N. Y. Supp. 90.

²³ The corporation was held not to be responsible where the necessary signature of a transfer agent was forged by a clerk, who had nothing to do with the issuing of certificates, after the certificate had been signed by the secretary and treasurer and the cor-

charged with the duty of issuing certificates, and where the certificate in question is not acquired by the holder through the office of the corporation in the regular course of business but through a private and personal transaction with the forger, at least unless the corporation has in some way been guilty of negligence in the matter,²⁴ and such negligence is the proximate cause of the loss.²⁵ Under such circumstances it is the duty of the purchaser or pledgee of the stock to look to the genuineness of the signatures, and it is only when the signatures are found to be genuine that the duty of the company to stand by its representations and its duty to the purchaser to take care as to the issue of the certificate arise.²⁶

porate seal had been attached. *Dollar Sav. Fund & Trust Co. v. Pittsburg Plate Glass Co.*, 213 Pa. 307, 5 Ann. Cas. 248, 62 Atl. 916. In this case it is said that possibly the corporation would have been estopped if the certificate had been put upon the market by an officer of the corporation, such as the president and secretary, who, in dealing with the issue of stock, must be regarded as the company.

²⁴ The keeping of the corporate seal and book of blank certificates where the president can have access to them, so as to be able to remove certificates from the book and impress the seal upon them, is not negligence in the absence of any previous misconduct on his part. *Hill v. Jewett Pub. Co.*, 154 Mass. 172, 13 L. R. A. 193, 26 Am. St. Rep. 230, 28 N. E. 142.

The fact that the corporation allowed the president to continue in office, and to have access to its certificate book and seal after misconduct on his part consisting merely in violating an agreement to pledge certain stock to his associates was held not to render it responsible for his act in forging the name of the treasurer to a certificate on the ground of negligence, since it was not of such a character as would give the corporation or its other members reason to suppose that he would be liable to issue forged certificates. *Hill v. Jewett*

Pub. Co., 154 Mass. 172, 13 L. R. A. 193, 26 Am. St. Rep. 230, 28 N. E. 142.

The mere fact that the corporation leaves a certificate where one of its employees may complete it by forging a necessary signature will not estop it to deny the genuineness of such signature. *Dollar Sav. Fund & Trust Co. v. Pittsburg Plate Glass Co.*, 213 Pa. 307, 5 Ann. Cas. 248, 62 Atl. 916.

The corporation is not estopped by failure to advertise the fact that a certificate not fully executed has disappeared. *Dollar Sav. Fund & Trust Co. v. Pittsburg Plate Glass Co.*, 213 Pa. 307, 5 Ann. Cas. 248, 62 Atl. 916.

²⁵ *Hill v. Jewett Pub. Co.*, 154 Mass. 172, 13 L. R. A. 193, 26 Am. St. Rep. 230, 28 N. E. 142; *Dollar Sav. Fund & Trust Co. v. Pittsburg Plate Glass Co.*, 213 Pa. 307, 5 Ann. Cas. 248, 62 Atl. 916.

²⁶ *Dollar Sav. Fund & Trust Co. v. Pittsburg Plate Glass Co.*, 213 Pa. 307, 5 Ann. Cas. 248, 62 Atl. 916.

"Until the plaintiff shows a certificate, to which are attached the genuine signatures of all the parties whose signatures are necessary to its validity, he is not even entitled to enter the lists where the contest as to the negligence of the company is to be fought out." *Dollar Sav. Fund & Trust Co. v. Pittsburg Plate Glass Co.*, 213 Pa. 307, 5 Ann. Cas. 248, 62 Atl. 916.

The corporation may ratify forged certificates of stock, so as to subsequently be estopped to deny their validity.²⁷ But the acts relied on to constitute a ratification must have been done with knowledge of their invalidity.²⁸

The effect of forged transfers of stock, and the liability of the corporation in case it recognizes such a transfer will be considered in subsequent sections.²⁹

§ 3491. Authority of officer or agent issuing certificate. It is a general principle that a corporation, like a natural person, is liable for acts, including fraud and other wrongs, done by its officers or agents in the course of their employment, and within either the real or the apparent scope of the powers delegated to them. If a particular act is within the apparent scope of the authority conferred upon an officer or agent of a corporation, the corporation is liable therefor, although the act may have been in fact unauthorized, or even contrary to instructions.³⁰ It follows that a corporation is liable for the fraudulent or wrongful issue of false certificates of stock by an officer or agent whom it had clothed with general or apparent authority to issue certificates in the form in which the false certificates were issued, although the issue of the false certificates may have been unauthorized, and although they may have been issued by the officer or agent for his own purposes, and not for the purposes of the corporation.³¹ "The

²⁷ *Columbia Council No. 77 v. Belmar Building & Loan Ass'n* (N. J. Eq.), 54 Atl. 142.

²⁸ A member of a building and loan association, who owned valid certificates of stock and also held a forged certificate, made payments of dues on all of them to the secretary, who knew of the forgery, but had no authority to collect dues. The secretary turned the payments over to the treasurer, who did not know of the existence of the forged shares, and who credited the entire amount to the valid shares, treating the excess over the amount due thereon as payments in advance. It was held that this did not constitute a ratification of the forged certificate or estop the corporation to deny its validity. *Columbia Council No. 77 v. Belmar Building & Loan Ass'n* (N. J. Eq.), 54 Atl. 142.

²⁹ See subd. xxiv, *infra*, this chapter.

³⁰ See § 1896 et seq., *supra*.

³¹ *United States. Manhattan Beach Co. v. Harned*, 27 Fed. 484.

Connecticut. *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231.

Maryland. *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 17 Am. Rep. 540. See also *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 36, where this principle was applied in the case of a fraudulent and unauthorized issue of certificates used in funding overdue interest coupons.

Massachusetts. *Allen v. South Boston R. Co.*, 150 Mass. 200, 5 L. R. A. 716, 15 Am. St. Rep. 185, 22 N. E. 917.

Missouri. *National Bank of Webb City v. Newell-Morse Royalty Co.*, 259 Mo. 637, 168 S. W. 699.

ground of liability is not that the principal has been benefited by the act of the agent, but that an innocent third person has been damaged by confiding in the agent, who was accredited by the principal, as worthy of trust, in that particular business."³²

On the other hand, however, the corporation is not liable if the issue of the false certificates was not within either the actual or the apparent scope of the officer's or agent's authority, unless it has been guilty of negligence in the premises.³³

New York. Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co., 137 N. Y. 231, 19 L. R. A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; New York & N. H. R. Co. v. Schuyler, 34 N. Y. 30; Reno Oil Co. v. Culver, 60 App. Div. 129, 69 N. Y. Supp. 969, rev'g 33 Misc. 717, 68 N. Y. Supp. 303; Mutual Life Ins. Co. of New York v. Forty-Second St. & G. St. Ferry R. Co., 74 Hun 505, 26 N. Y. Supp. 545. See also B. & C. Electrical Const. Co. v. Owen, 176 App. Div. 399, 163 N. Y. Supp. 31.

North Carolina. Havens v. Bank of Tarboro, 132 N. C. 214, 95 Am. St. Rep. 627, 43 S. E. 639.

Ohio. Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank, 56 Ohio St. 351, 43 L. R. A. 777, 43 N. E. 249.

Pennsylvania. Mount Holly Paper Co.'s Appeal, 99 Pa. St. 513; People's Bank v. Kurtz, 99 Pa. St. 344, 44 Am. Rep. 112.

Washington. See Whitfield v. Non-pariel Consol. Copper Co., 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078.

Wisconsin. See First Ave. Land Co. v. Parker, 111 Wis. 1, 87 Am. St. Rep. 841, 86 N. W. 604.

"In some of the cases importance has been attached to the negligence of the company, through its proper agents, in not supervising the conduct of its business, and, whereby, the particular agent has been enabled to perpetrate his frauds. But I apprehend that upon an accurate analysis of the company's liability in such

cases, it will be found to rest on its liability for the acts of the agent who perpetrated the fraud. If the extent of his agency included the legitimate doing of an act of the kind done, then it will be liable though the act done was a fraud as to it and other persons. As to an innocent third person, affected by the agent's wrongful act, the negligence of the company in not discovering or preventing the fraud, may accentuate his right of recovery, but does not, as I apprehend, add to nor create that right." Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank, 56 Ohio St. 351, 43 L. R. A. 777, 47 N. E. 249.

³² Tome v. Parkersburg Branch R. Co., 39 Md. 36, 17 Am. Rep. 540; Reno Oil Co. v. Culver, 60 N. Y. App. Div. 129, 69 N. Y. Supp. 969, rev'g 33 N. Y. Misc. 717, 68 N. Y. Supp. 303.

³³ Moores v. Citizens' Nat. Bank of Piqua, 111 U. S. 156, 28 L. Ed. 385; Knox v. Eden Musee American Co., 148 N. Y. 441, 31 L. R. A. 779, 51 Am. St. Rep. 700, 42 N. E. 988; Manhattan Life Ins. Co. v. Forty-Second & G. St. Ferry R. Co., 139 N. Y. 146, 34 N. E. 776, aff'g 64 Hun (N. Y.) 635, 19 N. Y. Supp. 90; President, etc., of Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599.

In Mechanics' Bank v. New York & N. H. R. Co., 13 N. Y. 599, it was held that a corporation was not liable to a bona fide purchaser or pledgee of certificates of stock constituting a fraudulent overissue, where they were issued by the president of the corpo-

§ 3492. Certificates signed in blank. If a corporation or its managing officers intrust the officer or agent charged with the duty of registering transfers and issuing certificates with certificates of stock signed in blank by the officers by whom the by-laws require certificates to be signed, it will be liable if a certificate is fraudulently filled up and issued by such officer or agent, and comes into the hands of a bona fide purchaser or pledgee, not only on the ground of apparent authority, but also on the ground of negligence. Intrusting the officer or agent charged with the duty of issuing certificates with certificates signed in blank removes the safeguards against the fraudulent issue of false certificates intended by the by-laws,—the necessity for the approval and signature of the specified officers,—and is clearly negligence.³⁴ And where one of two innocent persons must suffer by

ration, who was intrusted merely with the transfer of stock.

In a Pennsylvania case, the president of a railroad company, by fraudulently representing to his aunt that a loan of her shares of stock in the company was needed by the company, induced her to part with them, and then pledged them for his own debt. Afterwards he conspired with other officers of the company to procure a fraudulent overissue of stock, and transferred some of it to his aunt in lieu of her shares. It was held that she could not hold the company liable, as he acted as her agent, and not as the agent of the company. *Wright's Appeal*, 99 Pa. St. 425.

That intrusting the officer or agent charged with the duty of issuing certificates with certificates signed in blank is negligence, see § 3492, *infra*.

³⁴*Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 43 L. R. A. 777, 43 N. E. 249.

Where certificates of stock of a bank are signed in blank by its president and secretary and left with the cashier to be filled out in the names of purchasers when called for by them, and the cashier fraudulently fills in and countersigns a certificate to himself and pledges the same to a bona fide pledgee for his private purposes,

the pledgee is entitled to a transfer of it on the books of the bank and to a new certificate, unless the certificate is an overissue of stock, in which case the bank is liable to him for the value of the stock represented by it. *Havens v. Bank of Tarboro*, 132 N. C. 214, 95 Am. St. Rep. 627, 43 S. E. 639.

In *Allen v. South Boston R. Co.*, 150 Mass. 200, 5 L. R. A. 716, 15 Am. St. Rep. 185, 22 N. E. 917, the treasurer of a corporation authorized a broker to sell a number of shares for him, and the broker sold shares to the plaintiff, giving him power of attorney, in blank, authorizing the transfer of the shares to him. The plaintiff presented the power of attorney to the treasurer, who filled in the purchaser's name and his own name as attorney, and thereupon issued to the plaintiff the number of shares called for, entering in the transfer book a transfer of the shares from himself, as treasurer, to the broker, and a transfer from the broker to the plaintiff. The shares so issued were a fraudulent overissue. It appeared, however, that the president of the corporation was in the habit of leaving blank certificates signed by him with the treasurer, and the latter, by signing and issuing these certificates

the acts of a third, the loss must be borne by the one whose misplaced confidence or negligence made it possible for the loss to occur.³⁵

§ 3493. Liability of corporation in damages. It is a well-settled principle that a certificate of stock issued by a corporation having the power under its charter to issue certificates in the form in which the certificate is issued is a continuing affirmation or representation of the ownership of the amount of stock therein specified by the person named therein, or his assignee, and of his right to transfer the same, and that purchasers or pledgees of the certificate, or the stock represented by it, have a right to rely on such affirmation, without inquiry as to the validity of the certificate, unless they have actual notice of its invalidity, or the circumstances are such as to create suspicion, and put a reasonably prudent man upon inquiry.³⁶ It is also a well-settled principle that a corporation is liable to the same extent and under the same circumstances as a natural person, for every fraud which it commits, and for negligence and other wrongs, however foreign to its nature or beyond its granted powers the wrongful transaction or act may be.³⁷ It follows from these principles that if a corporation itself, or an officer or agent for whose act it is responsible,³⁸ fraudulently, or even by mistake and without any actual fraudulent intent, issues certificates of stock which are fictitious because they are in excess of its authorized capital stock, or otherwise unauthorized, it is liable in damages to bona fide purchasers or pledgees of such certificates who are deceived and injured by relying upon their genuineness. And in an action to recover damages, upon refusal of the corporation to recognize the validity of such a certificate, the corporation

and falsifying the records of the corporation, was enabled to make the overissue. Under these circumstances, it was held that, as the negligence of the officers of the corporation made the fraudulent overissue possible, the corporation was liable to the plaintiff for his damages.

In *Western Maryland R. Co. v. Franklin Bank*, 60 Md. 36, this rule was applied in the case of a fraudulent and unauthorized issue of certificates used in funding overdue interest coupons.

This rule does not apply to certificates issued by a cemetery association

having no capital stock, which are not certificates of stock, but merely non-negotiable certificates of indebtedness. *American Exch. Nat. Bank v. Woodlawn Cemetery*, 194 N. Y. 116, 87 N. E. 107.

³⁵ *Havens v. Bank of Tarboro*, 132 N. C. 214, 95 Am. St. Rep. 627, 43 S. E. 639; *Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 43 L. R. A. 777, 43 N. E. 249.

³⁶ See § 3497, *infra*.

³⁷ See Chap. 52.

³⁸ See § 3491, *supra*.

is estopped to set up as a defense that it had no power to create the stock or issue the certificate.³⁹

39 United States. *Moore v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 28 L. Ed. 385; *Manhattan Beach Co. v. Harned*, 27 Fed. 484.

Connecticut. *Bridgeport Bank v. New York & N. H. R. Co.*, 30 Conn. 231.

Maryland. *Tome v. Parkersburg Branch R. Co.*, 39 Md. 36, 17 Am. Rep. 540.

Massachusetts. *Farrington v. South Boston R. Co.*, 150 Mass. 406, 5 L. R. A. 849, 15 Am. St. Rep. 222, 23 N. E. 109; *Allen v. South Boston R. Co.*, 150 Mass. 200, 5 L. R. A. 716, 15 Am. St. Rep. 185, 22 N. E. 917.

Minnesota. *Joslyn v. St. Paul Distilling Co.*, 44 Minn. 183, 46 N. W. 337.

Missouri. *National Bank of Webb City v. Newell-Morse Royalty Co.*, 259 Mo. 637, 168 S. W. 699; *Davey v. Newell-Morse Royalty Co.*, 169 Mo. App. 565, 154 S. W. 147.

New York. *Fifth Ave. Bank of New York v. Forty-Second St. & G. S. Ferry R. Co.*, 137 N. Y. 231, 19 L. R. A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; *Titus v. President, etc., of Great Western Turnpike Road*, 61 N. Y. 237; *Holbrook v. New Jersey Zinc Co.*, 57 N. Y. 616; *Bruff v. Mali*, 36 N. Y. 200; *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30; *Jarvis v. Manhattan Beach Co.*, 53 Hun 362, 6 N. Y. Supp. 703, 148 N. Y. 652, 31 L. R. A. 776, 51 Am. St. Rep. 727, 43 N. E. 68.

Ohio. *Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 43 L. R. A. 777, 47 N. E. 249.

Pennsylvania. *Kisterbock's Appeal*, 127 Pa. St. 601, 14 Am. St. Rep. 868, 18 Atl. 381; *Swain v. West Philadelphia Passenger Ry. Co.*, cited in 127 Pa. St. 601, 14 Am. St. Rep. 868, 18 Atl. 381; *In re Mt. Holly Paper Co.'s Appeal*, 99 Pa. St. 513; *People's Bank*

v. Kurtz, 99 Pa. St. 344, 44 Am. Rep. 112; *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Eq. Cas. 180; *Willis v. Philadelphia & D. R. R. Co.*, 6 Wkly. N. Cas. 461.

Washington. See *Whitfield v. Nonpareil Consol. Copper Co.*, 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078.

Wisconsin. *First Ave. Land Co. v. Parker*, 111 Wis. 1, 87 Am. St. Rep. 841, 86 N. W. 604.

England. *Shaw v. Port Philip & C. Gold Min. Co.*, 13 Q. B. D. 103.

"If the certificate of stock fair upon its face is, without notice and in good faith, bought, or taken as collateral, and such certificate turns out to be spurious, then the corporation is liable for the damages occasioned, whether such certificate be fraudulently or negligently put in circulation." *National Bank of Webb City v. Newell-Morse Royalty Co.*, 259 Mo. 637, 168 S. W. 699.

"The ground on which a corporation is held liable to a bona fide purchaser for value of false certificates of its stock issued under its seal, signed by the proper officers, and apparently genuine, is that the certificates are statements by the corporation of facts which it is its duty to know, and which cannot well be known to the purchaser." *Allen v. South Boston R. Co.*, 150 Mass. 200, 5 L. R. A. 716, 15 Am. St. Rep. 185, 22 N. E. 917.

If the proper corporate officers sign a certificate of stock in blank and leave it with another officer to be filled out in the name of and delivered to a purchaser, and such officer fraudulently fills it in with his own name and pledges it to a bona fide pledgee to secure a loan made to himself personally, the pledgee is entitled to have

The officer or agent who issued the stock is also liable to bona fide purchasers under such circumstances,⁴⁰ and may be sued alone or jointly with the corporation.⁴¹ "The wrongful act is the servant's, in fact, and the principal's by construction."⁴²

The liability of the corporation and its officers extends to every bona fide holder, no matter how many transfers have been made.⁴³

the stock transferred on the books and to a new certificate, unless the stock is an overissue, in which case the corporation is liable to him for its value. *Havens v. Bank of Tarboro*, 132 N. C. 214, 95 Am. St. Rep. 627, 43 S. E. 639.

Where the transfer clerk of a corporation fraudulently procured from the officers of the corporation a properly signed certificate of stock in the name of a fictitious person, indorsed the fictitious name thereon, and caused it to be registered on the transfer book, and caused a broker to sell the certificate for the fictitious person, after he inquired at the office of the corporation, and was informed that the stock was duly registered, and the broker paid the proceeds over to the transfer clerk, and was afterwards compelled to take back the certificate from the purchaser, and refund the purchase money, it was held that he could recover his damages from the corporation. *Jarvis v. Manhattan Beach Co.*, 53 Hun (N. Y.) 362, 6 N. Y. Supp. 703, 75 Hun (N. Y.) 100, 26 N. Y. Supp. 1061, 148 N. Y. 652, 31 L. R. A. 776, 51 Am. St. Rep. 727, 43 N. E. 68.

A loan association whose secretary customarily issues, in lieu of certificates, statements under the corporate seal, and attested by him, that persons therein named appear as stockholders on its books, is bound by such a statement to one who in good faith makes a loan in reliance thereon. *Richardson v. Delaware Loan Ass'n*, 9 Houst. (Del.) 354, 32 Atl. 980.

Responsibility of a corporation for the acts of its officers in issuing cer-

tificates of stock only attaches when it has power under its charter to issue certificates. *Reno Oil Co. v. Culver*, 60 N. Y. App. Div. 129, 69 N. Y. Supp. 969, rev'g 33 N. Y. Misc. 717, 68 N. Y. Supp. 303.

The plaintiff is entitled to be reimbursed for his actual loss with interest. *National Bank of Webb City v. Newell-Morse Royalty Co.*, 259 Mo. 637, 168 S. W. 699.

The recovery is not limited to nominal damages by failure to show the market value of the stock, where it appears that the stock is not upon the market, and the certificate recites the value of the stock and evidence shows that the money value of the corporation's holdings is in excess of its capital stock. *National Bank of Webb City v. Newell-Morse Royalty Co.*, 259 Mo. 637, 168 S. W. 699.

Where the stock is pledged, the corporation is liable to the pledgee for the amount of the loan. *Davey v. Newell-Morse Royalty Co.*, 169 Mo. App. 565, 154 S. W. 147.

This rule does not apply to non-negotiable certificates of indebtedness issued by a cemetery association having no capital stock. *American Exch. Nat. Bank v. Woodlawn Cemetery*, 194 N. Y. 116, 87 N. E. 107.

⁴⁰ *Windram v. French*, 151 Mass. 547, 8 L. R. A. 750, 24 N. E. 914; *Bruff v. Mali*, 36 N. Y. 200.

As to the responsibility of officers and agents generally see § 2543, supra.

⁴¹ *Bruff v. Mali*, 36 N. Y. 200.

⁴² *Bruff v. Mali*, 36 N. Y. 200.

⁴³ *Bruff v. Mali*, 36 N. Y. 200. See

This principle also applies when a corporation, or an officer or agent for whose act it is responsible, recognizes as valid a forged or unauthorized transfer of stock, and issues a new certificate to the transferee, and the new certificate comes into the hands of a bona fide purchaser for value.⁴⁴ And if a corporation transfers shares of stock on its books, and issues new certificates, leaving the original certificates outstanding, it will be liable to bona fide purchasers or pledgees of the stock who purchase or lend money on the same in reliance upon the original certificates.⁴⁵

§ 3494. Remedies of the corporation. If the officers of a corporation fraudulently or wrongfully issue fictitious or illegal certificates of stock, the corporation, or, if it refuses to sue, a stockholder on behalf of himself and the other stockholders, may maintain a suit in equity to cancel the certificates, and to enjoin their transfer, or the voting thereon by the holders, or the payment of dividends thereon.⁴⁶ And in such suit the court will determine and enforce any liability which the law may impose upon the corporation in favor of persons who have become bona fide purchasers or pledgees of the certificates.⁴⁷

An officer or agent who issues false certificates of stock is liable to the corporation for any damages sustained by it, and the corporation may maintain an action against him to recover the same.⁴⁸ If he has received the proceeds of the certificate so issued by him, the corporation may waive the tort, and maintain an action of assumpsit for money had and received, and he cannot defeat the action by setting up as a defense the illegality in the issue of the stock.⁴⁹

Where the stock is void because of an inherent lack of power to issue it, the corporation cannot recover on the officer's official bond on the theory that its issuance damaged it by the creation of stockholder's rights,⁵⁰ since, under such circumstances, the corporation is not estopped to deny the validity of the stock even in the hands of a

also *Sykes v. Pure Food Cider Co.*, 157 Iowa 601, 138 N. W. 554.

⁴⁴ See subd. xxiv, *infra*, this chapter.

⁴⁵ See subd. xxi, *infra*, this chapter.

⁴⁶ See § 3485, *supra*.

⁴⁷ *New York & N. H. R. Co. v. Schuyler*, 34 N. Y. 30.

A bona fide pledgee of stock representing secret profits of a promoter is entitled to protection in a suit in equity to cancel the stock, but the

company should be given the right to pay the debt and cancel the stock and to recover the amount so paid from the promoter. *Cuba Colony Co. v. Kirby*, 149 Mich. 453, 112 N. W. 1133.

⁴⁸ *Brooklyn Crosstown R. Co. v. Strong*, 75 N. Y. 591.

⁴⁹ *Rutland R. Co. v. Haven*, 62 Vt. 39, 19 Atl. 769.

⁵⁰ *First Ave. Land Co. v. Parker*, 111 Wis. 1, 87 Am. St. Rep. 841, 86 N. W. 604.

bona fide purchaser for value.⁵¹ And to enable it to maintain such an action on the theory that the issuance of the stock has rendered it liable in damages to the holder, based on the false representations contained in the certificate, the complaint must show that such holder relied on such representations and was ignorant of their falsity,⁵² since otherwise he would have no right of action against the corporation.⁵³

As we shall see in subsequent sections, if a corporation in good faith recognizes a forged or unauthorized transfer of stock, and issues a new certificate to the transferee, it is not estopped, as against him, to deny the validity of the transfer and the new certificate, for he has acted in reliance on the forged or unauthorized transfer, and not on the corporation's recognition thereof, nor on the new certificate. In such case, therefore, as against him the corporation may maintain a suit in equity to cancel the certificate before it reaches the hands of a bona fide purchaser; or if the corporation has been held liable thereon to a bona fide purchaser, it may maintain an action against the transferee for damages for inducing it to recognize the transfer and issue the certificate.⁵⁴

If the corporation is induced to issue stock through fraud it may cancel the same,⁵⁵ provided it has not come into the hands of a bona fide purchaser for value;⁵⁶ or it may elect to treat it as valid and compel the person to whom it was issued to pay for it.⁵⁷

⁵¹ See § 3488, *supra*.

⁵² *First Ave. Land Co. v. Parker*, 111 Wis. 1, 87 Am. St. Rep. 841, 86 N. W. 604.

⁵³ See § 3497, *infra*.

⁵⁴ See § 3497, *infra*.

⁵⁵ *Houston Fire & Marine Ins. Co. v. Swain* (Tex. Civ. App.), 114 S. W. 149. See also *Hutton v. Joseph Bancroft & Sons Co.*, 83 Fed. 17.

The right of a corporation to cancel stock on the ground of fraud in its procurement is waived where it accepts a surrender of the certificate by one to whom it has been pledged and issues a new one to him. *Tecumseh Nat. Bank v. Russell*, 50 Neb. 277, 69 N. W. 763.

⁵⁶ Where a corporation is induced to issue stock by fraud it cannot treat it as void and procure its cancellation

as against bona fide purchasers for value. *Houston Fire & Marine Ins. Co. v. Swain* (Tex. Civ. App.), 114 S. W. 149.

⁵⁷ As where stock which an officer of the corporation procures to be issued to a fictitious person and later, as attorney for the latter, transfers to himself, is paid for by forged securities. *Houston Fire & Marine Ins. Co. v. Swain* (Tex. Civ. App.), 114 S. W. 149.

If a subscriber fraudulently procures the issuance to himself of certificates for a larger number of shares than he has subscribed and paid for, and the statute does not preclude the sale of stock upon credit, the corporation may elect to ratify the transaction, treat the additional shares as validly issued, and sue to recover the

§ 3495. Injunction to restrain illegal or unauthorized issue. An illegal issue of stock may be enjoined at the instance of stockholders.⁵⁸ And injunction is the proper remedy where authorized stock is about to be issued for an unauthorized purpose.⁵⁹ But the issuance of stock in strict conformity to the laws of the state where the corporation was organized cannot be enjoined by the courts of another state, even though it is issued in violation of the laws of the latter state, but such issuance will only authorize the forfeiture of the corporation's license to do business in such state.⁶⁰

§ 3496. Criminal liability of officers. In at least one jurisdiction the fraudulent issue of stock, or the sale of stock so issued, is made a criminal offense.⁶¹

§ 3497. Persons entitled to protection or relief. The right of persons to hold a corporation liable because of the issue of fictitious certificates of stock is not based upon the stock which the certificates purport to represent, for, as we have seen, there is no such stock, but it is based upon the ground that bona fide purchasers or pledgees who have parted with their money in reliance upon the certificate being valid are entitled to be indemnified. "The right to relief," said the Supreme Court of Pennsylvania, "depends upon the equity of the per-

par value thereof from him. *White-water Tile & Pressed Brick Mfg. Co. v. Baker*, 142 Wis. 420, 125 N. W. 984.

⁵⁸ *Fitzpatrick v. Dispatch Pub. Co.*, 83 Ala. 604, 2 So. 727; *Donald v. American Smelting & Refining Co.*, 62 N. J. Eq. 729, 48 Atl. 771, 1116, rev'g 61 N. J. Eq. 458, 48 Atl. 786; *Kraft v. Griffon Co.*, 82 N. Y. App. Div. 29, 81 N. Y. Supp. 438.

Where the principal office of a New Jersey corporation is in New York, where the plaintiff and all the directors reside, and all meetings of the directors are held in the latter state, an illegal issue of stock may be enjoined in New York. *Kraft v. Griffon Co.*, 82 N. Y. App. Div. 29, 81 N. Y. Supp. 438.

⁵⁹ *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115.

⁶⁰ *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115.

⁶¹ *Howell's Mich. St.* (2nd Ed.), § 14872, provides that any person who shall fraudulently issue or cause to be issued any corporate stock, or who shall sell, offer for sale, hypothecate or otherwise dispose of any such stock, knowing the same to be so fraudulently issued, shall be guilty of a felony.

In *Ford v. Kalamazoo Circuit Judge*, 192 Mich. 337, 158 N. W. 841, it was held that the stipulated facts did not show a violation of this provision. The lower court in this case held that the indictment was insufficient, but the Supreme Court held that it was unnecessary to pass on that question.

son claiming it. If he has expended money upon the faith of the official certificates of the officers of the company, he has a right to be indemnified, to the extent of his expenditures, against loss from false certificates, but only because of the fact of his expenditures. The false certificates are no certificates in legal contemplation, and give no rights of their own force. But the act of the officers in issuing them, having been accepted and acted upon by another, the company cannot be heard to deny the truth of the fact represented. It is simply the application of the principle that, 'if you make a representation with the intention that it shall be acted upon by another, and he does so, you are estopped from denying the truth of what you represent to be the fact.'"⁶² "The action is founded on the fraud accomplished by the false declarations in the certificate. To the existence of such liability * * * are necessary all the elements of the usual action for deceit. Of those elements the false representation is supplied by the certificate itself, but, in addition, it is necessary that the person making demand shall have relied thereon and shall have been ignorant of the falsity of the statements and free from any want of ordinary care and diligence."⁶³

It follows from this that liability upon the part of the corporation exists only in favor of persons who have paid or advanced money on the faith of the fictitious certificates,⁶⁴ and that stock which has been illegally and fraudulently issued may be cancelled although it has been transferred, where the transferee is not a purchaser for a valuable consideration.⁶⁵ So the company is not liable to one who has taken the certificate merely in payment of or as security for an antecedent debt, at least if no damages have been sustained by releasing or surrendering other security, for such a person has expended nothing on the faith of the certificate.⁶⁶ Nor is it liable to a purchaser of the stock in reliance on the certificate, where he has not paid for it.⁶⁷

⁶² Appeal of Kisterbock, 127 Pa. St. 601, 14 Am. St. Rep. 868, 871, 18 Atl. 381, citing *Freeman v. Cooke*, 2 Exch. 654, and *In re Bahia & S. F. Ry. Co.*, L. R. 3 Q. B. 585.

⁶³ *First Ave. Land Co. v. Parker*, 111 Wis. 1, 87 Am. St. Rep. 841, 86 N. W. 604.

⁶⁴ Appeal of Kisterbock, 127 Pa. St. 601, 14 Am. St. Rep. 868, 18 Atl. 381.

⁶⁵ *Kimball v. New England Roller Grate Co.*, 69 N. H. 485, 45 Atl. 253.

⁶⁶ Appeal of Kisterbock, 127 Pa. St.

601, 14 Am. St. Rep. 868, 18 Atl. 381.

⁶⁷ *Ryder v. Bushwick R. Co.*, 134 N. Y. 83, 31 N. E. 251.

Certificates of stock constituting an overissue, issued by the president of a corporation on the authority of an executive committee appointed by the directors out of their number, but without authority from or ratification by the directors, confer no rights on one who is not a bona fide holder for value. *Ryder v. Bushwick R. Co.*, supra.

And one who acquires fraudulently issued certificates in payment of margins in the purchase of cotton for future delivery is not in a position to assert title thereto as against the corporation.⁶⁸

In all cases, the person seeking relief against the corporation must be in the position of a bona fide purchaser or pledgee. The corporation, therefore, is not liable to one who has purchased the certificate or loaned money upon it with actual knowledge of its invalidity, or with notice of facts which were sufficient to put a reasonably prudent man upon an inquiry or investigation which, if followed up with reasonable diligence, would have disclosed its invalidity.⁶⁹ And invalid stock may be cancelled in the hands of the person to whom it was issued where he was a party to the unlawful purpose for which it was issued.⁷⁰

When a person, in taking a certificate of stock from an officer of a corporation, whose duty it is to issue certificates, is dealing with the officer personally, as where the officer is selling the stock or pledging it for money loaned to himself, this fact is sufficient to put the person taking the certificate on inquiry, and if he relies on the representations of the officer without making further and independent inquiry, he is guilty of such negligence as to exclude him from the position of a bona fide purchaser or pledgee.⁷¹ So where an officer of a corporation issues a false certificate of stock as security for money loaned to him personally, representing that he owns such an amount of stock, and that the stock has been transferred to the lender on the

⁶⁸ *Miller v. Houston City St. R. Co.*, 69 Fed. 63.

⁶⁹ *United States. Moores v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 28 L. Ed. 385.

Connecticut. Hayden v. Charter Oak Driving Park, 63 Conn. 142, 27 Atl. 232.

Massachusetts. Farrington v. South Boston R. Co., 150 Mass. 406, 5 L. R. A. 849, 15 Am. St. Rep. 222, 23 N. E. 109.

New York. Ryder v. Bushwick R. Co., 134 N. Y. 83, 31 N. E. 251.

Wisconsin. First Ave. Land Co. v. Parker, 111 Wis. 1, 87 Am. St. Rep. 841, 86 N. W. 604.

⁷⁰ *Elliott v. Baker*, 194 Mass. 518, 80 N. E. 450.

⁷¹ *Moores v. Citizens' Nat. Bank of*

Piqua, 111 U. S. 156, 28 L. Ed. 385; *Farrington v. South Boston R. Co.*, 150 Mass. 406, 5 L. R. A. 849, 15 Am. St. Rep. 222, 23 N. E. 109; *Cincinnati, N. O. & T. P. Ry. Co. v. Third Nat. Bank*, 1 Ohio Cir. Ct. 199; *Whitfield v. Nonpareil Consol. Copper Co.*, 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078. See also *Wilson v. Metropolitan El. R. Co.*, 120 N. Y. 145, 17 Am. St. Rep. 625, 24 N. E. 384.

One who deals with an apparent agent with reference to his private affairs cannot hold the company to an estoppel, but must look to the one who has wronged him. *Whitfield v. Nonpareil Consol. Copper Co.*, 67 Wash. 286, 41 L. R. A. (N. S.) 187, 123 Pac. 1078.

books of the corporation, as required by the by-laws, and stated on the certificate, the representations are made by him personally; and not as the agent of the corporation, and the corporation is not responsible therefor to the lender.⁷² But a pledgee or purchaser of a certificate regular on its face, who is not dealing with the officer issuing it personally, owes no positive duty to the corporation to see to it that the seller or pledgor surrenders the old certificate, and makes an assignment on the books of the corporation, and he is not guilty

⁷² *Moore v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 28 L. Ed. 385; *Farrington v. South Boston R. Co.*, 150 Mass. 406, 5 L. R. A. 849, 15 Am. St. Rep. 222, 23 N. E. 109.

In *Moore v. Citizens' Nat. Bank of Piqua*, 111 U. S. 156, 28 L. Ed. 385, the cashier of a bank borrowed money for his own use, representing that he was the owner of a certain amount of stock in the bank, which he offered as collateral, and that it had been transferred to the lender on the books of the bank, and issued directly to the lender as collateral a false certificate of stock by filling out a certificate which had been signed in blank by the president, and left with him for proper issue when needed, and the lender took the certificate on his representations, and without inquiring at the bank, although it recited on the face of it that no certificate of the stock could be lawfully issued without the surrender of a former certificate, and a transfer thereof on the books of the bank, and it was held that the lender was not in the position of a bona fide purchaser and could not hold the bank liable. Mr. Justice Gray said in delivering the opinion of the court: "The very form of the certificate was such as to put her (the lender) upon her guard. She was not applying to the bank to take stock, as an original subscriber or otherwise; but she was bargaining with Robert B. Moore (the cashier) for stock which she supposed him to hold as his own. She knew that she

had not held or surrendered any certificate, and she never asked to see his certificate or a transfer thereof to her; and he in fact made no surrender to the bank or transfer on its books. She relied on his personal representation, as the party with whom she was dealing, that he had such stock; and she trusted him as her agent to see the proper transfer made on the books of the bank. Having distinct notice that the surrender and transfer of a former certificate were prerequisites to the lawful issue of a new one, and having accepted a certificate that she owned stock, without taking any steps to assure herself that the legal prerequisites to the validity of her certificate, which were to be fulfilled by the former owner and not by the bank, had been complied with, she does not, as against the bank, stand in the position of one who receives a certificate of stock from the proper officers without notice of any facts impairing its validity."

There was a like decision in *Farrington v. South Boston R. Co.*, 150 Mass. 406, 5 L. R. A. 849, 15 Am. St. Rep. 222, 23 N. E. 109, where the treasurer of a corporation issued a false and fraudulent certificate as collateral for a loan made to him personally. It was further held in this case that the lender acquired no additional right or equity from the fact that the certificate fraudulently issued to him was afterwards surrendered by him, and a new one issued therefor by the same officer.

of negligence merely in failing to do so. It is the duty of the corporation which requires these things to be done to see to it that they are done before a new certificate is issued to the purchaser.⁷³

The mere fact that the certificate appears on its face to have been issued to an officer of the corporation as the owner of it cannot be regarded as a suspicious circumstance sufficient to put a purchaser or pledgee from him upon inquiry, where he is not forbidden to own stock, and valid stock has previously been issued to him.⁷⁴

Where a person to whom an application for a loan is made, and to whom a certificate of stock is offered as collateral security, applies at the office of the corporation to the person in charge thereof, and who is its secretary and treasurer, and inquires whether the certificate is genuine, and receives an answer in the affirmative, and then makes the loan and takes the certificate as collateral, he is entitled to protection as a bona fide holder, and he does not lose his right to be so treated by selling the stock, and applying the proceeds to the payment of the loan, and afterwards, upon discovering that the certificate has been forged, taking an assignment thereof from the purchasers, and repaying them the amount paid by them at the sale.⁷⁵

The false affirmation in the certificate must have been the proximate cause of the loss or injury to the person relying on the estoppel, since

⁷³ See subd. XXIII, *infra*, this chapter.

⁷⁴ *Davey v. Newell-Morse Royalty Co.*, 169 Mo. App. 565, 154 S. W. 147.

Where certificates of stock are required to be issued by the president and the secretary under the seal of the company, and no other mode is provided or can be used, and neither the secretary nor the president is prohibited from holding stock, and both, with its knowledge, do in fact hold stock, the fact that a certificate is issued in favor of the secretary is not of itself sufficient to put a party upon inquiry as to whether the secretary is rightfully the owner of it. *Cincinnati, N. O. & T. P. Ry. Co. v. Citizens' Nat. Bank*, 56 Ohio St. 351, 43 L. R. A. 777, 47 N. E. 249.

Where certificates of stock of a bank are signed in blank by the president and secretary and left with the cashier to be filled out in the names

of purchasers of the stock when called for by them, and the cashier fraudulently fills in and countersigns a certificate to himself and pledges such certificate for his private purposes, notice to a party taking this stock of the fraudulent issuance thereof cannot be deduced from the fact that the stock was issued in the name of the cashier and endorsed by him in blank, and that the certificate recited that it was transferable only on the books of the bank. *Havens v. Bank of Taboro*, 132 N. C. 214, 95 Am. St. Rep. 627, 43 S. E. 639.

⁷⁵ *Fifth Ave. Bank of New York v. Forty-Second St. & G. St. Ferry R. Co.*, 137 N. Y. 231, 19 L. R. A. 331, 33 Am. St. Rep. 712, 33 N. E. 378; *Mutual Life Ins. Co. of New York v. Forty-Second St. & G. St. Ferry R. Co.*, 74 Hun (N. Y.) 505, 26 N. Y. Supp. 545.

“an estoppel in pais only inures to the benefit of a party who can properly assert that the representation or conduct by which he has been misled was the direct and legitimate cause of his misfortune.”⁷⁶ So where a spurious certificate is issued in the name of a fictitious person, and the name of the latter is signed to a blank assignment and power of attorney by the person who fraudulently issued the certificate, a purchaser cannot rely upon an estoppel solely by reason of the purchase of the spurious certificate, since such purchase could not have been accomplished without the fraud or forgery involved in the preparation of the spurious assignment and power of attorney, for which the corporation is not responsible.⁷⁷ And where a corporation recognizes a forged or unauthorized transfer of a certificate, and issues a new certificate to the transferee, it is not estopped to deny the validity of the new certificate as against him, for he has parted with his money in reliance, not on such certificate, but on the forged or unauthorized transfer, for which the corporation is not responsible. He is not in any way injured, therefore, by the act of the corporation in recognizing the transfer and issuing the new certificate.⁷⁸

X. RIGHTS AND REMEDIES IN CASE OF LOSS OF CERTIFICATE OF STOCK

§ 3498. Right to new certificate. A corporation may voluntarily issue a new certificate of stock in place of an original certificate which has been lost or destroyed⁷⁹ and, where it refuses to issue one voluntarily, may be compelled to do so in a proper case, even in the absence of any statutory provision on the subject.⁸⁰ Statutes in many states specifically provide for the issuance of new certificates under such circumstances,⁸¹ and such a provision is found in the uniform stock

⁷⁶ *Manhattan Beach Co. v. Harned*, 27 Fed. 484.

⁷⁷ *Manhattan Beach Co. v. Harned*, 27 Fed. 484.

⁷⁸ See subd. xxii, *infra*, this chapter.

⁷⁹ See *Greenleaf v. Ludington*, 15 Wis. 558, 82 Am. Dec. 698.

⁸⁰ *Will's Adm'r v. George Weidemann Brewing Co.*, 171 Ky. 681, 188 S. W. 778; *Yeaman v. Galveston City Co.*, 106 Tex. 389, 167 S. W. 710, — Tex. Civ. App. —, 173 S. W. 489, — Tex. Civ. App. —, 190 S. W. 212; *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 82 S. E. 614.

⁸¹ *Minnesota*. Laws 1893, c. 45;

Guilford v. Western U. Tel. Co., 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324.

New York. Laws 1892, c. 88, §§ 50, 51; *In re Coats*, 75 App. Div. 469, 78 N. Y. Supp. 425; *In re Speir*, 69 App. Div. 149, 74 N. Y. Supp. 555; *In re Hayt*, 39 Misc. 356, 79 N. Y. Supp. 845; *Guilford v. Western U. Tel. Co.*, 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324, citing the *New York statute*, Laws 1873, c. 151; *Kinnan v. Forty-Second St., M. & St. N. Ave. Ry. Co.*, 140 N. Y. 183, 35 N. E. 498, *aff'g* 1 Misc. 457, 21 N. Y. Supp. 769; *Biglin v. Friendship Ass'n*, 46 Hun

transfer act.⁸² Similar provisions are also sometimes found in the corporate by-laws.⁸³ The issue of a new certificate in such a case is not an overissue of stock.⁸⁴

Statutes of the character under consideration merely affect the remedy, and hence govern only within the limits of the state enacting them.⁸⁵ But it has been held that such a state statute applies to stock of a national bank.⁸⁶ And it has also been held that a stockholder may sue to compel the issuance of a new certificate in a state other than that in which the corporation was organized.⁸⁷

It has been held by a number of courts that mandamus will lie to

223. The uniform stock transfer act is now in force in this state. See *infra*, this section.

North Carolina. Acts 1901, c. 2, § 95. This provision is compulsory on corporations which issue certificates of stock. It repeals and takes the place of Laws 1885, c. 265. *Travers v. North Carolina R. Co.*, 133 N. C. 322, 45 S. E. 651. It was held in respect to the law of 1885 that it was not an amendment of charters of existing corporations, but was in the nature of a general regulation applicable to all corporations, and was valid. *Hendon v. North Carolina R. Co.*, 127 N. C. 110, 37 S. E. 155, 125 N. C. 124, 34 S. E. 227.

Virginia. Code 1887, § 1135, as amended by Acts 1895-6, p. 36. *Downing v. Thompson*, 103 Va. 58, 48 S. E. 506. Acts 1910, p. 580, Code Supp. 1910, § 1105e(37), p. 163.

West Virginia. *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 82 S. E. 614. "A corporation has no discretion where the statute has been complied with, in regard to the issuance of duplicate certificates in place of those alleged to have been lost, unless it knows or has reason to believe the contrary to be the fact, and then it takes the risk of liability for damages, if the fact be as alleged." *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 82 S. E. 614.

⁸² Section 17 contains such a provision. This act has been adopted and is now in effect in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

⁸³ See *Isbell v. Graybill*, 19 Colo. App. 508, 76 Pac. 550.

⁸⁴ *Kinnan v. Forty-Second St., M. & St. N. Ave. Ry. Co.*, 1 N. Y. Misc. 457, 21 N. Y. Supp. 789, *aff'd* 140 N. Y. 183, 35 N. E. 498.

⁸⁵ *Guilford v. Western U. Tel. Co.*, 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324.

⁸⁶ *In re Hayt*, 39 N. Y. Misc. 356, 79 N. Y. Supp. 845.

⁸⁷ *Guilford v. Western U. Tel. Co.*, 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324.

The action does not necessarily fall within the rule that courts will not interfere with the management of the internal affairs of a foreign corporation, since it may affect only his individual rights under the contract by which his stock was issued. On the other hand there may be cases of this character which would involve the management of the internal affairs of the corporation, in which case the court would not take jurisdiction. *Guilford v. Western U. Tel. Co.*, 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324.

compel a corporation to issue a new certificate in a proper case.⁸⁸ And a court of equity has jurisdiction of a suit for that purpose.⁸⁹ Statutes in some states give a remedy by a civil action at law,⁹⁰ or a summary remedy by proceedings to show cause.⁹¹ But it has been held that a

⁸⁸ *State v. New Orleans Cotton Exchange*, 114 La. 324, 38 So. 204; *State v. New Orleans Gaslight Co.*, 25 La. Ann. 413; *Hof v. Western German Bank*, 6 Cinc. L. Bul. (Ohio) 665.

⁸⁹ *Kinnan v. Forty-Second St., M. & St. N. Ave. Ry. Co.*, 140 N. Y. 183, 35 N. E. 498, aff'g 1 N. Y. Misc. 457, 21 N. Y. Supp. 789; *Galveston City Co. v. Sibley*, 56 Tex. 269. See this case for form of decree in such a suit.

⁹⁰ Cal. Civ. Code, § 328.

Pell's Revisal N. C. 1908, § 1167, provides for such an action to be brought in the superior court of the county where the principal office of the corporation is located. If the issues of fact are found in favor of the plaintiff, the court is required to make an order directing the issuance of a new certificate. In such an action, the averment and denial of the loss raises an issue for the jury, but upon the trial, when evidence is offered of the contents of the lost certificate, it is for the court to pass upon the preliminary question whether there is a sufficient *prima facie* case of loss to let in proof of its contents, leaving still to the jury the decision of the fact whether there was a loss of the paper, and its contents. *Hendon v. North Carolina R. Co.*, 125 N. C. 124, 34 S. E. 227.

⁹¹ N. Y. Laws 1892, c. 688, §§ 50, 51. *Kinnan v. Forty-Second St., M. & St. N. Ave. Ry. Co.*, 140 N. Y. 183, 35 N. E. 498, aff'g 1 N. Y. Misc. 457, 21 N. Y. Supp. 789.

"The proceeding is statutory, and to justify the court in granting the application, performance of the requirements of the statute must be alleged." *In re Coats*, 75 N. Y. App. Div. 469, 78 N. Y. Supp. 425.

The statute contemplates that, upon return of the order to show cause, the court shall take proof of the facts stated in the petition, and without such proof no order requiring the issuance of a new certificate can be granted. *In re Coats*, 75 N. Y. App. Div. 469, 78 N. Y. Supp. 425.

Under the express terms of the statute, it is only where the corporation has refused to issue a certificate that a proceeding to compel it to do so can be commenced, and hence there must be a distinct refusal on the part of the corporation to issue a new certificate in place of the particular certificate lost or destroyed. A mere general request as to what formalities the corporation will require in order to issue a new certificate, without specifying the particular stock in question, and without a distinct request to issue a certificate in place of that particular stock, is not such a demand as is contemplated by the statute. *In re Coats*, 75 N. Y. App. Div. 469, 78 N. Y. Supp. 425.

In view of the fact that the statute attempts to affect the rights and interest of those claiming an interest under the original certificate, notice of the application should be given by such publication thereof as will give an opportunity to any one claiming an interest in the stock to appear and be heard, especially where there is no direct evidence that the certificate has been actually destroyed. *In re Coats*, 75 N. Y. App. Div. 469, 78 N. Y. Supp. 425; *In re Speir*, 69 N. Y. App. Div. 149, 74 N. Y. Supp. 555.

The statute provides that the court may direct the publication of such notice, either before or after making the order directing the issuance of the

statutory summary remedy is merely cumulative, and does not prevent the owner of a lost certificate from resorting to any other appropriate remedy,—as, for example, a suit in equity.⁹² The uniform stock transfer act provides that a court of competent jurisdiction may order the issue of a new certificate on service of process on the corporation, and on reasonable notice by publication, and in any other way which the court may direct, to all persons interested, and upon satisfactory proof of such loss; and also that the court may, in its discretion, order the payment of the corporation's reasonable costs and counsel fees.⁹³

The right to compel the issuance of a new certificate may be barred by the statute of limitations,⁹⁴ or by laches.⁹⁵

To warrant the court in ordering the issuance of a new certificate in any case, it must appear that the plaintiff is the owner of the stock,⁹⁶

new certificate, as it shall deem proper. It contemplates that either the order to show cause shall be published in such a way as to give notice to any one claiming title to the stock, or that such publication shall be made after the order directing the issuance of the new certificate is granted, but before such certificate is to be delivered. *In re Coats*, 75 N. Y. App. Div. 469, 78 N. Y. Supp. 425.

The uniform stock transfer act is now in force in New York. See *infra*, this section.

⁹² *Kinnan v. Forty-Second St., M. & St. N. Ave. Ry. Co.*, 140 N. Y. 183, 35 N. E. 498, *aff'd* 1 N. Y. Misc. 457, 21 N. Y. Supp. 789.

⁹³ See section 17 of the act. This act has been adopted and is now in effect in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

⁹⁴ The plaintiff's cause of action accrues and limitations begin to run from the time when a demand for the issuance of a new certificate is refused by the company. *Converse v. Galveston City Co.*, — Tex. Civ. App. —, 189 S. W. 539.

⁹⁵ *Dempster v. Rosehill Cemetery Co.*, 206 Ill. 261, 68 N. E. 1070.

⁹⁶ *Dempster v. Rosehill Cemetery Co.*, 206 Ill. 261, 68 N. E. 1070; *Tyson v. George's Creek Coal & Iron Co.*, 115 Md. 564, 81 Atl. 41; *Biglin v. Friendship Ass'n*, 46 Hun (N. Y.) 223; *Galveston City Co. v. Sibley*, 56 Tex. 269; *Converse v. Galveston City Co.*, — Tex. Civ. App. —, 189 S. W. 539.

Where a lost certificate was issued to one as "agent," the presumption is that he held it as agent for a third person, and the burden is on his administrator to show that it was held by him in his own right. The burden is not on the corporation to show who was the principal. *Tyson v. George's Creek Coal & Iron Co.*, 115 Md. 564, 81 Atl. 41.

Where stock stands in the name of a decedent as "trustee," it is proper for the corporation to refuse to issue a duplicate certificate to his administrator until it is determined by a court of competent jurisdiction that the decedent owned the stock in his own right. *Baltimore Trust Co. v. George's Creek Coal & Iron Co.*, 119 Md. 21, 85 Atl. 949.

In *Converse v. Galveston City Co.*, — Tex. Civ. App. —, 189 S. W. 539, the question of ownership was held to be for the jury under the evidence, and the evidence was held to sustain

that the certificates were the genuine obligations of the company,⁹⁷ and that they have, in fact, been lost or destroyed.⁹⁸

The rights and liabilities of purchasers of lost or stolen certificates, and the liability of the corporation to them, and to bona fide holders of the new certificate in case the original is afterwards discovered, will be considered in subsequent sections.⁹⁹

§ 3499. Right of corporation to indemnity. Whether or not the corporation can require the owner of the lost certificate to give a bond to indemnify it against possible liability on the original certificate depends upon the circumstances.

As we have seen, if a corporation issues a certificate of stock, it thereby represents that the person named therein is the owner of the number of shares designated therein, and that he has a right to transfer the same, and it will be estopped to deny this representation as against a bona fide transferee, at least to such an extent as to entitle him to recover damages.¹ It follows that if the owner of a certificate should transfer the same, and then, representing that it has been lost or stolen, induce or compel the corporation to issue to him a new certificate, and afterwards transfer it, the corporation would incur liability upon both certificates.² It has accordingly been held that a corporation cannot be compelled to issue a new certificate in the place of one which is asserted to have been lost or stolen, unless a bond is given to indemnify it against liability to possible bona fide holders of the original certificate, at least without the clearest proof that it has in fact been lost or stolen, so that the corporation will not be liable to the holder.³ The corporation, however, may be compelled to issue a

a finding that the plaintiffs were not the present owners of the stock.

⁹⁷ *Kinnan v. Forty-Second St., M. & St. N. Ave. Ry. Co.*, 140 N. Y. 183, 35 N. E. 498, aff'g 1 N. Y. Misc. 457, 21 N. Y. Supp. 789.

⁹⁸ Under a statute authorizing a court to compel a corporation to issue stock certificates in the place of certificates lost or destroyed, on proof that such certificates cannot be found by due diligence, a petitioner for such relief is not entitled thereto, where it appears that he himself has some of the certificates, and that others are in the possession of third persons who refuse to surrender them. *Biglin v.*

Friendship Ass'n, 46 Hun (N. Y.) 223.

The fact of the loss of the certificate and that it was not transferred or disposed of by the person to whom it was issued or by his legal representatives should be established by direct evidence, and by the testimony of witnesses whom the corporation should have a right to cross-examine. *In re Speir*, 69 N. Y. App. Div. 149, 74 N. Y. Supp. 555.

⁹⁹ See subd. xxiv, *infra*, this chapter.

¹ See § 3487, *supra*.

² See subd. xxiv, *infra*, this chapter.

³ *Kentucky. Will's Adm'r v. George*

new certificate if a bond of indemnity is given;⁴ or may do so voluntarily;⁵ and it has been held that it may be compelled to issue a new certificate without any indemnity where upon the facts it is reasonably certain that the original certificate will not reappear,⁶ as where there is clear proof that the original has been destroyed, or that it has been lost or stolen, not having an assignment thereon by the owner,⁷ or if

Weidemann Brewing Co., 171 Ky. 681, 188 S. W. 778.

Louisiana. State v. New Orleans Cotton Exchange, 114 La. 324, 38 So. 204.

Maryland. See Chesapeake & O. Canal Co. v. Blair, 45 Md. 102.

Minnesota. Guilford v. Western U. Tel. Co., 43 Minn. 434, 46 N. W. 70, 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324.

New York. Butler v. Glen Cove Starch Mfg. Co., 18 Hun 47.

Texas. Galveston City Co. v. Sibley, 56 Tex. 269.

West Virginia. La Belle Iron Works v. Quarter Sav. Bank, 74 W. Va. 569, 82 S. E. 614.

England. Societe Generale De Paris v. Walker, 11 App. Cas. 20.

A bond will be required where the circumstances are not such as to exclude the probability that the certificates were assigned and delivered to some person who may yet declare himself the claimant or owner of them. Will's Adm'r v. George Weidemann Brewing Co., 171 Ky. 681, 188 S. W. 778.

The court has authority to require a bond if it appears that it is necessary to fully protect the corporation. Yeaman v. Galveston City Co., — Tex. Civ. App. —, 173 S. W. 489.

“This indemnity should be governed by the circumstances of the particular case. If not only the loss, but also the destruction of the instrument and the ownership of the plaintiffs, should be clearly shown, then, if required at all, it would, as a general rule, be but

nominal.” Galveston City Co. v. Sibley, 56 Tex. 269.

⁴ State v. New Orleans Cotton Exchange, 114 La. 324, 38 So. 204; Hof v. Western German Bank, 6 Cinc. L. Bul. (Ohio) 665; Galveston City Co. v. Sibley, 56 Tex. 269.

See also § 3498, supra.

⁵ See Greenleaf v. Ludington, 15 Wis. 558, 82 Am. Dec. 698.

⁶ State v. New Orleans Cotton Exchange, 114 La. 324, 38 So. 204.

⁷ As where the evidence is clear and satisfactory that the original certificate, unassigned, has been lost for more than twelve years, during which time it has never been heard of, and no other claimant for the stock or the dividends thereon has appeared. Guilford v. Western U. Tel. Co., 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324.

A judgment in a former action that the plaintiff is entitled to a new certificate only on giving bond is not res judicata, where more than four years have elapsed since its rendition and the original certificates have not been heard from and no other claimant for the stock or the dividends thereon has appeared. Guilford v. Western U. Tel. Co., 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324.

In State v. Southern Mineral & Land Improvement Co., 108 La. 24, 32 So. 174, the court held that proof of loss of certificate was sufficiently made by showing absence of certificate for ten years. Apparently no bond was required in this case, although this does not clearly appear.

the corporation is otherwise protected,⁸ for in such a case the corporation cannot incur any liability by reason of the original certificate.

Statutes in some states expressly require the giving of indemnity,⁹ and such a requirement is found in the uniform stock transfer act which has been adopted in a number of states.¹⁰ It is also sometimes provided that indemnity need not be given if the loss is clearly proved.¹¹ Under some statutes the corporation is permitted to hold

⁸In *State v. New Orleans Cotton Exchange*, 114 La. 324, 38 So. 204, it was held that the corporation would be required to issue a new certificate without a bond of indemnity if the plaintiff was willing to accept one showing upon its face that it was issued in lieu of the original and was to be void in the event of the reappearance of the original.

In *State v. New Orleans Gaslight Co.*, 25 La. Ann. 413, it was held that since the stock was only transferable on the books of the company on surrender of the certificate, this was a sufficient protection. But in *State v. New Orleans Cotton Exchange*, 114 La. 324, 38 So. 204, it is said that this holding is contrary to a long list of cases holding that such transfer may take place without notice to the company, and must be considered as having been overruled.

⁹*New York*. Laws 1892, c. 688, § 51. In re Coats, 75 App. Div. 469, 79 N. Y. Supp. 425; In re Speir, 69 App. Div. 149, 74 N. Y. Supp. 555. Where the market value of the stock is \$20,800, the penalty of the bond should be at least \$25,000. In re Speir, 69 App. Div. 149, 74 N. Y. Supp. 555. The uniform stock transfer act is now in force in this state. See next note, *infra*.

North Carolina. Acts 1901, c. 2, § 95; Laws 1885, c. 265. *Travers v. North Carolina R. Co.*, 133 N. C. 322, 45 S. E. 651; *Hendon v. North Carolina R. Co.*, 125 N. C. 124, 34 S. E. 227, 127 N. C. 110, 37 S. E. 155. Where the corporation denies the plaintiff's

right to the reissue of the certificate asked for, it is immaterial that no tender of a bond was made before bringing the action. *Hendon v. North Carolina R. Co.*, 127 N. C. 110, 37 S. E. 155.

Ohio. A certificate left with the company as collateral security and mislaid while in its possession is not lost or destroyed within the meaning of the statute so as to make it obligatory on the corporation to require an indemnity bond from the pledgor before issuing a new certificate to his transferee. *Farmers' Bank v. Diebold Safe & Lock Co.*, 66 Ohio St. 367, 58 L. R. A. 620, 90 Am. St. Rep. 586, 64 N. E. 518. The uniform stock transfer act is now in force in this state. See next note, *infra*.

Virginia. Code 1887, § 1135, as amended by Acts 1895-6, p. 36. *Downing v. Thompson*, 103 Va. 58, 48 S. E. 506. Acts 1910, p. 580, Code Supp. 1910, § 1105e(37), p. 163.

West Virginia. *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 82 S. E. 614. In this case the declaration in an action on such a bond was held to be sufficient on demurrer.

¹⁰Section 17 of the act requires the giving of a bond with sufficient surety to be approved by the court. The act has been adopted and is in effect in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

¹¹*Minn.* Laws 1893, c. 45, provides that if the evidence is clear that the

the new certificate in escrow for a specified time as a further security.¹²

It has been held that the corporation may mark the new certificate duplicate.¹³

A mere custom of a corporation not to issue new certificates without a bond of indemnity is not binding on its stockholders.¹⁴

§ 3500. Conditions and effect of bond; liability on bonds. The bond protects the corporation against loss or damage from any source growing out of the issuance of the duplicate certificate, including liability to the holder of the original certificate or to innocent holders of certificates based on the duplicate.¹⁵ It has been held that, where the bond is conditioned "to save the company harmless" from any loss due to the issuance of a new certificate, its proceeds, on its breach, are mere general assets in the hands of the company, and that there can be no subrogation or right of action in equity upon it at the suit of a holder of the original certificate.¹⁶ Statutes in some states, however, require the bond to be conditioned to indemnify the corporation and

certificate has been lost or destroyed, and it has not been heard of for a period of seven years, it shall be the duty of the corporation to issue a new certificate without indemnity. *Guilford v. Western U. Tel. Co.*, 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324. In the above case it is intimated that this provision applies to all corporations, domestic or foreign, in all cases of which the courts have jurisdiction according to the existing rules of law.

Va. Acts 1910, p. 580, Code Supp. 1910, § 1105e(373), p. 163, provides that the directors may issue a new certificate without requiring a bond when in their judgment it is proper to do so. Code 1887, § 1135, as amended by Acts 1895-6, provided that if the certificate had been lost for seven years or more, the court might order the issuance of a new certificate, in a proceeding instituted for that purpose, without the execution of a bond, and that the company should then be discharged from any liability to any persons claiming an interest in the

stock under or by virtue of the former certificate. *Downing v. Thompson*, 103 Va. 58, 48 S. E. 506.

¹² Under N. C. Laws 1885, c. 265, in addition to giving an indemnity bond, the new certificate was required to be filed with the treasurer of the corporation as an escrow for five years. *Hendon v. North Carolina R. Co.*, 125 N. C. 124, 34 S. E. 227, 127 N. C. 110, 37 S. E. 155. The corporation may waive this requirement if it wishes. *Id.* This provision was repealed by Acts 1901, c. 2, § 95, and the corporation no longer has the right to retain the certificate. *Travers v. North Carolina R. Co.*, 133 N. C. 322, 45 S. E. 651.

¹³ *Keller v. Eureka Brick Mach. Mfg. Co.*, 43 Mo. App. 84, 11 L. R. A. 472.

¹⁴ *Guilford v. Western U. Tel. Co.*, 59 Minn. 332, 50 Am. St. Rep. 407, 61 N. W. 324.

¹⁵ *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 82 S. E. 614.

¹⁶ *Greenleaf v. Ludington*, 15 Wis. 558, 82 Am. Dec. 698.

all persons against any loss in consequence of the new certificate being issued in lieu of the former one.¹⁷ The uniform stock transfer act requires the giving of a bond to protect the corporation or any person injured by the issue of the new certificate from any liability or expense, which it or they may incur by reason of the original certificate remaining outstanding.¹⁸

Ordinarily the taking of a bond does not relieve the corporation from liability to the holder of the original certificate or to bona fide holders of the new one.¹⁹ But it is sometimes expressly provided by statute that any person who shall thereafter claim any rights under the lost or destroyed certificate shall have recourse to the indemnity, and that the corporation shall be discharged from all liability to such person by reason of compliance with the order requiring it to issue a new certificate.²⁰

The fact that the condition of the bond does not follow the exact language of the statute does not prevent it from being a valid statutory bond, where it covers, though with more elaboration, all that is covered by the statute.²¹

As in other cases, "to be binding on a surety a bond of indemnity purporting to be the bond of both principal and surety must be signed by the principal, or be executed on his behalf by someone duly authorized, or the unauthorized act be subsequently ratified, or the principal be bound independently of the bond for breaches thereof, unless the surety has otherwise agreed to be bound thereby, or by his act has estopped himself from denying his liability."²² If the bond on its

¹⁷ *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 82 S. E. 614.

¹⁸ See section 17. The act has been adopted and is in force in Louisiana, Maryland, Massachusetts, Michigan, New Jersey, New York, Ohio, Pennsylvania, Rhode Island, Wisconsin and Alaska.

¹⁹ See subd. xxiv, *infra*, this chapter.

²⁰ N. Y. Laws 1892, c. 688, § 51; *In re Coats*, 75 N. Y. App. Div. 469, 79 N. Y. Supp. 425; *In re Speir*, 69 N. Y. App. Div. 149, 74 N. Y. Supp. 555; North Carolina Acts 1901, c. 2, § 95, Pell's Revisal 1908, § 1167; *Travers v. North Carolina R. Co.*, 133 N. C. 322, 45 S. E. 651.

The effect of the order directing the issuance of a new certificate is to divest the person in whose name the stock stands, or to whom it may have been transferred, of the title thereto by issuing a new certificate. *In re Coats*, 75 N. Y. App. Div. 469, 79 N. Y. Supp. 425. The uniform stock transfer act is now in force in this state. See *supra*, this section.

²¹ *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 82 S. E. 614.

²² *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 82 S. E. 614.

Pleas of non est factum by the surety setting up want of such proper execution of the bond by the principal, and his nonliability thereon, or for breaches thereof, constitute a good

face purports to be the bond of principal and surety, and to have been executed on behalf of the principal by an agent, it is the duty of the obligee to know the authority of the agent, and if the agent is not so authorized, and the obligee accepts the bond, the surety will not be bound thereby, although he may know that the bond has been so executed on behalf of the principal, and have reasonable cause to know the agent's want of authority, nor will he be thereby deprived of his right to set up such want of authority by way of defense.²³ If the principal would escape responsibility for the unauthorized act of his agent in signing and executing the bond on his behalf, he must promptly repudiate the same before the rights of third persons intervene, else he will be held to have ratified the unauthorized act, and be estopped to deny the agent's authority.²⁴

XI. PAYMENT FOR STOCK

§ 3501. General considerations. In the absence of an express charter or statutory requirement, the stock of a corporation need not be paid in in cash at the time of its organization, or within any particular time after its organization, but assessments or calls may be made upon the subscribers, as the money is needed.²⁵ Nor, in the absence of an express provision to the contrary, is payment necessary to make one a stockholder, with all the rights and subject to all the liabilities of a stockholder,²⁶ although it has been held that a subscriber is not a stockholder, so as to be entitled to sue as such in equity on behalf of the corporation, where his subscription, or an instalment thereof, has

defense to an action on the bond. *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 82 S. E. 614.

See standard works on Indemnity and Suretyship.

²³ *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 82 S. E. 614.

²⁴ *La Belle Iron Works v. Quarter Sav. Bank*, 74 W. Va. 569, 82 S. E. 614.

²⁵ See § 708, *supra*.

As to the necessity for calls, and their validity and effect, see § 668 et seq., *supra*.

²⁶ *California*. *Mitchell v. Beckman*, 64 Cal. 117, 28 Pac. 110.

Maine. *Chaffin v. Cummings*, 37 Me. 76.

New Jersey. *Savage v. Ball*, 17 N. J. Eq. 142.

South Carolina. *Glenn v. Rosborough*, 48 S. C. 272, 26 S. E. 611.

Tennessee. *Cartwright v. Dickin-son*, 88 Tenn. 476, 7 L. R. A. 706, 17 Am. St. Rep. 910, 12 S. W. 1030.

Vermont. *Windsor Elec.-Light Co. v. Tandy*, 66 Vt. 248, 44 Am. St. Rep. 838, 29 Atl. 248.

Compare *McComb v. Credit Mobilier*, Fed. Cas. No. 8,709, 13 Phila. (Pa.) 468. Compare *Busey v. Hooper*, 35 Md. 15, 6 Am. Rep. 350.

As to the right of a corporation to issue stock certificates before payment in full, see § 3480, *supra*.

become due and payable, and he has refused to pay the same upon a valid call.²⁷

Sometimes, however, there are express charter or statutory provisions requiring the whole amount of the capital stock to be paid in before the commencement of business, or within a certain time after the organization of the corporation; and a failure to comply with such a provision may render the charter of the corporation subject to forfeiture in proceedings by the state, or forfeit the same ipso facto, or prevent the corporation from acquiring a de jure corporate existence.²⁸

The necessity for payment of a deposit at the time of subscribing for stock, and the effect of failure to do so,²⁹ and the right of a corporation to issue stock upon payment of less than its par value,³⁰ are considered in other sections.

An agreement by subscribers to pay more than par for their stock is not ultra vires as an attempt to increase the par value of the stock,³¹ but is valid and enforceable according to its terms.³² And a stockholder, who has voluntarily paid more than par for his stock in discharge of his obligation on his subscription, cannot recover back the excess from the corporation, if the payment was not made under a mistake; nor can he recover from the other stockholders, although they may have paid less than par under an agreement between the corporation and all the stockholders.³³

§ 3502. Payment in property, labor or services—Scope. Many questions relating to the payment or agreement to pay for stock in property, labor or services are considered in other sections, such as the questions whether subscriptions so payable can be received and counted in determining whether the required amount of stock has been subscribed; ³⁴ whether agents of a corporation or commissioners have

²⁷ *Busey v. Hooper*, 35 Md. 15, 6 Am. Rep. 350.

²⁸ See § 707, supra.

Noncompliance with such requirements does not prevent the association from being a corporation de facto. See § 297, supra.

Generally such requirements are conditions subsequent, and not conditions precedent, to acquiring corporate existence. As to conditions subsequent generally, see § 186, supra.

²⁹ See § 707 et seq., supra.

³⁰ See § 3518 et seq., infra.

As to the effect of subscriptions on special terms, whereby the subscriber is to be relieved in whole or in part from liability on his subscription, see § 606, supra.

³¹ *Grone v. Economic Life Ins. Co.* (Del. Ch.), 80 Atl. 809.

³² *Grone v. Economic Life Ins. Co.* (Del. Ch.), 80 Atl. 809. See also *Esgen v. Smith*, 113 Iowa 25, 84 N. W. 954.

³³ *Esgen v. Smith*, 113 Iowa 25, 84 N. W. 954.

³⁴ See § 702, supra.

authority to receive subscriptions so payable, and the effect of their not having such authority;³⁵ whether parol evidence is admissible to show that subscriptions are so payable;³⁶ the effect of overvaluation of property, labor or services taken in payment of stock,³⁷ and the right of a corporation to issue bonus stock to a person for the purpose of inducing him to make a loan to it or to purchase its bonds.³⁸

§ 3503. — The right in general. It is well settled, both in England and in this country, that a corporation need not necessarily receive money in payment for its stock, unless there is some requirement to this effect in its charter, or in the constitution or general laws of the state. Whether stock is issued upon subscriptions or sold, the corporation, in the absence of express restrictions, may receive or contract to receive payment therefor in property, labor or services, provided it would, under the express or implied powers conferred upon it by its charter, have the power to purchase the property or incur a debt for the labor or services, and provided the transaction is in good faith, and no fraud is perpetrated upon other stockholders or creditors.³⁹ The

³⁵ See § 557 et seq., *supra*.

³⁶ See § 609, *supra*.

³⁷ See § 3576 et seq., *infra*.

³⁸ See § 3591, *infra*.

³⁹ **United States.** *Camden v. Stuart*, 144 U. S. 104, 36 L. Ed. 363; *Bank of Ft. Madison v. Alden*, 129 U. S. 372, 32 L. Ed. 725; *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 30 L. Ed. 420; *Branch v. Jesup*, 106 U. S. 468, 27 L. Ed. 279; *Pendery v. Carleton*, 87 Fed. 41; *Washburn v. National Wall-Paper Co.*, 81 Fed. 17; *Northern Trust Co. v. Columbia Straw-Paper Co.*, 75 Fed. 936, *aff'd* 80 Fed. 450, 176 U. S. 181, 44 L. Ed. 423; *Thompson-Houston Elec. Co. v. Dallas Consol. Traction Ry. Co.*, 54 Fed. 1001; *Coe v. East & W. R. Co. of Alabama*, 52 Fed. 531; *Holly Mfg. Co. v. New Chester Water Co.*, 48 Fed. 879, *aff'd* 53 Fed. 19; *Foreman v. Bigelow*, 4 Cliff. 508, Fed. Cas. No. 4,934; *Phelan v. Hazard*, 5 Dill. 45, Fed. Cas. No. 11,068.

Alabama. *Montgomery Iron Works v. Capital City Ins. Co.*, 137 Ala. 134, 34 So. 210; *Englen v. Nathan*, 136

Ala. 412, 34 So. 929; *State v. Webb*, 110 Ala. 214, 20 So. 462; *Knex v. Childersburg Land Co.*, 86 Ala. 180, 5 So. 578; *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736, 2 So. 758; *Eppes v. Mississippi, G. & T. R. Co.*, 35 Ala. 33.

Arkansas. *Harriage v. Daley*, 121 Ark. 23, 180 S. W. 333; *Lester v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518; *Memphis & L. R. R. v. Dow*, 120 U. S. 287, 30 L. Ed. 595, construing the Constitution of Arkansas.

California. *Sargent v. Palace Café Co.*, 167 Pac. 146; *Whitten v. Dabney*, 171 Cal. 621, 154 Pac. 312; *Harrison v. Armour*, 169 Cal. 787, 147 Pac. 1166; *R. H. Herron Co. v. Shaw*, 165 Cal. 668, Ann. Cas. 1915 A 1265, 133 Pac. 488; *Turner v. Markham*, 155 Cal. 562, 102 Pac. 272; *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838; *Smith v. Martin*, 135 Cal. 247, 67 Pac. 779; *Smith v. Ferries & C. H. Ry. Co.*, 119 Cal. xvii, 51 Pac. 710; *Kellerman v. Maier*, 116 Cal. 416, 48

right to receive payment in this manner is expressly conferred by

Pac. 377; *Chater v. San Francisco Sugar Refining Co.*, 19 Cal. 219; *Ellsworth v. National Home & Town Builders*, 33 Cal. App. 1, 164 Pac. 14; *Western Nat. Bank v. Wittman*, 31 Cal. App. 615, 161 Pac. 137; *California Trona Co. v. Wilkinson*, 20 Cal. App. 694, 130 Pac. 190; *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70.

Colorado. *Arapahoe Cattle & Land Co. v. Stevens*, 13 Colo. 534, 22 Pac. 823; *Speer v. Bordeleau*, 20 Colo. App. 413, 79 Pac. 332; *Buck v. Jones*, 18 Colo. App. 250, 70 Pac. 951; *Calivada Colonization Co. v. Hays*, 119 Fed. 202, construing the Constitution of Colorado. See also *Bivens v. Hull*, 58 Colo. 338, 145 Pac. 694.

Delaware. *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879; *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 80 Atl. 666; *Hobgood v. Ehlen*, 141 N. C. 344, 53 S. E. 857, construing the Delaware statute.

Georgia. *Hayden v. Atlanta Cotton Factory*, 61 Ga. 233.

Illinois. *Gillett v. Chicago Title & Trust Co.*, 230 Ill. 373, 82 N. E. 891, aff'g 131 Ill. App. 66; *Garden City Sand Co. v. American Refuse Crematory Co.*, 205 Ill. 42, 68 N. E. 724, rev'g 105 Ill. App. 342; *Sprague v. National Bank of America*, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, aff'g 66 Ill. App. 320; *Farwell v. Great Western Tel. Co.*, 161 Ill. 522, 44 N. E. 891, rev'g 47 Ill. App. 579; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725, aff'g 53 Ill. App. 82; *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362; *Reichwald v. Commercial Hotel Co.*, 106 Ill. 439; *Dean v. Baldwin*, 99 Ill. App. 582; *Davenport v. Plano Implement Co.*, 70 Ill. App. 161; *Peck v. Coalfield Coal Co.*, 11 Ill. App. 88, aff'd 105 Ill. 529. See also *People v.*

Union Consol. El. Ry. Co., 263 Ill. 32, Ann. Cas. 1915 C 388, 105 N. E. 12; *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725, aff'g 105 Ill. App. 271; *Taylor v. Cummings*, 127 Fed. 108, aff'g 117 Fed. 737; *Lake St. El. R. Co. v. Ziegler*, 99 Fed. 114.

Indiana. *Bruner v. Brown*, 139 Ind. 600, 38 N. E. 318; *Coffin v. Ransdell*, 110 Ind. 417, 11 N. E. 20; *Ohio, I. & I. R. Co. v. Cramer*, 23 Ind. 490; *Cincinnati, I. & C. R. Co. v. Clarkson*, 7 Ind. 595.

Iowa. *First Nat. Bank of Ottumwa v. Fulton*, 156 Iowa 734, 137 N. W. 1019; *Wishard v. Hansen*, 99 Iowa 307, 61 Am. St. Rep. 238, 63 N. W. 691; *Price v. Holcomb*, 89 Iowa 123, 56 N. W. 407; *Jackson v. Traer*, 64 Iowa 469, 52 Am. Rep. 449, 20 N. W. 764; *Osgood & Moss v. King*, 42 Iowa 478.

Kansas. *Walburn v. Chenault*, 43 Kan. 352, 23 Pac. 657; *St. Louis, Ft. S. & W. R. Co. v. Tiernan*, 37 Kan. 606, 15 Pac. 544.

Kentucky. *Wyeth v. Renz-Bowles Co.*, 23 Ky. L. Rep. 2337, 66 S. W. 825; *John R. Procter Land Co. v. Cooke*, 19 Ky. L. Rep. 1734, 44 S. W. 391; *Mercer v. Park City Mineral Water Co.*, 18 Ky. L. Rep. 985, 38 S. W. 841; *Phillips v. Covington & C. Bridge Co.*, 2 Metc. 219; *Altenberg v. Grant*, 85 Fed. 345, construing the Kentucky Constitution.

Louisiana. *Edwards v. Bringier Sugar Extracting Co.*, 27 La. Ann. 118.

Maine. *Gillin v. Sawyer*, 93 Me. 151, 44 Atl. 677.

Maryland. *Tompkins v. Sperry, Jones & Co.*, 96 Md. 560, 54 Atl. 254; *Brant v. Ehlen*, 59 Md. 1; *Southern Trust & Deposit Co. v. Yeatman*, 134 Fed. 810, aff'g 130 Fed. 798, construing the Maryland statute.

Massachusetts. *Harvey-Watts Co.*

the constitutions or statutes of many of the states. The reason for the

v. Worcester Umbrella Co., 193 Mass. 138, 78 N. E. 886; New Haven Horse Nail Co. v. Linden Spring Co., 142 Mass. 349, 7 N. E. 773; Boston, B. & G. R. Co. v. Wellington, 113 Mass. 79; Wyman v. American Powder Co., 8 Cush. 168.

Michigan. Brown v. Weeks, 161 N. W. 945; McBryan v. Universal Elevator Co., 130 Mich. 111, 97 Am. St. Rep. 453, 89 N. W. 683; Moore v. Universal Elevator Co., 122 Mich. 48, 80 N. W. 1015; Peninsular Sav. Bank of Detroit v. Black Flag Stove Polish Co., 105 Mich. 535, 63 N. W. 514; Kobogum v. Jackson Iron Co., 76 Mich. 498, 43 N. W. 602; Young v. Erie Iron Co., 65 Mich. 111, 31 N. W. 814.

Minnesota. Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606; Selover v. Isle Harbor Land Co., 100 Minn. 253, 111 N. W. 155, 91 Minn. 451, 98 N. W. 344; Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28, 67 N. W. 652.

Mississippi. Lee v. Cutrer, 96 Miss. 355, 27 L. R. A. (N. S.) 315, Ann. Cas. 1912 B 478, 51 So. 808.

Missouri. Luehrmann v. Lincoln Trust & Title Co., 192 S. W. 1026; Vogeler v. Punch, 205 Mo. 558, 103 S. W. 1001; First Nat. Bank of Deadwood, South Dakota v. Rockefeller, 195 Mo. 15, 93 S. W. 761; L. M. Rumsey Mfg. Co. v. Kaime, 173 Mo. 551, 73 S. W. 470; Berry v. Rood, 168 Mo. 316, 67 S. W. 644; State v. Hogan, 163 Mo. 43, 63 S. W. 378; Van Cleve v. Berkey, 143 Mo. 109, 42 L. R. A. 593, 44 S. W. 743; Woolfolk v. January, 131 Mo. 620, 33 S. W. 432; Foster v. Belcher's Sugar Refining Co., 118 Mo. 238, 24 S. W. 63; Garrett v. Kansas City Coal Min. Co., 11? Mo. 330, 35

Am. St. Rep. 713, 20 S. W. 965; Shickle v. Watts, 94 Mo. 410, 7 S. W. 274; State v. Wood, 84 Mo. 378; Liebke v. Knapp, 79 Mo. 22, 49 Am. Rep. 212; Kraft-Holmes Grocery Co. v. Crow, 36 Mo. App. 288; State v. Wood, 13 Mo. App. 139; Chouteau v. Dean, 7 Mo. App. 210.

Nebraska. Troup v. Horbach, 53 Neb. 795, 74 N. W. 326; Gilkie & Anson Co. v. Dawson Town & Gas Co., 46 Neb. 333, 64 N. W. 978, 1097; Rich v. State Nat. Bank, 7 Neb. 201, 29 Am. Rep. 382.

New Hampshire. Libby v. Mt. Monadnock Mineral Spring & Land Co., 68 N. H. 444, 44 Atl. 602.

New Jersey. Clevenger v. Moore, 71 N. J. L. 148, 58 Atl. 88; American Mutoscope Co. v. State Board of Assessors, 70 N. J. L. 172, 56 Atl. 369; Vineland Grape Juice Co. v. Chandler, 80 N. J. Eq. 437, Ann. Cas. 1914 A 679, 85 Atl. 213; Tooker v. National Sugar Refining Co. of New Jersey, 80 N. J. Eq. 305, 84 Atl. 10; Holcombe v. Trenton White City Co., 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069; Strickland v. National Salt Co., 79 N. J. Eq. 182, 64 Atl. 982; McCarter v. Pitman, G. & C. Gas Co., 74 N. J. Eq. 255, 69 Atl. 211; Ecuadorian Ass'n v. Ecuador Co., 71 N. J. Eq. 757, 65 Atl. 1051, aff'g 70 N. J. Eq. 277, 61 Atl. 481; Easton Nat. Bank v. American Brick & Tile Co., 70 N. J. Eq. 722, 64 Atl. 1095, rev'g judgment 69 N. J. Eq. 326, 60 Atl. 54, as to certain defendants, and aff'g as to others; See v. Heppenheim, 69 N. J. Eq. 36, 61 Atl. 843; Donald v. American Smelting & Refining Co., 62 N. J. Eq. 729, 48 Atl. 771, 1116, rev'g judgment 61 N. J. Eq. 458, 48 Atl. 786; Wetherbee v. Baker, 35 N. J. Eq. 501. See also Enright v. Heckscher, 240 Fed. 863; In re Rem-

rule is that there is no need for the roundabout process of first issuing

ington Automobile & Motor Co., 153 Fed. 345, modifying judgment 139 Fed. 766; Kraft v. Griffon Co., 82 N. Y. App. Div. 29, 81 N. Y. Supp. 438, construing the New Jersey statute.

New Mexico. Medler v. Albuquerque Hotel & Opera House Co., 6 N. M. 331, 28 Pac. 551.

New York. Close v. Noye, 147 N. Y. 597, 41 N. E. 570; Skinner v. Smith, 134 N. Y. 240, 31 N. E. 911; Barr v. New York, L. E. & W. R. Co., 125 N. Y. 263, 26 N. E. 145; Gamble v. Queens County Water Co., 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201, rev'g 52 Hun 166, 5 N. Y. Supp. 124; Veeder v. Mudgett, 95 N. Y. 295; Van Cott v. Van Brunt, 82 N. Y. 535; Beach v. Smith, 30 N. Y. 116; B. & C. Electrical Const. Co. v. Owen, 176 App. Div. 399, 163 N. Y. Supp. 31; Stevens v. Episcopal Church History Co., 140 App. Div. 570, 125 N. Y. Supp. 573; Flour City Nat. Bank v. Shire, 88 App. Div. 401, 84 N. Y. Supp. 810, aff'd 179 N. Y. 587, 72 N. E. 1141; White, Corbin & Co. v. Jones, 79 App. Div. 373, 79 N. Y. Supp. 583; Rafferty v. Buffalo City Gas Co., 37 App. Div. 618, 56 N. Y. Supp. 288; Beebe v. Richmond Light, Heat & Power Co., 3 App. Div. 334, 38 N. Y. Supp. 395; Powers v. Knapp, 85 Hun 38, 32 N. Y. Supp. 622, aff'd 158 N. Y. 733, 53 N. E. 1131; American Silk Works v. Salomon, 4 Hun 135; Trent Import Co. v. Wheelwright, 118 Md. 249, 84 Atl. 543, construing the New York statute.

North Carolina. Goodman v. White, 93 S. E. 906; Hobgood v. Ehlen, 141 N. C. 344, 53 S. E. 857; Clayton v. Ore Knob Co., 109 N. C. 385, 14 S. E. 36; Haywood & P. Plank Road Co. v. Bryan, 51 N. C. 82. But see Neuse River Nav. Co. v. Newbern, 7 Jones L. 275.

Ohio. Gates v. Tippecanoe Stone

Co., 57 Ohio St. 60, 63 Am. St. Rep. 705, 48 N. E. 285; Goodwin v. Evans, 18 Ohio St. 150. But see Henry v. Vermillion & A. R. Co., 17 Ohio 187.

Oklahoma. Webster v. Webster Refining Co., 36 Okla. 168, 47 L. R. A. (N. S.) 697, 128 Pac. 261; McMillen v. Lamb, — N. Y. Misc. —, 166 N. Y. Supp. 656, quoting the Oklahoma Constitution.

Oregon. Farrell v. Davis, 161 Pac. 94; Macbeth v. Banfield, 45 Ore. 553, 106 Am. St. Rep. 670, 78 Pac. 693. See also Pacific Mill Co. v. Inman, 46 Ore. 352, 80 Pac. 424.

Pennsylvania. Gearhart v. Standard Steel Car Co., 223 Pa. 385, 72 Atl. 699; Finletter v. Acetylene Light, Heat & Power Co., 215 Pa. 86, 64 Atl. 429; McNeal Pipe & Foundry Co. v. Bullock, 174 Pa. St. 93, 34 Atl. 594; Shannon v. Stevenson, 173 Pa. St. 419, 34 Atl. 218; American Tube & Iron Co. v. Baden Gas Co., 165 Pa. St. 489, 30 Atl. 940; Johnston v. Merkle Paper Co., 153 Pa. St. 189, 25 Atl. 560, 885; Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. St. 318; Carr v. Le Fevre, 27 Pa. St. 413.

South Dakota. Schiller Piano Co. v. Hyde, 162 N. W. 937; Gardner v. Haines, 19 S. D. 514, 104 N. W. 244.

Tennessee. Morgan Bros. v. Dayton Coal & Iron Co., 134 Tenn. 228, 183 S. W. 1019; Bristol Bank & Trust Co. v. Jonesboro Banking Trust Co., 101 Tenn. 545, 48 S. W. 228; Jones v. Whitworth, 94 Tenn. 602, 30 S. W. 736; Shields v. Clifton Hill Land Co., 94 Tenn. 123, 26 L. R. A. 509, 45 Am. St. Rep. 700, 28 S. W. 668; Kelley v. Fletcher, 94 Tenn. 1, 28 S. W. 1099; Albitztigui v. Guadalupe y Caloo Min. Co., 92 Tenn. 598, 22 S. W. 739; Bedford v. Nashville, C. & St. L. R. Co., 14 Lea 525; Searight v. Payne, 6 Lea 283.

the stock for money, and then paying out the money for the property;

Texas. O'Bear-Nester Glass Co. v. Antiexplo Co., 101 Tex. 431, 16 L. R. A. (N. S.) 520, 130 Am. St. Rep. 865, 109 S. W. 931, 108 S. W. 967; Cole v. Adams, 92 Tex. 171, 46 S. W. 790, 19 Tex. Civ. App. 507, 49 S. W. 1052; Southwestern Portland Cement Co. v. Latta v. Happer, — Tex. Civ. App. —, 193 S. W. 1115; Western Supply & Manufacturing Co. v. United States & M. Trust Co., 41 Tex. Civ. App. 478, 92 S. W. 986; Thayer v. Wathen, 17 Tex. Civ. App. 382, 44 S. W. 906; Lester v. Bemis Lumber Co., 71 Ark. 379, 74 S. W. 518, construing the Texas Constitution.

Utah. Coray v. Perry Irrigation Co., 166 Pac. 672; Union Pac. R. Co. v. Blair, 48 Utah 38, 156 Pac. 948; Richardson v. Treasure Hill Min. Co., 23 Utah 366, 65 Pac. 74; Bear River Valley Orchard Co. v. Hanley, 15 Utah 506, 50 Pac. 611.

Washington. Davies v. Ball, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833; Kroenert v. Johnston, 19 Wash. 96, 52 Pac. 605; Turner v. Bailey, 12 Wash. 634, 42 Pac. 115; Cunningham v. Holley, Mason, Marks & Co., 121 Fed. 720, holding that stock may be issued for property in Washington; Coler v. Tacoma Railway & Power Co., 65 N. J. Eq. 347, 103 Am. St. Rep. 786, 54 Atl. 413, rev'g judgment 64 N. J. Eq. 117, 53 Atl. 680, referring to the Washington decisions.

West Virginia. Merchants' & Mechanics' Sav. Bank v. Belington Coal & Coke Co., 51 W. Va. 60, 41 S. E. 390; Southwestern Portland Cement Co. v. Latta & Happer, — Tex. Civ. App. —, 193 S. W. 1115, holding that stock may be issued for property under the West Virginia statutes.

Wisconsin. Williams v. Brewster, 117 Wis. 370, 93 N. W. 479; La Crosse Brown Harvester Co. v. Goddard, 114 Wis. 610, 91 N. W. 225; Potter v.

Necedah Lumber Co., 105 Wis. 25, 81 N. W. 118, 80 N. W. 88; Jenkins v. Bradley, 104 Wis. 540, 80 N. W. 1025; Whitehill v. Jacobs, 75 Wis. 474, 44 N. W. 630; McBride v. Farrington, 131 Fed. 797, aff'd 149 Fed. 114, relative to the law of Wisconsin. See also First Ave. Land Co. v. Parker, 111 Wis. 1, 87 Am. St. Rep. 841, 86 N. W. 604.

England. Burkinshaw v. Nicolls, 3 App. Cas. 1004; Larocque v. Beauchemin, [1897] App. Cas. 358; In re Wragg, [1897] 1 Ch. 796; Spargo's Case, 8 Ch. App. 407; Woodfall's Case, 3 DeG. & S. 63; Coates' Case, L. R. 17 Eq. 169.

"Payment of stock subscriptions * * * may be in whatever, considering the situation of the corporation, represents to that corporation a fair, just, lawful and needed equivalent for the money subscribed." Liebke v. Knapp, 79 Mo. 22, 49 Am. Rep. 212.

"The directors of a corporation, in the absence of a constitutional or statutory inhibition to the contrary, may receive property in payment for stock in any case in which they are authorized under the charter or articles of incorporation to purchase for the benefit of the corporation, and to subserve the purposes for which it is organized." Macbeth v. Banfield, 45 Ore. 553, 106 Am. St. Rep. 670, 78 Pac. 693.

"Acting in good faith, it was competent for all the stockholders to agree by unanimous concurrence that shares of the corporation should be issued to themselves in exchange for property conveyed by them to the corporation and to acquire which in part the corporation was formed." Garretson v. Pacific Crude Oil Co., 146 Cal. 184, 79 Pac. 838.

labor or services.⁴⁰ "Corporations must own property for the purposes of their legitimate business, and it would be but a useless formality to receive the money in payment for the stock and return it again in payment for the property."⁴¹

"It has been said that, in respect to the right to take property in payment of subscriptions, banks stand upon a different footing from other corporations and that strong reasons exist for holding that the acceptance by them of anything but money in payment of subscriptions is illegal unless expressly authorized."⁴²

When a person enters into a contract with a corporation to convey property to it or perform services, and take stock in payment, or to

Where the statute provides that all subscriptions must be payable in money, but that the commissioners may receive subscriptions payable in money, the subscribers having the privilege of discharging the same in property, and a subscriber is given the privilege of discharging his subscription by the transfer of specific articles of property, but afterwards disposes of such property, he is liable for the amount of his subscription in dollars, and not merely for the value of the property in which he was privileged to pay. *Enslen v. Nathan*, 136 Ala. 412, 34 So. 929.

Where an executor has organized a corporation, transferring land to it and taking stock in exchange therefor where the will provided that he sell the property and distribute the proceeds among the beneficiaries of the will, persons dealing with the corporation and taking stock from it will be deemed charged with notice that the executor has exceeded his powers, and cannot claim to be bona fide purchasers without notice as to the land. *Mitchell v. Carrollton Nat. Bank*, 29 Ky. L. Rep. 1228, 97 S. W. 45.

⁴⁰ *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212; *Chouteau, Harrison & Valle v. Dean*, 7 Mo. App. 210; *Veeder v. Mudgett*, 95 N. Y. 295; *Beach v. Smith*, 30 N. Y. 116; *Spargo's Case*,

8 Ch. App. 407; *Fothergill's Case*, 8 Ch. App. 270.

⁴¹ *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713, 20 S. W. 965, quoted in *Van Cleve v. Berkey*, 143 Mo. 109, 42 L. R. A. 593, 44 S. W. 743.

⁴² "It may be suggested that strong reasons exist for holding that the acceptance of anything but money in payment of subscriptions to the capital stock of a banking association is illegal. No authority for such transactions is found in the statutes, and the nature of the business to be carried on seems to forbid them. The purchase of real estate by a banking association, except for use in its business, and under certain special circumstances, is expressly prohibited. Corporations, other than banking, may, perhaps, take property of certain kinds at a reasonable valuation, and under circumstances entirely free from fraud, in payment of such subscriptions, but banks stand upon a different footing, and the reasons which justify such dealings in the one case do not apply in the other." *Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567. In this case it was held that, in any event, the directors had no authority to accept the property in question if it was worthless, as alleged.

take stock in payment of a claim which he has against it, he must take the stock at its par value, unless there is some agreement to the contrary, although it may be worth less than par.⁴³

A stockholder who is a party to an agreement to accept property for stock cannot subsequently question its validity.⁴⁴ Nor can the successor of a corporation which has issued stock as part consideration for a loan question the sufficiency of the consideration.⁴⁵

§ 3504. — Charter, statutory or constitutional provisions. The power of the corporation to take property in payment for stock and the character of the property which may be so taken is to be determined by the law of the state where the corporation is organized.⁴⁶ As we have seen, the constitutions and statutes of many states expressly permit stock to be issued for property, labor or services,⁴⁷ subject to regulations for the purpose of preventing the issue of watered stock.⁴⁸ On the other hand, the issue of stock for property or services may be altogether prohibited. By the weight of authority, however, it is not prohibited by a provision that stock shall not be issued except upon payment in full, or payment of the par value, or payment in cash.⁴⁹ If a man contracts to take shares under such a statute, said Lord Justice Gifford in an English case, "he must pay for them, to use a homely phrase, 'in meal or in malt'; he must either pay in money or in money's worth. If he pays in one or the other, that will be a satisfaction."⁵⁰ This conclusion, it has been said in

⁴³ Where a landowner agrees to take stock of a railroad company in payment of the damages caused by the construction of its road through his land, he must take the stock at its par value. *Hoffman v. Bloomsburg & S. R. R.*, 157 Pa. St. 174, 27 Atl. 564.

⁴⁴ *Cunningham v. Holley, Mason, Marks & Co.*, 121 Fed. 720; *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838.

⁴⁵ *Lindsey v. Pasco Power & Water Co.*, 203 Fed. 251.

⁴⁶ *McBride v. Farrington*, 131 Fed. 797, aff'd 149 Fed. 114; *Joseph Bancroft & Sons Co. v. Bloede*, 106 Fed. 396, 52 L. R. A. 734, certiorari denied 181 U. S. 620, 45 L. Ed. 1031 (mem. dec.); *Lester v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518; *Maine v.*

Butler, 130 Mass. 196; *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115. See also *Taylor v. Cummings*, 127 Fed. 108, aff'g 117 Fed. 737.

⁴⁷ See § 3503, supra.

⁴⁸ See § 3575, infra.

⁴⁹ *Lee v. Cutrer*, 96 Miss. 355, 27 L. R. A. (N. S.) 315, Ann. Cas. 1912 B 478, 51 So. 808; *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212; *Kraft-Holmes Grocery Co. v. Crow*, 36 Mo. App. 288; *State v. Wood*, 13 Mo. App. 139; *Larocque v. Beauchemin*, [1897] App. Cas. 358; *In re Wragg*, [1897] 1 Ch. 796; *Spargo's Case*, 8 Ch. App. 407; *Drummond's Case*, 4 Ch. App. 772; *Coate's Case*, L. R. 17 Eq. 169.

⁵⁰ *Drummond's Case*, 4 Ch. App. 772, quoted with approval in *Van Cleve v.*

substance, "rests upon the common-sense idea that the statute does not exact of the company the barren form, the idle ceremony, of taking a check from the shareholder for the value of his stock with one hand, and giving him simultaneously with the other a check for the same amount for the property which it is authorized to purchase from him."⁵¹ The word "cash" under such circumstances is deemed to have been used as a term meaning the opposite of credit, and not to designate the medium of payment.⁵²

It has been held that where the statute provides that subscriptions "must be payable in money," a subscription by which it is agreed that land shall be conveyed to the corporation in payment is prohibited and unenforceable.⁵³ And also that where the charter requires payment in money, an agreement that the subscriber may pay in goods,⁵⁴ or in land,⁵⁵ will be considered as a fraud upon the other stockholders and corporate creditors, and that the subscriber will be required to pay in money. But there is authority to the effect that stock may be paid for in labor or property even where the statute requires the corporators to certify in the articles of incorporation that a designated proportion of the stock has been actually paid up in lawful money of the United States.⁵⁶ And also that a provision requiring payment in money is satisfied by applying the amount of a debt due by the corporation in payment of his subscription.⁵⁷

Berkey, 143 Mo. 109, 42 L. R. A. 593, 44 S. W. 743; *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713, 20 S. W. 965; *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212.

⁵¹ *Sherwood, J.*, in *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212.

⁵² "The word 'cash' has a number of meanings, as will appear from an examination of the authorities, and in sales is frequently used as a term meaning the opposite of credit. The particular meaning to be attributed to this word must therefore be ascertained from the context in which it is used. This section of the charter * * * provides that stock 'may be paid for in cash or in monthly installments,' etc., thus providing in terms for a sale either for cash or on credit; and it is manifest from this contention that the word 'cash' is used, not to

designate the medium of payment, but as a term meaning the opposite of credit." *Lee v. Cutrer*, 96 Miss. 355, 27 L. R. A. (N. S.) 315, Ann. Cas. 1912 B 478, 51 So. 808.

⁵³ *Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 So. 578.

Where the statute provides that "nothing but money shall be considered as payment of any part of the capital stock," an agreement to issue stock for patents is illegal and unenforceable. *Maine v. Butler*, 130 Mass. 196.

⁵⁴ *Henry v. Vermillion & A. R. Co.*, 17 Ohio 187.

⁵⁵ *Noble v. Callender*, 20 Ohio St. 199.

⁵⁶ *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644.

⁵⁷ *Veeder v. Mudgett*, 95 N. Y. 295. See also § 3515, *infra*.

The effect of provisions requiring payment in cash or in money on the right to take notes for stock will be considered in a subsequent section.⁵⁸

It has been held that a provision authorizing lands to be considered as payment does not authorize leaseholds to be so considered,⁵⁹ and that a provision authorizing the issuing of stock for "real estate or leases thereof" does not authorize the acceptance of options on real estate for stock.⁶⁰

The fact that a corporation, because of charter or statutory provisions, has no power to receive subscriptions payable in property or services, as where subscriptions are required to be payable in cash, does not prevent the corporation, after it is formed, from accepting payment in property or services needed in its business, if the transaction is free from fraud, and the value of the property or services is such as to make them a fair equivalent of cash.⁶¹

A provision that no corporation shall issue stock except for money paid, labor done or property actually received does not operate to confer power on corporations to take property in payment for stock, or affect the character of the property which it may so take, but is rather in the nature of a limitation on their powers restraining them from issuing stock having only a fictitious value.⁶² The effect of such a provision on the right to take notes in payment for stock will be considered in a subsequent section.⁶³

It is sometimes provided that not more than a specified percentage of each subscription may be paid in property.⁶⁴

⁵⁸ See § 3512 et seq., *infra*.

⁵⁹ *Basshor v. Dressel*, 34 Md. 503.

⁶⁰ This is true even though the options are "in hand," and it is particularly true where the options are not owned by the persons to whom the stock is issued at the time, but they merely have them "in view." *Hobgood v. Ehlen*, 141 N. C. 344, 53 S. E. 857.

⁶¹ *Coe v. East & W. R. Co.*, 52 Fed. 531; *Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 So. 578; *Frenkel v. Hudson*, 82 Ala. 158, 60 Am. Rep. 736, 2 So. 758; *Boston, B. & G. R. Co. v. Wellington*, 113 Mass. 79; *Beach v. Smith*, 30 N. Y. 116.

⁶² Such a provision does not authorize the corporation to accept stock in

another corporation in payment of a subscription. *Lester v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518.

⁶³ See § 3512 et seq., *infra*.

⁶⁴ A charter provision that the capital stock shall be a specified amount which shall be divided into a specified number of shares of \$100 each, "which shall be paid in cash except that one-half of the capital stock or less may be paid in property, labor or services," means that half of each subscriber's subscription must be paid in money and that the other half may be paid in property, and not merely that one-half of the entire authorized capital stock of the company, without reference to individual subscriptions thereto, may be paid for in property and

In some states leave to issue stock for property is required to be obtained from a designated public official or board,⁶⁵ or the company is required to file with a designated public officer a statement showing the prices paid or to be paid for labor or property for which stock is issued.⁶⁶ And in others the statute requires a previous authorization by the stockholders before property can be received in payment of subscriptions.⁶⁷ But where an agreement to pay in property has been fully executed on both sides, the corporation cannot question its validity on the ground that it was not authorized by the stockholders,

that such half may be subscribed for by one subscriber and the whole of his subscription paid for in property other than money. Hence it is not permissible for a subscriber to turn over a patent to the company as full payment of his own and other subscriptions. *Stemple v. Bruin*, 57 Fla. 173, 49 So. 151.

⁶⁵ Iowa Code Supp. 1907, § 1641 b, requires the corporation to first obtain permission from the executive council of the state, who are required to ascertain and fix the value of the property to be received. *Sykes v. Pure Food Cider Co.*, 157 Iowa 601, 138 N. W. 554; *First Nat. Bank of Ottumwa v. Fulton*, 156 Iowa 734, 137 N. W. 1019.

Mass. Rev. Laws, c. 110, § 144, provides that if the capital is to be paid by a conveyance of property, a statement must be filed with the secretary of the commonwealth setting forth the property conveyed in such detail as is satisfactory to the commissioner of corporations, and indorsed with a certificate signed by him that he is satisfied that the valuation put upon that property is a fair and reasonable one. *Harvey-Watts Co. v. Worcester Umbrella Co.*, 193 Mass. 138, 78 N. E. 886.

⁶⁶ The Pennsylvania statute contains such a requirement in respect to railroad companies. Act May 7, 1887, P. L. 94. *Yetter v. Delaware Valley R. Co.*, 206 Pa. 485, 56 Atl. 57.

The remedy for violation of this

provision by proceedings by the attorney general, given by § 4 of the act, is exclusive, and a stockholder cannot maintain a suit to have stock issued without complying with it, declared invalid. *Id.*

⁶⁷ Maryland Code 1888, art. 23, § 69, that subscriptions in land "shall not be so received unless the same shall have been previously authorized by the stockholders assembled in general meeting, pursuant to call, to consider the propriety of receiving the said subscription and of fixing the terms upon which it shall be received."

Where at the organization meeting, at which a majority of the stockholders was present, and a majority of the stock was represented, it was announced that unless certain property was accepted as payment on a subscription, the company could not legally be organized, and the subscribers thereupon, without objection, proceeded to organize the company, it was held that they thereby accepted such property as a cash payment, and that, while the state might have objected, the corporation could not do so, no rights of creditors being involved. *Southern Trust & Deposit Co. v. Yeatman*, 134 Fed. 810, aff'g 130 Fed. 798.

The presence of all of the stockholders at the meeting does away with the necessity for notice of the meeting. *Tompkins v. Sperry, Jones & Co.*, 96 Md. 560, 54 Atl. 254.

especially where it has exercised acts of ownership over the property for a long period of time, and does not undertake to avoid the contract until after conditions have changed and it has become impossible to restore the status quo.⁶⁸ In any event the corporation cannot recover the amount of such a subscription in money, since as between it and the subscriber, the subscription agreement, if binding at all, is binding in its entirety, and the corporation cannot demand its enforcement save upon the agreed terms.⁶⁹

Under some statutes where subscriptions are made in property, the articles of incorporation are required to contain a description of such property with a statement of its fair cash value.⁷⁰ But a failure to comply with such a requirement will not render a payment in property void, or prevent the subscriber from being entitled to credit for the amount so paid, in the absence of any provision to that effect in the statute.⁷¹ It is sometimes provided that all payments must be made in money unless it is stated in the charter that the capital stock or some designated portion thereof shall be payable in property, labor or services.⁷²

It is sometimes provided that certificates must have indorsed on the face thereof what amount or portion of the par value has been paid to the corporation, and whether such payment was made in money or property;⁷³ or that the words "issued for property" must be stamped on the face of the certificate when such is the case.⁷⁴

§ 3505. — Payment in services. A corporation may issue stock to employees or others in payment for services rendered to it,⁷⁵ as, for

⁶⁸ Southern Trust & Deposit Co. v. Yeatman, 134 Fed. 810, aff'g 130 Fed. 798.

⁶⁹ Southern Trust & Deposit Co. v. Yeatman, 134 Fed. 810, aff'g 130 Fed. 798.

⁷⁰ Utah Comp. Laws 1907, § 316, contains such requirements, and further provides that except in the case of corporations organized for mining or irrigation purposes, such statements must be supplemented by affidavits of three persons to the effect that they know the property and that it is reasonably worth the amount in cash for which it was accepted by the corporation. Union Pac. R. Co. v. Blair, 48 Utah 38, 156 Pac. 948.

⁷¹ Union Pac. R. Co. v. Blair, 48 Utah 38, 156 Pac. 948.

⁷² Stemple v. Bruin, 57 Fla. 173, 49 So. 151.

⁷³ Iowa Code 1897, § 1627. Failure to comply with this provision does not invalidate the certificates. French v. Northwestern Laundry, 132 Iowa 81, 107 N. W. 430.

⁷⁴ N. J. Rev. St. 1877, p. 186, § 55, contained such a requirement, but there is no such requirement in the law of 1896. See Easton Nat. Bank v. American Brick & Tile Co., 70 N. J. Eq. 722, 64 Atl. 1095, aff'g 69 N. J. Eq. 326, 60 Atl. 54.

⁷⁵ Arkansas. Harriage v. Daley, 121 Ark. 23, 180 S. W. 333.

example, for the services of a superintendent;⁷⁶ or for services of an agent in procuring subscriptions to its capital stock;⁷⁷ or for the services of its president in procuring options on land and agreements to convey land to the company,⁷⁸ or for the services of an attorney.⁷⁹ And a corporation finding it necessary to borrow money for the purposes of its business may issue stock in payment for services in procuring a loan for it.⁸⁰ But an agreement to issue stock in payment for services rendered to a third person individually is unenforceable.⁸¹

Where the statute prohibits the issuance of stock except for money paid, labor done or property actually received, it has been held that the only work or service for which the issuance of stock is authorized is work or services performed before the stock is issued,⁸² and that it cannot be issued for work or services to be performed in the future.⁸³

California. Cortelyou v. Imperial Land Co., 156 Cal. 373, 104 Pac. 695; Ellsworth v. National Home & Town Builders, 33 Cal. App. 1, 164 Pac. 14; Turner v. Fidelity Loan Concern, 2 Cal. App. 122, 83 Pac. 62, 70.

Colorado. Arapahoe Cattle & Land Co. v. Stevens, 13 Colo. 534, 22 Pac. 823; Calivada Colonization Co. v. Hays, 119 Fed. 202.

Delaware. John W. Cooney Co. v. Arlington Hotel Co., — Del. Ch. —, 101 Atl. 879.

Illinois. Lake St. El. R. Co. v. Ziegler, 99 Fed. 114, construing the Illinois Constitution.

Minnesota. Randall Printing Co. v. Sanitas Mineral Water Co., 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606.

Missouri. Vogeler v. Punch, 205 Mo. 558, 103 S. W. 1001.

New Jersey. Clevenger v. Moore, 71 N. J. L. 148, 58 Atl. 88; Vineland Grape Juice Co. v. Chandler, 80 N. J. Eq. 437, Ann. Cas. 1914 A 679, 85 Atl. 213. See also Porch v. Agnew Co., 70 N. J. Eq. 328, 61 Atl. 721.

Tennessee. Doak v. Stahlman, 58 S. W. 741.

“ ‘Work done’ is an equivalent for money.” John W. Cooney Co. v. Arlington Hotel Co., — Del. Ch. —, 101 Atl. 879.

Other stockholders cannot complain of the action of the directors in surrendering to a stockholder his note given for stock in full discharge of his valid claim for services exceeding in value the value of the stock. Jones v. Johnson, 86 Ky. 530, 6 S. W. 582. See also § 3502, supra.

⁷⁶ Chater v. San Francisco Sugar Refining Co., 19 Cal. 219, where it was held that performance of the services (the agreement being for a term of years) was not a condition precedent to the right to the stock.

⁷⁷ Cincinnati, I. & C. R. Co. v. Clarkson, 7 Ind. 595.

⁷⁸ Calivada Colonization Co. v. Hays, 119 Fed. 202.

⁷⁹ Turner v. Fidelity Loan Concern, 2 Cal. App. 122, 83 Pac. 62, 70; Lee v. Cutrer, 96 Miss. 355, 27 L. R. A. (N. S.) 315, Ann. Cas. 1912 B 478, 51 So. 808; Vogeler v. Punch, 205 Mo. 558, 103 S. W. 1001.

⁸⁰ Arapahoe Cattle & Land Co. v. Stevens, 13 Colo. 534, 22 Pac. 823.

⁸¹ Rogers v. Gladiator Gold Mining & Milling Co., 21 S. D. 412, 113 N. W. 86.

⁸² Stevens v. Episcopal Church History Co., 140 N. Y. App. Div. 570, 125 N. Y. Supp. 573.

⁸³ John W. Cooney Co. v. Arlington Hotel Co., — Del. Ch. —, 101 Atl. 879;

But there is authority to the contrary.⁸⁴ It has also been held that such a provision has reference to labor performed for the company after its incorporation, and does not embrace services in promoting the corporation.⁸⁵

Lothrop v. Goudeau, — La. —, 76 So. 794; *Shaw v. Ansaldi Co., Inc.*, — N. Y. App. Div. —, 165 N. Y. Supp. 872; *B. & C. Electrical Const. Co. v. Owen*, 176 N. Y. App. Div. 399, 163 N. Y. Supp. 31; *Morgan v. Bon Bon Co.*, 165 N. Y. App. Div. 89, 150 N. Y. Supp. 668; *Hobgood v. Ehlen*, 141 N. C. 344, 53 S. E. 857.

Stock cannot lawfully be issued to a person for services to be performed as president of the corporation for the ensuing year after his election. *B. & C. Electrical Const. Co. v. Owen*, 176 N. Y. App. Div. 399, 163 N. Y. Supp. 31.

"This requirement cannot be satisfied by the purchase of an executory contract for the performance of services in futuro." *Stevens v. Episcopal Church History Co.*, 140 N. Y. App. Div. 570, 125 N. Y. Supp. 573.

"It may be true, as between the corporation and a stockholder, that shares may be issued for services to be performed, though even that is doubtful. * * * But when the interests of creditors are affected 'work done' should not include prospective labor as an equivalent for money in exchange for shares of stock. By a strict construction 'work done' does not include work to be done, or work done and to be done." *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

In *Vineland Grape Juice Co. v. Chandler*, 80 N. J. Eq. 437, Ann. Cas. 1914 A 679, 85 Atl. 213, it is said that it is at least doubtful whether stock may be issued in anticipation of work and labor afterwards to be performed or services afterwards to be rendered.

Even if stock cannot lawfully be issued in anticipation of work or serv-

ices to be performed in the future, "when it is issued and the work and labor are subsequently performed, or the services rendered, and they are equal in value to the par value of the stock which has been issued in payment therefor, it does not lie in the mouth of the corporation to attack the transaction in a court of equity, without at the same time tendering itself ready to pay to the parties to whom the stock was issued, or to their assigns, the full value of the work done or services rendered for its benefit." *Vineland Grape Juice Co. v. Chandler*, 80 N. J. Eq. 437, Ann. Cas. 1914 A 679, 85 Atl. 213.

⁸⁴ *Shannon v. Stevenson*, 173 Pa. St. 419, 34 Atl. 218.

In *Vogeler v. Punch*, 205 Mo. 558, 103 S. W. 1001, it was held that services rendered and to be rendered by an attorney were a sufficient consideration for stock issued to him.

Such a provision "does not prevent payment for labor or services bona fide to be thereafter rendered, any more than it prevents contracts to pay in advance for property to be furnished." *Shannon v. Stevenson*, 173 Pa. St. 419, 34 Atl. 218.

⁸⁵ *Shaw v. Ansaldi Co., Inc.*, — N. Y. App. Div. —, 165 N. Y. Supp. 872; *Lamphear v. Lang*, 157 N. Y. App. Div. 306, 141 N. Y. Supp. 967; *Stevens v. Episcopal Church History Co.*, 140 N. Y. App. Div. 570, 125 N. Y. Supp. 573; *Herbert v. Duryea*, 34 N. Y. App. Div. 478, 54 N. Y. Supp. 311, aff'd 164 N. Y. 596, 58 N. E. 1088. See also *John W. Cooney Co. v. Arlington Hotel Co.*, — Del. Ch. —, 101 Atl. 879.

"Services rendered in bringing a corporation into existence are neither

A corporation cannot, at least as against creditors or dissenting stockholders, issue its stock to a person as a gift for his influence and recommendation;⁸⁶ nor merely for the use of his name in the name of the corporation,⁸⁷ or as a director.⁸⁸ But it may issue stock to a person in consideration of his giving up a position with another person or company, and becoming its president or manager.⁸⁹ And it has been held that a bank may issue stock to a person in consideration of his acting as a director and agreeing that a firm, of which he is a member, will give the bank all their business and use their influence in its favor.⁹⁰

An agreement to secure customers and business for the corporation cannot be regarded as property or its equivalent, where the successful termination of the projected enterprise is problematical, and it cannot be said with reasonable certainty that any substantial advantage or benefit will inure to the corporation.⁹¹

§ 3506. — General nature of property that may be taken. The property which a corporation may accept in exchange for its stock must be of a kind which the corporation may lawfully acquire and hold in carrying out the purposes of its incorporation,⁹² and which is nec-

cash nor property." *Herbert v. Duryea*, 34 N. Y. App. Div. 478, 54 N. Y. Supp. 311, aff'd 164 N. Y. 596, 58 N. E. 1088.

Where all of the then stockholders agree that stock may be issued to promoters for their services in promoting and organizing the corporation, and no question as to the rights of subsequent stockholders is involved, the corporation may legally issue such stock, and its issuance must be deemed to have been upon sufficient consideration. *Fitzpatrick v. O'Neill*, 43 Mont. 552, Ann. Cas. 1912 C 296, 118 Pac. 273.

As to the liability of the corporation for services and expenses of promoters generally, see § 164, *supra*.

⁸⁶ *Peninsular Sav. Bank of Detroit v. Black Flag Stove Polish Co.*; 105 Mich. 535, 63 N. W. 514.

⁸⁷ *Webster v. Webster Refining Co.*, 36 Okla. 168, 47 L. R. A. (N. S.) 697, 128 Pac. 261.

⁸⁸ *Randall Printing Co. v. Sanitas*

Mineral Water Co., 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606.

⁸⁹ *Shannon v. Stevenson*, 173 Pa. St. 419, 34 Atl. 218.

⁹⁰ *Rich v. State Nat. Bank*, 7 Neb. 201, 29 Am. Rep. 382.

⁹¹ *Holman v. Thomas*, 171 Fed. 219.

⁹² *Joseph Bancroft & Sons Co. v. Bloede*, 106 Fed. 396, 52 L. R. A. 734, certiorari denied 181 U. S. 620, 45 L. Ed. 1031 (mem. dec.); *Lester v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518; *Stevens v. Episcopal Church History Co.*, 140 N. Y. App. Div. 570, 125 N. Y. Supp. 573; *Sargent v. American Bank & Trust Co.*, 80 Ore. 16, 156 Pac. 431, 154 Pac. 759; *Macbeth v. Banfield*, 45 Ore. 553, 106 Am. St. Rep. 670, 78 Pac. 693. See also *In re Waterloo Organ Co.*, 134 Fed. 341, rev'g 128 Fed. 517.

Maryland Code 1888, art. 23, § 69, provides that the property must be "such as it is proper that the said corporation shall own for the advancement of the purposes for which it was

essary or proper for it to own in carrying on its business.⁹³ It cannot lawfully issue stock for property which its charter does not authorize it to acquire, or for property acquired for an unauthorized purpose.⁹⁴

incorporated." *Southern Trust & Deposit Co. v. Yeatman*, 134 Fed. 810, aff'g 130 Fed. 798.

The New York statute provides that the property must be "for the use and lawful purposes" of the corporation. *Rafferty v. Buffalo City Gas Co.*, 37 N. Y. App. Div. 618, 56 N. Y. Supp. 288.

⁹³ *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069; *See v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843; *Stevens v. Episcopal Church History Co.*, 140 N. Y. App. Div. 570, 125 N. Y. Supp. 573; *Powell v. Murray*, 3 N. Y. App. Div. 273, 38 N. Y. Supp. 233, aff'd 157 N. Y. 717, 53 N. E. 1130.

The property must be of the kind or character in which the corporation deals or which it requires in its business. *Union Pac. R. Co. v. Blair*, 48 Utah 38, 156 Pac. 948.

Pub. Acts 1907, Act No. 146, § 2, specifically provides that only such property shall be taken as the purposes of the corporation shall require. *Brown v. Weeks*, — Mich. —, 161 N. W. 945.

⁹⁴ *Powell v. Murray*, 3 N. Y. App. Div. 274, 38 N. Y. Supp. 233, aff'd 157 N. Y. 717, 53 N. E. 1130.

Where a manufacturing corporation organized for the manufacture of electric lamp appliances and other articles connected with electric machinery issued stock to individuals in exchange for an assignment from them to it of a contract with a foreign corporation, by which they had acquired the exclusive right to sell its product in the state and elsewhere, it was held that the contract was ultra vires, as the business proposed to be carried on under it was foreign to the business

for which the corporation was created, and that the purchase of the contract was not a purchase of property necessary to its business, within a statute allowing such a purchase, and payment of the price in stock, and exempting the holders from liability to any further payments. *Powell v. Murray*, 3 N. Y. App. Div. 273, 38 N. Y. Supp. 233, aff'd 157 N. Y. 717, 53 N. E. 1130.

A corporation cannot issue stock for a patent to enable it to engage in business in territory outside the territory to which it is restricted by its articles of incorporation, at least without the consent of all the stockholders. *Kimball v. New England Roller Grate Co.*, 69 N. H. 485, 45 Atl. 253.

A corporation for the purpose of manufacturing and supplying electricity for lighting, heating and power cannot issue its stock for electric light plants acquired for the purpose of sale. *Montgomery v. Brush Elec. Illuminating Co.*, 48 N. Y. App. Div. 12, 62 N. Y. Supp. 606, aff'd 168 N. Y. 657, 61 N. E. 1131.

A bank has no authority to take real estate in payment of subscriptions, where the statute expressly prohibits the purchase of real estate by banks except for use in its business, and under certain special circumstances. *Sargent v. American Bank & Trust Co.*, 80 Ore. 16, 156 Pac. 431, 154 Pac. 759. *See also Coddington v. Canada*, 157 Ind. 243, 61 N. E. 567.

The prohibition in the New York Stock Corporation Law against the issue of stock by a corporation, except for property actually received for its "lawful purposes," does not restrict a corporation, organized to manufac-

The property must be of a substantial nature, having a pecuniary value capable of ascertainment,⁹⁵ and must be something real and tangible as distinguished from something constructive or speculative;⁹⁶ and it has been held that it must be of such a character that it can be delivered to the corporation, instead of being merely communicated to its officers or employees.⁹⁷ It must also be such as is capable of being applied to the payment of debts and of distribution among the stockholders.⁹⁸ And it is sometimes specifically provided by statute that only such property may be taken for stock as can be sold and transferred by the corporation,⁹⁹ and as shall be subject to levy and sale on execution, or other process issued out of any court having competent jurisdiction, for the satisfaction of any judgment or decree against the corporation.¹

ture, sell and distribute gas, exclusively to the object thus expressed; but it may issue its stock in exchange for all the stock of another gas company, if the transaction is otherwise permissible. *Rafferty v. Buffalo City Gas Co.*, 37 N. Y. App. Div. 618, 56 N. Y. Supp. 288. In the course of its opinion in this case the court says, with reference to the words lawful purposes: "They are very general, and would seem primarily to mean purposes not foreign to the business of the corporation, and such as are not disconnected with the lawful management of that business. * * * The words 'lawful purposes' are not to be construed with the narrow restriction which would apply them exclusively to the object for which the corporation was created, namely, the manufacture and sale and distribution of gas. If the proposed transaction is otherwise legal, we should construe it to be within the lawful purposes of the corporation, the statute permitting the purchase to be made."

See also *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115, where it was held that the purchase of property in another state was not ultra vires.

⁹⁵ *Stevens v. Episcopal Church His-*

tory Co., 140 N. Y. App. Div. 570, 125 N. Y. Supp. 573. See also *Scully v. Automobile Finance Co.*, — Del. Ch. —, 101 Atl. 908.

⁹⁶ *Scully v. Automobile Finance Co.*, — Del. Ch. —, 101 Atl. 908; *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069; See *v. Heppenheim*, 69 N. J. Eq. 36, 61 Atl. 843; *General Bonding & Casualty Ins. Co. v. Mosely*, — Tex. Civ. App. —, 174 S. W. 1031.

⁹⁷ *O'Bear-Nester Glass Co. v. Antiexplo. Co.*, 101 Tex. 431, 16 L. R. A. (N. S.) 520, 130 Am. St. Rep. 865, 109 S. W. 931, 108 S. W. 967; *General Bonding & Casualty Ins. Co. v. Mosely*, — Tex. Civ. App. —, 174 S. W. 1031. See also *Scully v. Automobile Finance Co.*, — Del. Ch. —, 101 Atl. 908.

⁹⁸ See *Webster v. Webster Refining Co.*, 36 Okla. 168, 47 L. R. A. (N. S.) 697, 128 Pac. 261; *O'Bear-Nester Glass Co. v. Antiexplo. Co.*, 101 Tex. 431, 16 L. R. A. (N. S.) 520, 130 Am. St. Rep. 865, 109 S. W. 931, 108 S. W. 967; *General Bonding & Casualty Ins. Co. v. Mosely*, — Tex. Civ. App. —, 174 S. W. 1031.

⁹⁹ Pub. Acts 1907, Act No. 146, § 2. *Brown v. Weeks*, — Mich. —, 161 N. W. 945.

¹ Pub. Acts 1907, Act No. 146, § 2.

§ 3507. — **Patents, trade-marks, secret formulae, etc.** A corporation may issue stock in exchange for patents or patent rights, or a license to use patents,² or for trade-marks³ which it may use in the promotion of its corporate business, but not for inventions or patents,⁴ or so-called secret processes or formulae,⁵ of no substantial value.

Brown v. Weeks, — Mich. —, 161 N. W. 945.

The words "other process" in the statute are broad enough to include decrees and orders of a court of chancery, and hence this provision does not prohibit the taking of patents, trade-marks, or the good-will of a business, since they can all be sold under the process of a court of chancery. The fact that good-will cannot be sold separately is unimportant. **Brown v. Weeks**, — Mich. —, 161 N. W. 945.

² **United States**. **Humaston v. American Tel. Co.**, 20 Wall. 20, 22 L. Ed. 279. See **Kimbell v. Chicago Hydraulic Press Brick Co.**, 119 Fed. 102.

Alabama. **State v. Webb**, 110 Ala. 214, 20 So. 462.

California. **Harrison v. Armour**, 169 Cal. 787, 147 Pac. 1166.

Louisiana. **Edwards v. Bringier Sugar-Extracting Co.**, 27 La. Ann. 118.

Massachusetts. **New Haven Horse Nail Co. v. Linden Spring Co.**, 142 Mass. 349, 7 N. E. 73.

Michigan. **Brown v. Weeks**, 161 N. W. 945; **McBryan v. Universal Elevator Co.**, 130 Mich. 111, 97 Am. St. Rep. 453, 89 N. W. 683; **Moore v. Universal Elevator Co.**, 122 Mich. 48, 80 N. W. 1015.

New Jersey. **American Mutoscope Co. v. State Board of Assessors**, 70 N. J. L. 172, 56 Atl. 369; **Easton Nat. Bank v. American Brick & Tile Co.**, 70 N. J. Eq. 722, 64 Atl. 1095, aff'g 69 N. J. Eq. 326, 60 Atl. 54; **Way v. American Grease Co.**, 60 N. J. Eq. 263, 44 Atl. 44.

New York. **Skinner v. Smith**, 134 N. Y. 240, 31 N. E. 911.

Oregon. **Farrell v. Davis**, 161 Pac. 94.

Pennsylvania. Act April 29, 1874, § 17, P. L. 73, expressly provides that full paid stock may be issued for patent rights to the amount of the value thereof. **Finletter v. Acetylene Light, Heat & Power Co.**, 215 Pa. 86, 64 Atl. 429.

Wisconsin. **Whitehill v. Jacobs**, 75 Wis. 474, 44 N. W. 630.

In **Mountain Water Works Const. Co. v. Holme**, 49 Colo. 412, 113 Pac. 501, a contract by a corporation extending the time of payment for stock in consideration of an assignment of a patent to it by the subscriber was held to be valid.

³ **Brown v. Weeks**, — Mich. —, 161 N. W. 945.

⁴ Payment for stock in an invention or patent right of no ascertained value, and which turns out to be worthless, is not a payment in money or its equivalent, and is not a good payment as against creditors. **Gillett v. Chicago Title & Trust Co.**, 230 Ill. 373, 82 N. E. 891, aff'g 131 Ill. App. 66; **Chisholm v. Forny**, 65 Iowa 333, 21 N. W. 664; **Maine v. Butler**, 130 Mass. 196; **Van Cleve v. Berkey**, 143 Mo. 109, 42 L. R. A. 593, 44 S. W. 743; **National Tube Works Co. v. Gilfillan**, 46 Hun (N. Y.) 248, aff'd 124 N. Y. 302, 26 N. E. 538; **Tasker v. Wallace**, 6 Daly (N. Y.) 364. See also **National Tube-Works v. Gilfillan**, 124 N. Y. 302, 26 N. E. 538, aff'g 46 Hun (N. Y.) 248.

The possibility of obtaining a patent, which possibly has no commercial value, is not a sufficient consideration for stock. **State v. Webb**, 97 Ala. 111, 38 Am. St. Rep. 151, 12 So. 377.

See also § 3577, infra.

⁵ So-called secret formulae were held

So it has been held that a secret unpatented formula or recipe for the manufacture of a compound to be mixed with gasoline, kerosene and other oils to prevent explosions is not property which can be taken for stock under a provision that stock may be issued for property actually received.⁶ Nor, under such a provision, can stock be issued for an unpatented process for manufacturing gasoline, consisting merely of a method of constructing refineries, which is not even a secret process and may be used by any one who knew it or could find it out from the many people who did know it, and which is not shown to be of actual value.⁷

An assignment of a right to use a play which the subscriber is to write in the future, and which right has no market value, is not a sufficient payment of a subscription.⁸ Nor can stock legally be issued in consideration of a business idea of no commercial value, which others have used and which any one can use freely.⁹

§ 3508. — Mines, mining and oil leases, etc. A mining company may issue stock in payment of a mine or mining lands,¹⁰ or a

not to be a sufficient consideration for stock where it appeared that there was no such variation from general known formulae as to constitute any secret process which was of any substantial value to the corporation, and especially where the evidence was insufficient to show that any such formulae were delivered to the corporation. *Berger v. National Architects' Bronze Co.*, 173 N. Y. App. Div. 680, 160 N. Y. Supp. 331.

Stock cannot legally be issued for an unpatented formula for making dyes, which is claimed to be a secret one, but which in fact is well known to dye manufacturers, and is of little or no value. *Dean v. Baldwin*, 99 Ill. App. 582.

⁶ *O'Bear-Nester Glass Co. v. Antiexplo Co.*, 101 Tex. 431, 16 L. R. A. (N. S.) 520, 130 Am. St. Rep. 865, 109 S. W. 931, 108 S. W. 967.

⁷ *Webster v. Webster Refining Co.*, 36 Okla. 168, 47 L. R. A. (N. S.) 697, 128 Pac. 261.

⁸ *Gillett v. Chicago Title & Trust*

Co., 230 Ill. 373, 82 N. E. 891, aff'g 131 Ill. App. 66.

⁹ *Scully v. Automobile Finance Co.*, — Del. Ch. —, 101 Atl. 908.

¹⁰ **United States.** *Foreman v. Bigelow*, 4 Cliff. 508, Fed. Cas. No. 4,934; *Phelan v. Hazard*, 5 Dill. 45, Fed. Cas. No. 11,068. See *Stratton's Independence v. Dines*, 135 Fed. 449, aff'g 126 Fed. 968.

Alabama. See *Howison v. Baird*, 145 Ala. 683, 40 So. 94.

California. *Turner v. Markham*, 155 Cal. 562, 102 Pac. 272; *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377.

Colorado. The statute expressly authorizes the directors of a mining corporation to purchase mines and issue stock to the amount of the value thereof in payment therefor, and provides that the stock so issued shall be taken to be full paid. 1 Mill's Ann. St. §§ 490, 582. *Homestead Min. Co. v. Reynolds*, 30 Colo. 330, 70 Pac. 422; *Speer v. Bordeleau*, 20 Colo. App. 413, 79 Pac. 332; *Buck v. Jones*, 18 Colo. App. 250, 70 Pac. 951.

lease of mining lands,¹¹ or for options on mining property,¹² provided they are shown to have an actual existence, and are not intangible and mythical,¹³ or for machinery to be used in mining operations.¹⁴ It has also been held that an oil company may issue stock in payment for oil leases,¹⁵ and that a natural gas company may take land and gas wells for the purpose of obtaining gas.¹⁶

§ 3509. — Construction of railroads, etc. A railroad company may contract to issue stock, and issue the same in payment for materials and labor in the construction of its road, or in payment of its contractors,¹⁷ or in payment for land necessary for the construction of

Maryland. *Brant v. Ehlen*, 59 Md. 1.

Michigan. *Young v. Erie Iron Co.*, 65 Mich. 111, 31 N. W. 814.

Missouri. *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644; *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713, 20 S. W. 965.

Pennsylvania. *Carr v. Le Fevre*, 27 Pa. St. 417.

Tennessee. *Albitztigui v. Guadalupe y Caloo Min. Co.*, 92 Tenn. 598, 22 S. W. 739.

Utah. The statute expressly permits mining corporations to issue stock for property. *Richardson v. Treasure Hill Min. Co.*, 23 Utah 366, 65 Pac. 74.

West Virginia. Code, c. 53, § 24, expressly permits mining corporations to issue stock for real or personal property, and provides that subscribers to the stock of such corporations may pay their subscriptions in real or personal property. *Merchants' & Mechanics' Sav. Bank v. Belington Coal & Coke Co.*, 51 W. Va. 60, 41 S. E. 390.

11 United States. *Enright v. Heckscher*, 240 Fed. 863; *McBride v. Farrington*, 131 Fed. 797, aff'd 149 Fed. 114; *Cunningham v. Holley*, *Mason, Marks & Co.*, 121 Fed. 720.

Alabama. See *Howison v. Baird*, 145 Ala. 683, 40 So. 94.

Colorado. *Speer v. Bordelean*, 20 Colo. App. 413, 79 Pac. 332.

Michigan. *Young v. Erie Iron Co.*, 65 Mich. 111, 31 N. W. 814.

Utah. *Richardson v. Treasure Hill Min. Co.*, 23 Utah 366, 65 Pac. 74.

12 Chambers v. Mittnacht, 23 S. D. 449, 122 N. W. 434; *Gold Ridge Mining & Development Co. v. Rice*, 77 Wash. 384, 137 Pac. 1001; *Davies v. Ball*, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

13 An option on a silver mine in a foreign country of which a certain person merely asserts he is the owner, without producing any evidence whatever of that fact, or as to how he acquired title to the mine, if he ever had any, is not money or property within the meaning of the constitution or statute. "An option of this character can only be regarded as intangible, and mythical, and in no sense money or property." *State v. Hogan*, 163 Mo. 43, 63 S. W. 378.

14 Berry v. Rood, 168 Mo. 316, 67 S. W. 644.

15 Whitten v. Dabney, 171 Cal. 621, 154 Pac. 312; *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838. See also *McMillen v. Lamb*, — N. Y. Misc. —, 166 N. Y. Supp. 656.

16 American Tube & Iron Co. v. Baden Gas Co., 165 Pa. St. 489, 30 Atl. 940.

17 United States. *Fogg v. Blair*, 139 U. S. 118, 35 L. Ed. 104; *Branch v. Jesup*, 106 U. S. 468, 27 L. Ed. 279; *Citizens' Savings & Loan Ass'n v.*

its road,¹⁸ or of damages to land caused by construction of the road.¹⁹ "The right of the officers of a railroad corporation to enter into an agreement to build its road and pay for the construction of the same in stock or bonds, cannot be seriously questioned."²⁰

Such a company may also purchase a railroad already constructed, and issue its stock in payment, if the other company has the power to sell.²¹

A street railway company may issue stock in payment for the transfer to it of street franchises.²²

§ 3510. — Stock of other corporations. A corporation has no right to take stock in another corporation in payment for its own stock where it has no power to acquire and hold stock in other corporations.²³ But the contrary is true where it has such power.²⁴ Of course, stock

Belleville & S. I. R. Co., 117 Fed. 109; Lake St. El. R. Co. v. Ziegler, 99 Fed. 114; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642; Brown v. Duluth, M. & N. R. Co., 53 Fed. 889; Coe v. East & W. R. Co. of Alabama, 52 Fed. 531, aff'd in Grant v. East & W. R. Co. of Alabama, 54 Fed. 569.

Illinois. Peoria & S. R. Co. v. Thompson, 103 Ill. 187.

Indiana. Ohio, I. & I. R. Co. v. Cramer, 23 Ind. 490.

Iowa. Jackson v. Traer, 64 Iowa 469, 52 Am. Rep. 449, 20 N. W. 764.

Massachusetts. Boston, B. & G. R. Co. v. Wellington, 113 Mass. 79.

New York. Barr v. New York, L. E. & W. R. Co., 125 N. Y. 263, 26 N. E. 145; Van Cott v. Van Brunt, 82 N. Y. 535; McMahon v. New York & E. R. Co., 20 N. Y. 463.

Pennsylvania. Philadelphia & W. C. R. Co. v. Hickman, 28 Pa. St. 318.

Tennessee. Doak v. Stahlman, 58 S. W. 741.

Vermont. Boody v. Rutland & B. R. Co., 24 Vt. 660.

¹⁸ Cincinnati, I. & C. R. Co. v. Clarkson, 7 Ind. 595; St. Louis, Ft. S. & W. R. Co. v. Tiernan, 37 Kan. 606; Clark v. Farrington, 11 Wis. 306, 327.

¹⁹ Hoffman v. Bloomsburg & S. R. R., 157 Pa. St. 174, 27 Atl. 564.

²⁰ Van Cott v. Van Brunt, 82 N. Y. 535.

²¹ United States. Branch v. Jesup, 106 U. S. 468, 27 L. Ed. 279; Grant v. East & W. R. Co. of Alabama, 54 Fed. 569, aff'g 52 Fed. 531.

California. Smith v. Ferries & C. H. R. Co., 119 Cal. xvii, 51 Pac. 710.

Illinois. Sprague v. National Bank of America, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19.

Kansas. St. Louis, Ft. S. & W. R. Co. v. Tiernan, 37 Kan. 606, 15 Pac. 544.

Pennsylvania. Com. v. Central Passenger R. Co., 52 Pa. St. 506.

²² Smith v. Martin, 135 Cal. 247, 67 Pac. 779.

²³ So far as creditors are concerned the delivery of stock in another corporation is not a valid payment of a subscription under such circumstances. Lester v. Bemis Lumber Co., 71 Ark. 379, 74 S. W. 518.

As to the power of a corporation to take and hold stock in another corporation, see § 1116 et seq., supra.

²⁴ Southern Trust & Deposit Co. v. Yeatman, 134 Fed. 810, aff'g 130 Fed. 798; Ingraham v. National Salt Co.,

cannot legally be issued for other stock which has not any value.²⁵

§ 3511. — Further illustrations. It has often been held that a corporation formed by the members of a partnership to take its property and continue its business may take a conveyance of the partnership assets, real and personal, and issue its stock to the partners in payment therefor,²⁶ and also that stock may be issued by a corporation

130 Fed. 676; *Joseph Baneroff & Sons Co. v. Bloede*, 106 Fed. 396, 52 L. R. A. 734, certiorari denied 181 U. S. 620, 45 L. Ed. 1031 (mem. dec.); *MacGinniss v. Boston & M. Consol. Copper & Silver Min. Co.*, 29 Mont. 428, 75 Pac. 89; *Strickland v. National Salt Co.*, 79 N. J. Eq. 182, 64 Atl. 982; *Rafferty v. Buffalo City Gas Co.*, 37 N. Y. App. Div. 618, 56 N. Y. Supp. 288.

Where a corporation issues stock in exchange for stock of another corporation under a statute authorizing it to issue stock for property only where the property taken is necessary in the accomplishment of the corporate purposes, in seeking to sustain the validity of such issue it may be shown that the relations between the corporations were intimate, that the cementing of these relations by the acquisition of stock in the new corporation was of value to the former corporation, and that it was of value to the former corporation to have the chief stockholder in the new corporation interested in the business of the former corporation by reason of certain technical knowledge which he possessed and which was of great value in the accomplishment of the corporate purpose. *Joseph Baneroff & Sons Co. v. Bloede*, 106 Fed. 396, 52 L. R. A. 734, certiorari denied 181 U. S. 620, 45 L. Ed. 1031 (mem. dec.).

As to the power of a corporation to take and hold stock in another corporation, see § 1116 et seq., *supra*.

²⁵ *McDaniel v. Harvey*, 51 Mo. App. 198; *Sargent v. American Bank & Trust Co.*, 80 Ore. 16, 156 Pac. 431, 154

Pac. 759. See also *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721; *Conklin v. United Construction & Supply Co.*, 166 N. Y. App. Div. 284, 151 N. Y. Supp. 624, *aff'd* 219 N. Y. 555, 114 N. E. 1063.

As where stock for which it is issued at par is not worth par. *Ecuadorian Ass'n v. Ecuador Co.*, 71 N. J. Eq. 757, 65 Atl. 1051, *aff'g* 70 N. J. Eq. 277, 61 Atl. 481.

See also § 3579 et seq., *infra*.

²⁶ **United States.** *Camden v. Stuart*, 144 U. S. 104, 36 L. Ed. 363; *Taylor v. Cummings*, 127 Fed. 108, *aff'g* 117 Fed. 737.

Illinois. *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725.

Indiana. *Coffin v. Ramsdell*, 110 Ind. 417, 11 N. E. 20.

Kentucky. *Wyeth v. Renz-Bowles Co.*, 23 Ky. L. Rep. 2337, 66 S. W. 825.

Massachusetts. See *Harvey-Watts Co. v. Worcester Umbrella Co.*, 193 Mass. 138, 78 N. E. 886.

Minnesota. *Thorpe v. Pennock Mercantile Co.*, 99 Minn. 22, 9 Ann. Cas. 229, 108 N. W. 940.

New York. See *Flour City Nat. Bank v. Shire*, 88 App. Div. 401, 84 N. Y. Supp. 810, *aff'd* 179 N. Y. 587, 72 N. E. 1141.

Ohio. *Gates v. Tippecanoe Stone Co.*, 57 Ohio St. 60, 63 Am. St. Rep. 705, 48 N. E. 285.

Oregon. *Macbeth v. Banfield*, 45 Ore. 553, 106 Am. St. Rep. 670, 78 Pac. 693.

Texas. See *Hamilton v. James A. Cushman Mfg. Co.*, 15 Tex. Civ. App. 338, 39 S. W. 641.

in payment for a stock of goods or a business owned by an individual.²⁷

It has also been held that a corporation formed for the purpose of constructing a plank road may take plank for use in building its road in payment for stock;²⁸ that a waterworks company or gas company may issue its stock in payment for works already constructed, or in payment of contractors for their construction,²⁹ or for a franchise to carry on its business in a city or town;³⁰ that an irrigation company may issue stock in payment for its wells, ditches, etc.;³¹ that a corporation for creating and maintaining a cemetery may issue its stock in payment for the land necessary for such purpose;³² that stock may be issued by a corporation in payment for the good-will of a business;³³ or for a contract assigned to the corporation,³⁴ or procured for it,³⁵ or

As to the incorporation of partnerships generally, see Chap. 12, *supra*.

²⁷ *Western Nat. Bank v. Wittman*, 31 Cal. App. 615, 161 Pac. 137; *Kraft-Holmes Grocery Co. v. Crow*, 36 Mo. App. 288; *Flour City Nat. Bank v. Shire*, 88 N. Y. App. Div. 401, 84 N. Y. Supp. 810, *aff'd* 179 N. Y. 587, 72 N. E. 1141.

²⁸ *Haywood & P. Plank Road Co. v. Bryan*, 51 N. C. 82.

²⁹ *Bruner v. Brown*, 139 Ind. 600, 38 N. E. 318; *Woolfolk v. January*, 131 Mo. 620; *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274; *Drake v. New York Suburban Water Co.*, 26 N. Y. App. Div. 499, 50 N. Y. Supp. 826; *McNeal Pipe & Foundry Co. v. Bullock*, 174 Pa. St. 93, 35 Atl. 594.

General Corporation Law, § 50 (P. L. 1896, p. 294), expressly authorizes gas companies to issue stock for property purchased from or labor supplied by a construction company. *McCarter v. Pitman, Glassboro & Clayton Gas Co.*, 74 N. J. Eq. 255, 69 Atl. 211.

³⁰ See *Thomas v. Barthold*, — Tex. Civ. App. —, 171 S. W. 1071.

³¹ *Loud v. Pomona Land & Water Co.*, 153 U. S. 564, 582, 38 L. Ed. 822.

³² *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362; *Rural Homestead Co. v. Wildes*, 54 N. J. Eq. 668, 35 Atl. 896, *rev'g* 53 N. J. Eq. 452, 32 Atl. 676.

³³ *Washburn v. National Wall-Paper*

Co., 81 Fed. 17; *Brown v. Weeks*, — Mich. —, 161 N. W. 945; *Beebe v. Hatfield*, 67 Mo. App. 609; *White, Corbin & Co. v. Jones*, 79 N. Y. App. Div. 373, 79 N. Y. Supp. 583.

“The good-will of a business, though intangible, is property, and stock of a corporation issued for such good-will is issued for property actually received within the meaning of laws allowing stock to be paid for in property.” *Brown v. Weeks*, — Mich. —, 161 N. W. 945.

But the court may decline to deem good-will of a business to constitute sufficient consideration for an issue of stock where the existence of the good-will is uncertain and visionary. *Camden v. Stuart*, 144 U. S. 104, 36 L. Ed. 363; See *v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843; *Hobgood v. Ehlen*, 141 N. C. 344, 53 S. E. 857. See also *Holman v. Thomas*, 171 Fed. 219.

³⁴ *Fuller v. Corker Motor Car Co.*, 137 Ga. 370, 73 S. E. 647; *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, *aff'd* 82 N. J. Eq. 364, 91 Atl. 1069.

As, for example, a contract giving an exclusive right to buy and market certain products manufactured under a patented process. *Farrell v. Davis*, — Ore. —, 161 Pac. 94.

³⁵ *Cole v. Adams*, 19 Tex. Civ. App. 507, 49 S. W. 1052.

for the assignment of a lease;³⁶ that a contract may be made, by a corporation organized to build and maintain a bridge, with the proprietor of a newspaper, to give him stock in payment for publishing articles advertising the enterprise, and showing its value as an investment;³⁷ and that a corporation owning property on which there is a mortgage securing bonds issued by its predecessor may purchase the bonds, and issue its stock in payment therefor.³⁸

There may be circumstances under which a corporation will have the power to issue shares of its stock for the purpose of aiding another enterprise. Thus, where an improvement company was organized to buy and sell lands, erect, sell and lease buildings, grade and improve streets, furnish gas, electric light and waterworks, construct and operate street railroads, furnaces and mills, and to acquire by purchase or subscription the stock or bonds of any mining, manufacturing, water, gas, street railway, or other improvement company, it was held that it had power to issue part of its stock to a railroad company to enable it to complete its line to the property which it owned.³⁹

§ 3512. Payment in notes, bonds, mortgages, etc.—In general. If subscriptions are not yet due, or if the corporation has the power to extend the time of payment, and there is no charter or statutory prohibition, it may lawfully take the subscribers' or a third person's notes or bonds in payment, payable either on demand or at a fixed time in the future.⁴⁰ So it may take a note or bond secured by a mortgage on

³⁶ *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 80 Atl. 666; *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, *aff'd* 82 N. J. Eq. 364, 91 Atl. 1069; *Close v. Noye*, 147 N. Y. 597, 41 N. E. 570.

³⁷ *Liebke v. Knapp*, 79 Mo. 22, 49 Am. Rep. 212.

³⁸ *Beebe v. Richmond Light, Heat & Power Co.*, 3 N. Y. App. Div. 334, 38 N. Y. Supp. 395.

³⁹ *McGeorge v. Big Stone Gap Improvement Co.*, 57 Fed. 262.

⁴⁰ *Alabama.* See *Jefferson County Sav. Bank v. Compton*, 192 Ala. 16, 68 So. 261.

California. *Pacific Trust Co. v. Dorsey*, 72 Cal. 55, 12 Pac. 49.

Connecticut. *Stoddard v. Shetucket Foundry Co.*, 34 Conn. 542.

Florida. *Southern Life Insurance & Trust Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448.

Georgia. *Bing v. Bank of Kingston*, 5 Ga. App. 578, 63 S. E. 652.

Illinois. *Protection Life Ins. Co. v. Osgood*, 93 Ill. 69; *Chetlain v. Republic Life Ins. Co.*, 86 Ill. 220; *Goodrich v. Reynolds, Wilder & Co.*, 31 Ill. 490, 83 Am. Dec. 240.

Iowa. *Merrill v. Reaver*, 50 Iowa 404.

Kentucky. *Henderson & N. R. Co. v. Moss*, 2 Duv. 242.

Michigan. *Rouse, Hazzard & Co. v. Detroit Cycle Co.*, 111 Mich. 251, 38 L. R. A. 794, 69 N. W. 511.

Mississippi. *Lewis v. Robertson*, 13 Smedes & M. 558.

New York. *Magee v. Badger & Pot-*

real or personal property,⁴¹ especially where it is expressly authorized to invest its funds in securities of that character.⁴²

There is not a payment in cash where, pursuant to a prior agree-

ter, 30 Barb. 246, aff'd 34 N. Y. 247, 90 Am. Dec. 691; *Valk v. Crandall*, 1 Sandf. Ch. 179.

Ohio. Union Cent. Life Ins. Co. v. Curtis, 35 Ohio St. 343; *Bates v. Lewis*, 3 Ohio St. 459.

Vermont. Vermont Cent. R. Co. v. Clayes, 21 Vt. 30.

Wisconsin. *Andrews v. Hart*, 17 Wis. 297; *Lyon v. Ewings*, 17 Wis. 61; *Blunt v. Walker*, 11 Wis. 334, 78 Am. Dec. 709; *Clark v. Farrington*, 11 Wis. 306.

State bonds may be taken in payment of a subscription to stock by the state where the statute authorizes their issuance for that purpose. *South Dakota v. North Carolina*, 192 U. S. 286, 48 L. Ed. 448.

"An arrangement whereby a debtor corporation, for the purpose of releasing and acquitting a solvent subscriber to its stock from his obligation to pay the same, accepts in lieu the obligation of a known insolvent person, to whom the solvent subscriber transfers his stock, and thereupon releases the solvent subscriber from his obligation and surrenders his promise in writing to pay the amount of his subscription as paid and canceled, is in legal effect the transfer of property by the corporation to the solvent subscriber without consideration, which is fraudulent and void as to the creditor, and the latter may come into chancery to enforce the original obligation resting on the subscriber to the satisfaction of his debt." *Hall v. Alabama Terminal & Improvement Co.*, 143 Ala. 464, 2 L. R. A. (N. S.) 130, 5 Ann. Cas. 363, 39 So. 285.

A charter provision requiring a corporation to take securities for stock to a certain amount does not prevent it

from afterwards selling stock on other terms, or for other securities. *Upton v. Hansbrough*, 3 Biss. 417, Fed. Cas. No. 16,801.

It has been held that where no statute expressly so authorizes, it is beyond the power of a banking corporation to accept such evidences of debt as notes and judgments in payment of subscriptions to its stock, especially where they are worthless. *Coddington v. Canaday*, 157 Ind. 243, 61 N. E. 567.

41 Florida. *Southern Life Insurance & Trust Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448.

Illinois. *Protection Life Ins. Co. v. Osgood*, 93 Ill. 69.

New York. *Valk v. Crandall*, 1 Sandf. Ch. 179.

Ohio. Union Cent. Life Ins. Co. v. Curtis, 35 Ohio St. 343.

Wisconsin. *Western Bank of Scotland v. Tallman*, 17 Wis. 530; *Andrews v. Hart*, 17 Wis. 297; *Lyon v. Ewings*, 17 Wis. 61; *Blunt v. Walker*, 11 Wis. 334, 78 Am. Dec. 709; *Clark v. Farrington*, 11 Wis. 306.

42 When the charter of a corporation authorizes it to reissue surrendered stock, and invest the proceeds in bonds and mortgages, it may sell the stock directly for bonds and mortgages. *Southern Life Insurance & Trust Co. v. Lanier*, 5 Fla. 110, 58 Am. Dec. 448.

Where a charter provides that the entire capital stock shall be paid in before commencement of business, and that the corporation may invest its funds in bonds and mortgages, it may receive bonds and mortgages in payment of stock subscriptions. *Yard v. Pacific Mut. Ins. Co.*, 10 N. J. Eq. 480, 64 Am. Dec. 467.

ment, the corporation loans the money received in payment for stock back to the stockholder and takes his note therefor.⁴³ "There is no more a payment in cash when the corporation receives cash one day and lends the cash received to the stockholders the next day than when it receives a note originally in payment of a stock subscription." ⁴⁴

The delivery of a certified check is a payment in cash; and the same has been held to be true where the check is not certified, provided it is payable in praesenti, and the drawer has sufficient funds on deposit to meet it, although there is authority to the contrary.⁴⁵

It has been held that a guaranty of payment of corporate notes will not be considered as payment for stock of the guarantors.⁴⁶

The fact that securities given by a party to a corporation in payment for a subscription to its capital stock prove valueless does not render the transaction fraudulent, or invalidate the certificates of stock issued and delivered, as against the corporation, when it does not appear that the party knew the securities to be valueless, or represented them to be good, or resorted to any means to mislead, deceive or defraud the company, or prevent it from inquiring into the facts.⁴⁷ It has been held, however, that creditors of a corporation, or a receiver for their benefit, may compel a subscriber to pay in money, if the note of a third person given by him in payment is worthless, and was so when given in payment.⁴⁸

§ 3513. — Effect of charter or statutory provisions. Payment for stock in notes or bonds may be expressly prohibited by charter or statutory provisions, as by a provision expressly requiring payment in cash,⁴⁹ or requiring that stock shall be fully paid in.⁵⁰

⁴³ *Harvey-Watts Co. v. Worcester Umbrella Co.*, 193 Mass. 138, 78 N. E. 886.

⁴⁴ *Harvey-Watts Co. v. Worcester Umbrella Co.*, 193 Mass. 138, 78 N. E. 886.

⁴⁵ See *People v. Board of Railroad Com'rs*, 81 N. Y. App. Div. 242, 81 N. Y. Supp. 20, aff'd 175 N. Y. 516, 67 N. E. 1088.

And see § 712, *supra*.

⁴⁶ *Hinkley v. Sac Oil & Pipe Line Co.*, 132 Iowa 396, 119 Am. St. Rep. 564, 107 N. W. 629.

⁴⁷ *Protection Life Ins. Co. v. Osgood*, 93 Ill. 69.

⁴⁸ *Bouton v. Dement*, 123 Ill. 142, 14 N. E. 62, rev'g 22 Ill. App. 619.

⁴⁹ *State v. New Orleans Debenture Redemption Co.*, 51 La. Ann. 1827, 26 So. 586. See also *Alabama Nat. Bank v. Halsey*, 109 Ala. 196, 19 So. 522; *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638; *Boyd v. Peach Bottom R. Co.*, 90 Pa. St. 169; *Leighty v. Susquehanna & W. Turnpike Co.*, 14 Serg. & R. (Pa.) 434; *Moses v. Ocoee Bank*, 1 Lea (Tenn.) 398.

⁵⁰ Capital stock cannot be considered as "fully paid in" as to creditors merely because the corporation accepts the subscriber's note for his subscrip-

Statutes in some states provide that no note or obligation given by a stockholder, whether secured by pledge or otherwise, shall be considered as payment of any part of the capital stock.⁵¹ But it is generally held that such a provision merely means that when a note is given for stock it shall not, in law, effect a payment, so as to relieve the purchaser or subscriber from his obligation to actually pay,⁵² and does not operate to prevent the corporation from taking a note for stock issued by it, or to invalidate a note so taken or relieve the maker thereof from the obligation to pay it.⁵³

Some courts hold that payment by the note of the subscriber is not prohibited by a statutory provision that no corporation shall issue stock except for labor done, services performed or money or property

tion. Such a note is enforceable, however. *Williams v. Brewster*, 117 Wis. 370, 93 N. W. 479.

⁵¹ *Massachusetts*. Rev. Laws, c. 110, § 44. *Harvey-Watts Co. v. Worcester Umbrella Co.*, 193 Mass. 138, 78 N. E. 886.

Mississippi. Code 1892, § 850. *Allen v. Edwards*, 93 Miss. 719, 47 So. 382; *Alford v. Laurel Improvement Co.*, 86 Miss. 375, 38 So. 548.

North Dakota. Rev. Codes 1905, § 4196. *German Mercantile Co. v. Wanner*, 25 N. D. 479, 52 L. R. A. (N. S.) 453, 142 N. W. 463.

Pennsylvania. *Hacker v. National Oil Refining Co.*, 73 Pa. St. 93.

Where a subscriber gives his note for the amount of his subscription, and the company retains his certificate as collateral security, he is not entitled to a certificate for his share of a subsequent stock dividend, the note not having been paid. *Alford v. Laurel Improvement Co.*, 86 Miss. 375, 38 So. 548.

⁵² *German Mercantile Co. v. Wanner*, 25 N. D. 479, 52 L. R. A. (N. S.) 453, 142 N. W. 463.

“The giving of a promissory note for stock is a promise to pay therefor. It is only a promise in a different form from the promise contained in a subscription. Neither the subscription,

nor a check given for stock, nor a note, constitutes actual payment until it is in fact paid.”

The purpose of the statute “was to place notes on the same footing as subscriptions and as checks which are received subject to payment. It does not work payment, so as to relieve the stockholder or the party entitled to stock, from his obligation to actually pay.” *German Mercantile Co. v. Wanner*, 25 N. D. 479, 52 L. R. A. (N. S.) 453, 142 N. W. 463.

⁵³ *German Mercantile Co. v. Wanner*, 25 N. D. 479, 52 L. R. A. (N. S.) 453, 142 N. W. 463; *Hacker v. National Oil Refining Co.*, 73 Pa. St. 93.

In *Allen v. Edwards*, 93 Miss. 719, 47 So. 382, it is said of such a provision that “it simply provides that there can be no valid subscription to stock without the payment in cash therefor.” But it was held that the purpose was to protect corporate creditors, and not to benefit a defaulting stockholder, and that a stockholder could not take advantage of it to escape liability to creditors on a note given by him for his stock, especially where, by his conduct and course of dealing with the corporation, he had held himself out as a stockholder.

actually received,⁵⁴ for the reason that such a note is property.⁵⁵ Other courts, however, hold that such a provision is violated by taking notes for stock where the stock is actually issued to the subscriber before the note is paid,⁵⁶ but that the taking of a note for the unpaid

54 California. *Pacific Trust Co. v. Dorsey*, 72 Cal. 55, 12 Pac. 49; *Quartz Glass & Manufacturing Co. v. Joyce*, 27 Cal. App. 523, 150 Pac. 648.

Idaho. *Meholin v. Carlson*, 17 Idaho 742, 134 Am. St. Rep. 286, 107 Pac. 755.

Kentucky. *Clarke v. Lexington Stove Works*, 24 Ky. L. Rep. 2247, 73 S. W. 788, 24 Ky. L. Rep. 1755, 72 S. W. 286.

North Dakota. *German Mercantile Co. v. Wanner*, 25 N. D. 479, 52 L. R. A. (N. S.) 453, 142 N. W. 463.

South Dakota. *Schiller Piano Co. v. Hyde*, 162 N. W. 937.

A note secured by an insurance policy having a loan value and a cash surrender value is the equivalent of money, and may be accepted as payment. *Clarke v. Lexington Stove Works*, 24 Ky. L. Rep. 2247, 73 S. W. 788, 24 Ky. L. Rep. 1755, 72 S. W. 286. In this case the note was not accepted as payment, but was taken by an agent of the corporation to be negotiated for the subscriber, the proceeds to be applied on his subscription. The money obtained on it was lost through the negligence of the agent, and it was held that the subscriber was entitled to credit therefor on his subscription.

55 *Pacific Trust Co. v. Dorsey*, 72 Cal. 55, 12 Pac. 49; *Quartz Glass & Manufacturing Co. v. Joyce*, 27 Cal. App. 523, 150 Pac. 648; *Meholin v. Carlson*, 17 Idaho 742, 134 Am. St. Rep. 286, 107 Pac. 755; *German Mercantile Co. v. Wanner*, 25 N. D. 479, 52 L. R. A. (N. S.) 453, 142 N. W. 463; *Schiller Piano Co. v. Hyde*, — S. D. —, 162 N. W. 937.

Under Civ. Code, § 14, the word property includes both real and personal property, and personal property

includes things in action and evidences of debt. A note is a thing in action or evidence of a debt. *Pacific Trust Co. v. Dorsey*, 72 Cal. 55, 12 Pac. 49; *Quartz Glass & Manufacturing Co. v. Joyce*, 27 Cal. App. 523, 150 Pac. 648.

“The word ‘property’ includes both real and personal property, and ‘personal property’ includes money, goods, chattels, things in action and evidences of debt. (Sec. 16, Rev. Codes.) Said promissory note was actually received by the corporation and was a thing in action or evidence of debt. * * * The bank then received said promissory note for said stock, which was ‘property’ as defined by said sec. 16 of our Rev. Codes.” *Meholin v. Carlson*, 17 Idaho 742, 134 Am. St. Rep. 286, 107 Pac. 755.

56 *Bank of Commerce v. Goolsby*, — Ark. —, 196 S. W. 803; *Commercial Guaranty State Bank v. Crews*, — Tex. Civ. App. —, 196 S. W. 901; *Prudential Life Ins. Co. of Texas v. Pearson*, — Tex. Civ. App. —, 188 S. W. 513; *Kanamán v. Gahagan*, — Tex. Civ. App. —, 185 S. W. 619; *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield*, — Tex. Civ. App. —, 184 S. W. 776; *Republic Trust Co. v. Taylor*, — Tex. Civ. App. —, 184 S. W. 772; *Sturdevant v. Falvey*, — Tex. Civ. App. —, 176 S. W. 908; *Farmers’ & Merchants’ State Bank v. Falvey*, — Tex. Civ. App. —, 175 S. W. 833; *General Bonding & Casualty Ins. Co. v. Mosely*, — Tex. Civ. App. —, 174 S. W. 1031; *Cope v. Pitzer*, — Tex. Civ. App. —, 166 S. W. 447; *Mason v. First Nat. Bank of Paint Rock*, — Tex. Civ. App. —, 156 S. W. 366; *McCarthy v. Texas Loan & Guaranty Co.*, — Tex. Civ. App. —, 142 S. W. 96. See also Com-

portion of a subscription is not a violation of such a provision where

monwealth Bonding & Casualty Ins. Co. v. Hill, — Tex. Civ. App. —, 184 S. W. 247.

“A sale of the stock of a corporation on a credit is not a sale in consideration of money paid, labor done, or property actually received, and is hence illegal and void, because prohibited by the constitution.” *Kananian v. Gahagan*, — Tex. Civ. App. —, 185 S. W. 619.

“A note is not money paid nor is it property within the meaning of said article of the constitution.” *Mason v. First Nat. Bank of Paint Rock*, — Tex. Civ. App. —, 156 S. W. 366.

And this is true though the note is secured by a deed of trust in which the corporation would have authority to invest its funds (*Prudential Life Ins. Co. of Texas v. Pearson*, — Tex. Civ. App. —, 188 S. W. 513); or though the notes are indorsed by a solvent indorser and are secured by a pledge of the stock, and though a part of the subscription is paid in cash. *McCarthy v. Texas Loan & Guaranty Co.*, — Tex. Civ. App. —, 142 S. W. 96.

The notes cannot be regarded as “property actually received” within the meaning of the constitution. “It is true a promissory note is ‘property’ in one sense of the word, as, for instance, when it is in the hands of a third person. It has been frequently so held; but as between the original parties to the same, it is but a mere evidence of indebtedness, and it would be a strained and unnatural interpretation of the constitution to hold that it was there used in the sense contended for by appellants. To so hold would be to say that in one breath the organic law expressly refused to accept it as ‘money paid,’ and in the next breath permitted it under the guise of property, thus convicting the

framers of the constitution of a palpable inconsistency.” *McCarthy v. Texas Loan & Guaranty Co.*, — Tex. Civ. App. —, 142 S. W. 96, quoted with approval in *Prudential Life Ins. Co. of Texas v. Pearson*, — Tex. Civ. App. —, 188 S. W. 513; *General Bonding & Casualty Ins. Co. v. Mosely*, — Tex. Civ. App. —, 174 S. W. 1031.

The note is a chose in action and a deed of trust given to secure it is merely security for the debt. “While they are, in a sense, property, they are not, when considered, either separately or together, even if they had been accepted by the company in full payment for the stock, ‘property actually received,’ within the meaning of the constitution. The words ‘actually received,’ as there used, mean the receipt and possession of something real and tangible, as distinguished from something constructive or speculative—an existing fact as opposed to a possibility.” *General Bonding & Casualty Ins. Co. v. Mosely*, — Tex. Civ. App. —, 174 S. W. 1031.

In Texas a note given in payment for stock issued to a subscriber or purchaser is void. The statutes of that state provide that no foreign corporation doing business in the state shall issue stock except for money paid, etc. Where an Arizona corporation had its home office in Texas, and the subscription contract and notes for the price of the stock, with a deed of trust given to secure them, were executed in Texas, and the subscription contract provided that the company was to be incorporated pursuant to the laws of Texas, it was held that the transaction was subject to the laws of that state: *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield*, — Tex. Civ. App. —, 184 S. W. 776.

This provision as to foreign corpo-

the stock is not actually issued or delivered to the subscriber,⁵⁷ since, under such circumstances, the note is but another form of evidence of the agreement to pay the balance due on the subscription.⁵⁸

It has also been held that the taking of a note for stock is not a violation of a provision requiring the corporation to obtain permission from the state executive council if it is proposed to pay for stock in property or in any other thing than money, where the note is good and the stock is not in fact issued.⁵⁹

§ 3514. — Enforceability of notes. Some courts hold that even though the taking of a note in payment of a subscription for stock is a violation of a statute providing that only money, labor done or property actually received shall be accepted in payment, or of a statute

rations applies to a corporation doing business in Texas although it has never been licensed to do business there. *Sturdevant v. Falvey*, — Tex. Civ. App. —, 176 S. W. 908; *Farmers' & Merchants' State Bank v. Falvey*, — Tex. Civ. App. —, 175 S. W. 833.

In the absence of proof of the laws of the state where the corporation was organized, it will be presumed that they are the same as those of the forum. *Sturdevant v. Falvey*, — Tex. Civ. App. —, 176 S. W. 908; *Farmers' & Merchants' State Bank v. Falvey*, — Tex. Civ. App. —, 175 S. W. 833.

In *In re Waterloo Organ Co.*, 134 Fed. 341, rev'g 128 Fed. 517, it was held that an issue of bonds for unsecured notes was in violation of the New York statute to this effect which is applicable to both bonds and stocks. In the course of the opinion the court says that the note "was not property in any practical sense. It was a mere piece of paper unless and until it was collected or otherwise availed of in securing some form of property." And it is further said that even if the note should be regarded as property, it was not property received for the use "and lawful purposes of the corporation within the meaning of the statute."

⁵⁷ *Commercial Guaranty State Bank*

v. Crews, — Tex. Civ. App. —, 196 S. W. 901; *Smoot v. Perkins*, — Tex. Civ. App. —, 195 S. W. 988; *Kanamman v. Gahagan*, — Tex. Civ. App. —, 185 S. W. 619; *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield*, — Tex. Civ. App. —, 184 S. W. 776; *Cattlemen's Trust Co. of Ft. Worth v. Pruett*, — Tex. Civ. App. —, 184 S. W. 716; *Commonwealth Bonding & Casualty Ins. Co. v. Hill*, — Tex. Civ. App. —, 184 S. W. 247; *Cattlemen's Trust Co. of Ft. Worth v. Turner*, — Tex. Civ. App. —, 182 S. W. 438; *Farmers' & Merchants' State Bank v. Falvey*, — Tex. Civ. App. —, 175 S. W. 833; *Davis v. Burns*, — Tex. Civ. App. —, 173 S. W. 476; *Cope v. Pitzer*, — Tex. Civ. App. —, 166 S. W. 447. See also *Sturdevant v. Falvey*, — Tex. Civ. App. —, 176 S. W. 908.

In *Schiller Piano Co. v. Hyde*, — S. D. —, 162 N. W. 937, it is held that even though the note is not property, the corporation may recover on the note where the certificate has not been delivered.

⁵⁸ *Smoot v. Perkins*, — Tex. Civ. App. —, 195 S. W. 988; *Cattlemen's Trust Co. of Ft. Worth v. Turner*, — Tex. Civ. App. —, 182 S. W. 438.

⁵⁹ *First Nat. Bank of Ottumwa v. Fulton*, 156 Iowa 734, 137 N. W. 1019.

prohibiting payment otherwise than in cash, the note is not necessarily void, even in the hands of the corporation,⁶⁰ or a purchaser from it with notice of the facts.⁶¹ And if the corporation procures a loan by pledge or discount of the note, the corporation cannot defeat an action to recover the loan on the ground that the taking of the note by it was prohibited, even though the lender may have had notice of the facts.⁶² In support of this rule it has been said that the maker of the note is estopped to assert the constitutional or statutory provision as a defense, since he was a party to the delivery of the certificate and will not be permitted to take advantage of his own wrong,⁶³ and that if the corporation disposes of the note for full value, even to a purchaser having knowledge of the consideration, the transaction is from that time cleared of vice, since the corporation has its money, and the purpose of the provision is therefore met.⁶⁴

Some courts, however, have held that such a note is void and that it cannot be enforced by the corporation,⁶⁵ or by a third person who

60 Alabama. Selma & T. R. Co. v. Rountree, 7 Ala. 670.

California. Pacific Trust Co. v. Dorsey, 72 Cal. 55, 12 Pac. 49. Compare Jefferson v. Hewitt, 103 Cal. 624, 37 Pac. 638.

Iowa. Franklin v. Twogood, 18 Iowa 515. See First Nat. Bank of Ottumwa v. Fulton, 156 Iowa 734, 137 N. W. 1019.

Kentucky. Finnell v. Sandford, 17 B. Mon. 748.

Louisiana. Canal Bank v. Holland, 5 La. Ann. 363. See also State v. New Orleans Debenture Redemption Co., 51 La. Ann. 1827, 26 So. 586.

Massachusetts. Farmers' & Mechanics' Bank v. Jenks, 7 Metc. 592.

Mississippi. Hepburn v. Kincannon, 74 Miss. 691, 21 So. 569. See also Hayne v. Beauchamp, 5 Smedes & M. 515.

New York. McLaren v. Pennington, 1 Paige 102.

North Carolina. McRae v. Russel, 12 Ired. 224.

South Carolina. Greenville & C. R. Co. v. Woodsides, 5 Rich. L. 145, 55 Am. Dec. 708.

South Dakota. Schiller Piano Co. v. Hyde, 162 N. W. 937.

Nor is a note taken in payment for stock void because a statute makes it a misdemeanor for directors to receive notes in payment of instalments actually called; or because a statute requires corporations to publish semi-annual statements of their paid up capital, and provides that nothing shall be counted as capital except money. Pacific Trust Co. v. Dorsey, 72 Cal. 55, 12 Pac. 49.

⁶¹ Schiller Piano Co. v. Hyde, — S. D. —, 162 N. W. 937.

⁶² First Nat. Bank of Baldwinville v. Cornell, 8 N. Y. App. Div. 427, 40 N. Y. Supp. 850.

⁶³ Schiller Piano Co. v. Hyde, — S. D. —, 162 N. W. 937.

⁶⁴ Schiller Piano Co. v. Hyde, — S. D. —, 162 N. W. 937.

⁶⁵ Republic Trust Co. v. Taylor, — Tex. Civ. App. —, 184 S. W. 772; Sturdevant v. Falvey, — Tex. Civ. App. —, 176 S. W. 908; Cope v. Pitzer, — Tex. Civ. App. —, 166 S. W. 447. See also Alabama Nat. Bank v. Halsey, 109 Ala. 196, 19 So. 522.

is not a bona fide holder,⁶⁶ or even by a bona fide purchaser for value,⁶⁷ and may be cancelled in a suit brought for that purpose by the subscriber;⁶⁸ and that the contract of the corporation to issue stock for notes cannot be enforced by the subscriber or purchaser nor damages recovered for its breach.⁶⁹ And it has also been held that, under such circumstances, the subscriber is not estopped to assert the invalidity of such a note by participation as a stockholder in the meetings of the company.⁷⁰ One who indorses such a note for a consideration is liable to a bona fide holder, however, since such indorsement carries with it his warranty of genuineness.⁷¹

Of course the note is enforceable where the taking of it does not violate the constitutional or statutory provision because the stock is not issued to the subscriber before the note is paid.⁷²

§ 3515. Issue of stock in payment of debts. If a corporation is indebted to a subscriber or other person, and conflicting rights of creditors are not involved, it may lawfully pay the debt by cancelling the subscription or issuing its stock.⁷³ It may also issue stock

The stock is absolutely void, and the promise of the subscriber or purchaser to pay for it is a nullity. General Bonding & Casualty Ins. Co. v. Mosely, — Tex. Civ. App. —, 174 S. W. 1031.

⁶⁶ Kanaman v. Gahagan, — Tex. Civ. App. —, 185 S. W. 619; Sturdevant v. Falvey, — Tex. Civ. App. —, 176 S. W. 908; Mason v. First Nat. Bank of Paint Rock, — Tex. Civ. App. —, 156 S. W. 366. See also Alabama Nat. Bank v. Halsey, 109 Ala. 196, 19 So. 522.

⁶⁷ Republic Trust Co. v. Taylor, — Tex. Civ. App. —, 184 S. W. 772.

⁶⁸ Prudential Life Ins. Co. of Texas v. Pearson, — Tex. Civ. App. —, 188 S. W. 513; Commonwealth Bonding & Casualty Ins. Co. v. Hollifield, — Tex. Civ. App. —, 184 S. W. 776; General Bonding & Casualty Ins. Co. v. Mosely, — Tex. Civ. App. —, 174 S. W. 1031.

The corporation cannot be regarded as an innocent purchaser. Prudential Life Ins. Co. of Texas v. Pearson, — Tex. Civ. App. —, 188 S. W. 513.

⁶⁹ McCarthy v. Texas Loan & Guar-

anty Co., — Tex. Civ. App. —, 142 S. W. 96.

⁷⁰ Commonwealth Bonding & Casualty Ins. Co. v. Hollifield, — Tex. Civ. App. —, 184 S. W. 776.

⁷¹ Farmers' & Merchants' State Bank v. Falvey, — Tex. Civ. App. —, 175 S. W. 833.

⁷² First Nat. Bank of Ottumwa v. Fulton, 156 Iowa 734, 137 N. W. 1019; Schiller Piano Co. v. Hyde, — S. D. —, 162 N. W. 937; Smoot v. Perkins, — Tex. Civ. App. —, 195 S. W. 988; Cattlemen's Trust Co. of Ft. Worth v. Pruett, — Tex. Civ. App. —, 184 S. W. 716; Commonwealth Bonding & Casualty Ins. Co. v. Hill, — Tex. Civ. App. —, 184 S. W. 247; Cattlemen's Trust Co. of Ft. Worth v. Turner, — Tex. Civ. App. —, 182 S. W. 438; Farmers' & Merchants' State Bank v. Falvey, — Tex. Civ. App. —, 175 S. W. 833; Davis v. Burns, — Tex. Civ. App. —, 173 S. W. 476; Cope v. Pitzer, — Tex. Civ. App. —, 166 S. W. 447.

⁷³ Alabama. Goodwin v. McGehee, 15 Ala. 232, 44 Atl. 602.

New Hampshire. Libby v. Mt.

to a person in consideration of his assuming a corporate indebtedness.⁷⁴

§ 3516. Pledge of unissued stock by corporation. Although there seem to be some holdings to the contrary,⁷⁵ according to the great weight of authority, a corporation having unissued stock in its treasury may lawfully pledge the same as security for a debt previously contracted, or as security for a loan made to it, or a debt otherwise contracted at the time, unless it is expressly prohibited from doing so by some charter or statutory provision.⁷⁶ In speaking of stock so pledged the Supreme Court of the United States has said: "Though issued in form, it was only issued in a qualified sense, to subserve a

Monadnock Mineral Spring & Land Co., 68 N. H. 444, 44 Atl. 602.

New Jersey. Fidelity Trust Co. v. Federal Trust Co., — N. J. Eq. —, 100 Atl. 615. See Iserman v. International Stoker Co. (N. J. Eq.), 66 Atl. 605.

New York. Reed v. Hayt, 19 Jones & S. 121, aff'd 109 N. Y. 659, 17 N. E. 418; Lohman v. New York & E. R. Co., 2 Sandf. 39.

West Virginia. Richardson v. Graham, 45 W. Va. 134, 30 S. E. 92.

England. Larocque v. Beauchemin, [1897] App. Cas. 358; Appleyard's Case, 49 L. J. Ch. 290.

This satisfies a statute requiring payment "in cash." Larocque v. Beauchemin, [1897] App. Cas. 358.

The corporation may apply the amount of a debt owing by it to a stockholder in payment of his subscription, and this constitutes a payment in money. Veeder v. Mudgett, 95 N. Y. 295.

A mining corporation was in debt indirectly for its mine. A party bought stock from the mining corporation and transferred a mortgage to the creditor of the mining corporation in consideration of the stock. The court held that there was no failure of consideration for the mortgage where later the mine was ascertained to be worthless. Smith v. Krueger, 71 N. J. Eq. 531, 63 Atl. 850.

Issuance of stock to promoters in

consideration of money previously advanced by them for the benefit of the corporation and the assumption of corporate indebtedness by them does not violate a statute prohibiting the issue of stock for other than a money payment of the consideration. Wing v. Credit Guide Co., — Iowa —, 164 N. W. 627.

See also § 640, *supra*.

⁷⁴ Watt v. German Sav. Bank, — Iowa —, 165 N. W. 897.

The fact that the stock is issued direct to third persons at the request of the person who assumes the indebtedness makes no difference, although they pay nothing to the corporation for it. *Id.*

⁷⁵ Star Mills v. Bailey, 140 Ky. 194, 140 Am. St. Rep. 370, 130 S. W. 1077. In this case, in the course of its opinion, the court said: "A corporation cannot pledge its own stock to secure its own debt, and * * * it would be a worthless proceeding if it could."

⁷⁶ **United States.** Burgess v. Seligman, 107 U. S. 20, 27 L. Ed. 359; Granite Brick Co. v. Titus, 226 Fed. 557; Combination Trust Co. v. Weed, 2 Fed. 24. See also Levison v. Hamilton, 204 Fed. 72; In re Noyes Bros., 136 Fed. 977; Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co., 79 Fed. 842; Gasquet v. Crescent City Brewing Co., 49 Fed. 496.

Alabama. See Nelson v. Hubbard,

specific purpose by way of collateral security for a limited period, and was returnable to the company when that purpose should be accomplished." 77

It has been held that a pledge of unissued stock is not prohibited by a constitutional or statutory provision that no corporation shall issue stock except for labor done, services performed or money or property actually received, and that all fictitious increases of stock shall be void, although the face value of the stock so pledged exceeds the amount of the indebtedness to be secured.⁷⁸ But there is authority to the contrary.⁷⁹

96 Ala. 238, 17 L. R. A. 375, 11 So. 428.

California. See *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197.

Delaware. In re *International Radiator Co.*, — Del. Ch. —, 92 Atl. 255.

Iowa. See *Tierney v. Ledden*, 143 Iowa 286, 21 Ann. Cas. 105, 121 N. W. 1050.

Maryland. *Matthews v. Albert*, 24 Md. 527.

Minnesota. See *Marshall Field & Co. v. Evans, Johnson, Sloane & Co.*, 106 Minn. 85, 19 L. R. A. (N. S.) 249, 118 N. W. 55.

Missouri. *Union Sav. Ass'n v. Seligman*, 92 Mo. 635, 1 Am. St. Rep. 776, 15 S. W. 630. See also *Colonial Trust Co. v. McMillan*, 188 Mo. 547, 107 Am. St. Rep. 335, 87 S. W. 933; *Fisher v. Seligman*, 75 Mo. 13.

Montana. See *Parberry v. Woodson Sheep Co.*, 18 Mont. 317, 45 Pac. 278.

New Hampshire. *Peterborough R. Co. v. Nashua & L. R. Co.*, 59 N. H. 385.

New York. See *Kinsman v. Fisk*, 83 Hun 494, 31 N. Y. Supp. 1045.

Vermont. See *Deavitt v. Eldridge*, 73 Vt. 332, 50 Atl. 1057.

Wisconsin. See *Gilman v. Gross*, 97 Wis. 224, 72 N. W. 885. See also *Andrews v. National Foundry & Pipe Works*, 76 Fed. 166, 36 L. R. A. 139, 77 Fed. 774, 88 Fed. 613.

England. *Bloomenthal v. Ford*, [1897] App. Cas. 156, rev'g [1896] 2 Ch. 525.

In *Powell v. Blair*, 133 Pa. St. 550, 19 Atl. 559, where the stock was issued by corporate officers to themselves and then assigned by them as security for a loan to the corporation, and it was held that the corporation was estopped to question the validity of the stock as against the pledgee.

It is no defense to an action for money had and received against a national bank or its receiver to recover money loaned, that stock issued by the bank as collateral security for the loan was issued without authority of law. *Williams v. American Nat. Bank*, 85 Fed. 376, 101 Fed. 943.

⁷⁷ *Burgess v. Seligman*, 107 U. S. 20, 27 L. Ed. 359, quoted in *Granite Brick Co. v. Titus*, 226 Fed. 557; *Williams v. American Nat. Bank*, 85 Fed. 376.

⁷⁸ *Granite Brick Co. v. Titus*, 226 Fed. 557. See also *Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co.*, 79 Fed. 842; *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428; *Illinois Trust & Savings Bank v. Pacific Ry. Co.*, 117 Cal. 332, 49 Pac. 197.

The stock is issued "for money paid" under such circumstances, and hence is not fictitious and not void. *Granite Brick Co. v. Titus*, 226 Fed. 557. See also § 1032, *supra*, as to the power to issue bonds under such circumstances.

⁷⁹ A corporation cannot issue its

It has also been held that such a pledge is void under a statute which prohibits the issuance of certificates until the stock has been paid for in full.⁸⁰ But, on the other hand, it has been held that where such a statute does not declare that stock issued in violation thereof is void, an issue of stock by way of pledge is not void, but at most is ultra vires and voidable, and that the corporation is estopped to question its validity, where all the stockholders have assented to such issue, and the pledgee has fully performed his obligations under the contract and the corporation has received all of the benefits of such performance,⁸¹ especially where the pledgee does not seek to hold the

stock as security for the future delivery bonds. *Haule v. Consumers' Park Brewing Co.*, 150 N. Y. App. Div. 582, 135 N. Y. Supp. 900, appeal dismissed 211 N. Y. 578, 105 N. E. 1086. Compare *Kinsman v. Fisk*, 83 Hun (N. Y.) 494, 31 N. Y. Supp. 1045, where, however, the stock pledged was treasury stock which had been previously issued and placed in the hands of trustees for the benefit of the corporation. See also *In re Progressive Wall Paper Co.*, 229 Fed. 489, which was a New York case relative to the issuance of bonds under such circumstances.

In *Farmers' Loan & Trust Co. v. San Diego Street Car Co.*, 45 Fed. 518, it was held that a pledge of bonds as collateral security for a pre-existing indebtedness was in violation of such a provision.

In *Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co.*, 79 Fed. 842, the court distinguishes *Farmers' Loan & Trust Co. v. San Diego Street Car Co.*, on the ground that the pledge in that case was for a pre-existing indebtedness and that it appeared that the issue of bonds was for a purpose other than that to which it was devoted.

See also § 1032, *supra*, as to the power to issue bonds under such circumstances.

⁸⁰ *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237.

"If the power exists in the corporation to issue stock to secure a loan or indebtedness, it is practically unlimited, and the directors may issue and pledge all the capital stock not held by stockholders as security for a trifling loan, and by the aid of the stocks thus issued, they may increase the capital stock, and pledge the new stock to secure another loan, and thus perpetuate themselves in power beyond the reach of redress on the part of the stockholders, who may have contributed much the larger portion of the assets of the corporation." *Brewster v. Hartley*, 37 Cal. 15, 99 Am. Dec. 237. See also *Andrews v. National Foundry & Pipe Works*, 76 Fed. 166, 36 L. R. A. 139, 77 Fed. 774, 36 L. R. A. 139, 88 Fed. 613.

⁸¹ *Granite Brick Co. v. Titus*, 226 Fed. 557.

Where stock was issued on the vote of the directors, and used by them as a pledge to obtain a loan, it was held that the corporation was estopped from objecting that the issue of stock not paid up was prohibited by the constitution, and that the holder was entitled to the same to the extent of the loan. *Gasquet v. Crescent City Brewing Co.*, 49 Fed. 496. And see *Bloomenthal v. Ford*, [1897] App. Cas. 156, *rev'g* [1896] 2 Ch. 525.

stock, but offers to surrender it upon payment of the amount advanced upon it.⁸²

Where such a pledge is valid, in case of default, the pledgee may sell the stock for what it will bring, although it may be less than par, and although the charter of the corporation may prohibit it from issuing its stock at less than par.⁸³

If the corporation becomes insolvent and is placed in the hands of a receiver, the pledgee may prove his claim for the amount of the debt secured by the pledge, but, if he does so, must return the pledged stock.⁸⁴

The liability of the pledgee to creditors of the corporation as a stockholder will be considered in a subsequent section.⁸⁵

XII. WATERED OR FICTITIOUSLY PAID UP STOCK

§ 3517. In general; definitions and distinctions. As will be developed in the succeeding sections, by the great weight of authority, in the absence of express charter, statutory or constitutional provisions establishing a different rule, an issue of watered or fictitiously paid up stock by a corporation, whether the issue was at a discount of its par value, or for property, labor or services taken at an intentional overvaluation, or gratuitous, is binding upon the corporation, and as against all other parties, except in so far as it may constitute a violation of the rights of existing stockholders, or operate as a fraud upon subsequent subscribers for stock, or subsequent creditors of the corporation. In most jurisdictions, when stock is issued for property, labor or services, at an overvaluation known to be excessive, the transaction is fraudulent as against dissenting stockholders and subsequent bona fide creditors, and they may compel payment of the difference between the par value of the stock and the actual value of the property, labor or services. It is otherwise, however, if the valuation was made in good faith, and the overvaluation was due to mistake or mere error of judgment.

In some jurisdictions, the rules above stated do not apply to the full extent because of special statutory or constitutional provisions. Generally, however, they apply under such provisions.⁸⁶

⁸² *Granite Brick Co. v. Titus*, 226 Fed. 557.

⁸³ *Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co.*, 79 Fed. 842; *Peterborough R. Co. v. Nashua & L. R. Co.*, 59 N. H. 385.

⁸⁴ *In re International Radiator Co.*, — Del. Ch. —, 92 Atl. 255.

⁸⁵ See subd. xxvi, *infra*, this chapter.

⁸⁶ See *infra*, this subdivision of this chapter.

When a corporation issues stock as full paid, this is a representation, in the absence of anything to show the contrary, that it has received from the subscribers or purchasers the full par value of the shares, in money or its equivalent, as capital upon which to conduct its operations, and from which, if necessary, to pay its debts. In such a case, persons dealing with the corporation and becoming its creditors, and persons subscribing for or purchasing other shares, have a right to assume that the corporation has received or will receive the par value of the stock. If the shares have been issued by the corporation as full paid, when in fact it has intentionally or knowingly received or agreed to receive nothing at all for them, or less than their par value, either in money, or in property or services, the shares are said to be "watered," or "fictitiously paid up," to the extent to which they have not been or are not to be paid for. Statutes, however, in some states have enacted what some courts have termed the "true value" rule, whereby it is made obligatory to put in as much in value as the par value of the stock with no latitude for erroneous valuations of property or services.⁸⁷ In this connection it is also essential to distinguish "issues" of stock from "sales" of stock by the corporation which has already "issued" it and has again come into the proprietary possession of it.⁸⁸

⁸⁷ See cases cited *infra* this section and sections following.

Watered or fictitious stock has been defined as that which "is issued as fully paid up, when in fact the whole amount of the par value thereof has not been paid in; * * * which purports to represent, but does not represent, in good faith, money paid in," etc. *Loud v. Solomon*, 188 Mich. 7, 154 N. W. 73, quoting Cook on Stocks and Stockholders, § 13.

This definition is only saved by the belated interjection of the words "in good faith," from being a misleading one. As will hereafter appear the erroneous valuation of that which is rendered in payment for full paid stock does not stamp it as watered or fictitious, even as to creditors, unless there was bad faith or unless the statute precluded any estimation of value by requiring actual full value.

⁸⁸ See § 3522, *infra*, as to repurchased or treasury stock.

A contract to "advance" needed money to the corporation, made with other stockholders and subject to its approval, on consideration that it should deliver 50 per cent. of its stock to the promisor, was held a purchase and not a loan to it. *Paine v. Copper Belle Min. Co.*, 13 Ariz. 406, 114 Pac. 964.

A corporation having acquired property for 1,000,000 shares by virtue of a modification of an agreement calling for 2,500,000 shares holds the difference as unissued and not as treasury stock, and directors cannot sell it below par (Civ. Code, §§ 423, 427). *Anderson v. Scandia Min. Syndicate*, 26 S. D. 558, 128 N. W. 1016.

Where the stock was given out to sell and account for the proceeds, it is the same as if never issued and re-

There are various ways in which watered stock may be issued. It may be issued gratuitously,—under an agreement that nothing at all shall be paid into the corporation therefor. Or it may be issued upon payment of, or an agreement to pay, less than its par value in money, or for cash at a discount.⁸⁹ Or it may be issued in payment for property; labor or services, the value of the property, labor or services being known to be less than the par value of the shares.⁹⁰ Or it may be issued in the guise of a stock dividend,—that is, issued to stockholders as a dividend representing surplus profits, or an increase in the value of property, when there are not sufficient profits or a sufficient increase in values to justify it.⁹¹ In all of these cases, the stock is watered to the extent that it does not represent money or its equivalent actually received or secured to the corporation as capital.

Whether a corporation can lawfully issue stock thus watered or fictitiously paid up, and the rights and liabilities arising out of such an issue of stock, or agreement therefor, will be considered in the following sections. An important distinction between an issue and an agreement to issue stock should be noted, the one being executed and the other executory, and it does not follow that an issue will be compelled or an executory contract be enforced, though it might have been valid if the issue had been made.⁹²

§ 3518. Power of corporation at common law—In general. In few or none of the states has this subject been left untouched by legislation, and the recent decisions are therefore to be read with careful attention to the condition of the statutes contemporaneous with the cause of action.⁹³ It has been said that when the amount of the capital stock of a corporation, and the par value of its shares,

maining in the treasury, unless it comes into the hands of an innocent purchaser. *Cortelyou v. Imperial Land Co.*, 156 Cal. 373, 104 Pac. 695.

⁸⁹ See *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648. See also *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968. See also §§ 3520, 3591, *infra*.

⁹⁰ *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala. 407, 12 L. R. A. 307, 25 Am. St. Rep. 65, 9 So. 129; *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713, 20 S. W. 965. See also §§ 3519, 3591, *infra*.

⁹¹ See § 3523, *infra*, and also *infra* this chapter, subdivision on Dividends.

⁹² This distinction appears as an effect of an issue or an agreement to issue the stock, and not as a phase of power to issue it. Therefore it is treated *infra*, § 3579 et seq.

⁹³ Many of the statutes are substantially declaratory of the common-law rules worked out by the courts. Some, however, impose radical inhibitions on power to issue for anything less than full par value. See § 3526 et seq., *infra*.

are fixed by its charter or the general law, or by its articles of association in pursuance thereof, the corporation has no power to issue the stock upon payment of less than its par value. This statement, however, is entirely too broad, and is not supported by authority. The writer, after a most careful investigation, has not been able to find a single case in which such a rule has been laid down, where there was no express charter, statutory or constitutional prohibition or provision, and where no rights of dissenting stockholders or creditors were involved. But there are numerous decisions seeming to state the above rule which on examination depend either on some statute, implied without mention or citation, or on an invasion of right or on fraud.⁹⁴ Even in the absence of a statutory prohibition, the issue of stock at less than its par value, except as hereafter explained, is in violation of the rights of dissenting stockholders who have paid the par value of their shares, and for this reason *ultra vires* as against them.⁹⁵ It is also a fraud upon other persons subscribing for or purchasing shares at their par value in reliance upon all other subscribers or purchasers paying the same. Any secret agreement, therefore, between a corporation and a subscriber for shares, under which he is to pay less than other subscribers, is void as a fraud upon the latter.⁹⁶ It is also a fraud upon persons who subsequently deal with the corporation and become its creditors in the belief that its authorized capital stock has been fully paid, and, as we shall see, payment of less than the par value of stock may not be full payment as against them.⁹⁷

Where, however, there is no charter, statutory or constitutional provision requiring that stock shall be paid for at its par value, and where no rights of other stockholders are violated, and there is no fraud as against creditors, there is nothing whatever to render it either illegal or *ultra vires* for a corporation to issue its stock as full paid upon payment of less than its par value. Such a transaction is perfectly valid as between the parties, if all the stockholders consent,

⁹⁴ An examination of the English cases and some cases in this country, which are sometimes cited as against this view, will show, either that they were decided under the influence of some special statutory or constitutional provision, or that the rights of nonconsenting stockholders or creditors were involved. See §§ 3525-3575, *infra*, where references are made to statutes of the various states.

See § 3585 *et seq.*, *infra*, and § 3589

et seq., as to the rights of stockholders and creditors to assail such an issue.

⁹⁵ *Fisk v. Chicago, R. I. & P. R. Co.*, 53 Barb. (N. Y.) 513. See § 3585, *infra*.

⁹⁶ See Chap. 17, *supra*.

⁹⁷ *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Union Mut. Life Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537, 37 Am. Rep. 129. And see § 3589 *et seq.*, *infra*.

and the corporation cannot afterwards repudiate the agreement, and compel payment of the difference between the par value of the stock and what it has agreed upon as payment in full.⁹⁸

In a leading case, on this point, decided in 1881 in the Supreme Court of the United States, a corporation organized under the laws of Kansas, where there was no express statutory or constitutional provision on the subject, issued its stock to all of its subscribers as full paid, upon payment of less than half of its par value, and agreed with them that no further payment should be required. The court held that the agreement was valid and binding as between the corporation and the stockholders, although the stockholders might be required in equity to pay such part of the difference between the par value of the stock and the amount paid as might be necessary to satisfy the claims of creditors of the corporation. "The stock held by the defendant," said the court, "was evidenced by certificates of full paid shares. It is conceded to have been the contract between him and the company that he should never be called upon to pay any further assessments upon it. The same contract was made with all the other shareholders, and the fact was known to all. As between them and the company this was a perfectly valid agreement. It was not forbidden by the charter or by any law or public policy, and as between the company and the stockholders was just as binding as if it had been expressly authorized by the charter. If the company, for the purpose of increasing its business, had called upon the stockholders to pay up that part of their stock, which had been satisfied 'by discount' according to their contract, they could have successfully resisted such a demand. No suit could have been maintained by the company to collect the unpaid stock for such a purpose. The shares were issued as full paid, on a fair understanding, and that bound the company."⁹⁹ The same result has been reached in New York and New Jersey, which have statutes regulating the issue of stock for property or services. The common-law right to make a subscription contract is the basis of the doctrine.¹ Promissory notes given to the corporation may be

⁹⁸ *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Barr v. New York, L. E. & W. R. Co.*, 125 N. Y. 263, 26 N. E. 145; *Flynn v. Brooklyn City R. Co.*, 9 N. Y. App. Div. 269, 41 N. Y. Supp. 566. And see §§ 3584, 3587, *infra*, and cases there cited.

Such sale price as the corporation chooses may be fixed, if no injury is

done to the stockholders or to creditors and if no statute forbids. *Ross v. Saylor*, 104 Ill. App. 19.

⁹⁹ *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968, opinion by Mr. Justice Woods.

¹ Since the subscription is a contract, there is no obstacle to issuance below par as between corporation and

the basis of a stock issue to the maker, paying his subscription in this manner or deferring payment thereby, unless the terms of the statute prevent it.²

§ 3519. — Issue of stock for property, labor or services. What has been stated in the foregoing section is true when a corporation issues its stock for property, labor or services, any of which may ordinarily be taken in payment as well as money might be,³ whether it issues the stock at less than par upon a fair valuation of the property, labor or services, or at par upon an overvaluation. If the transaction is unaffected by charter, statutory or constitutional provisions, and all the stockholders consent, and the rights of creditors are not involved, the transaction is perfectly valid and binding as between the parties. As between them, the courts will treat the stock as full paid, in accordance with their agreement, however much the par value of the stock may exceed the value of the property, labor or services.⁴ "Whatever," said Judge Showalter in a federal case, "may have been in fact the value of the property turned over to the company for its stock, the company agreed to take it for the stock. The persons interested were the stockholders, and there was no dissent on the part of any person concerned from what was then done. Neither any person then hold-

stockholder. *Southworth v. Morgan*, 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490, rev'g 143 N. Y. App. Div. 648, 128 N. Y. Supp. 196, 71 N. Y. Misc. 214, 128 N. Y. Supp. 598.

In *Flynn v. Brooklyn City R. Co.*, 9 N. Y. App. Div. 269, 41 N. Y. Supp. 566, it was held that, as there was no statutory provision in New York affecting the issue of stock by railroad companies at less than par, it was not contrary to public policy, or otherwise illegal, for a railroad company with a capital stock of thirty million dollars to issue the same at fifteen cents on the dollar in payment of the shares of stock in other railroad companies purchased by it.

It is said by the New Jersey court that, if the issue of stock for less than par in cash or property is *malum* of any kind, it is simply *malum prohibitum*; and that the old theories in regard to the status of capital stock

have been modified by recent decisions; and that in modern days credit is extended to the corporation on the difference between its assets and liabilities and not on the basis of its capital stock. *Stevenson, V. C.*, in *Rubino v. Pressed Steel Car Co.* (N. J. Ch.), 53 Atl. 1050.

²See § 3526 et seq., *infra*, particularly the cases decided under the Texas and California statutes.

³As to payment for stock in property, labor or services, see also this chapter, subdivision "Issue and Payment," *supra*.

⁴*Northern Trust Co. v. Columbia Straw Paper Co.*, 75 Fed. 936, *aff'd* sub nom. *Dickerman v. Northern Trust Co.*, 80 Fed. 450; *Barr v. New York, L. E. & W. R. Co.*, 125 N. Y. 263, 26 N. E. 145; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Whitehill v. Jacobs*, 75 Wis. 474, 44 N. W. 630. And see §§ 3579-3595, *infra*.

ing stock, nor any person who afterwards became a stockholder by assignment from one who then held stock, can now make complaint, on behalf of the corporation, as against the fairness of that transaction. This I take to be the settled law on that subject."⁵

According to the weight of authority, as we shall hereafter see, such payment for the stock will not be good as against subsequent bona fide creditors of the corporation, who deal with it on the faith of its stock being fully paid, if the overvaluation of the property was fraudulent, or if it was intentional, although without any actual fraudulent intent.⁶ Subject to limitations imposed by statute, charter or by-law,⁷ any services of value, including promotion services,⁸ up to a reasonable value,⁹ or tangible or intangible property¹⁰ of any de-

⁵ *Northern Trust Co. v. Columbia Straw Paper Co.*, 75 Fed. 936, aff'd *Diekerman v. Northern Trust Co.*, 80 Fed. 450. And see § 3583 et seq., *infra*, and cases there cited.

⁶ § 3589 et seq., *infra*.

⁷ By-laws prohibiting compensation for official services do not prevent issue of stock to officers for promotion and organization services. *Fitzpatrick v. O'Neill*, 43 Mont. 552, Ann. Cas. 1912 C 296, 118 Pac. 273.

⁸ Services in selling the stock may be of such value as to support issuance of it in consideration. A scheme by which \$50,000,000 of full paid nonassessable stock was to be sold in small blocks to retail grocers to furnish \$10,000,000 of capital for a sugar business to supply them and the balance of \$25,000,000 of such stock was to be divided equally one-half for selling services and one-half for providing \$100,000 capital, was not violative of statute or against public policy. *Holman v. Thomas*, 178 Fed. 675, rev'g 171 Fed. 219.

⁹ Stock can be issued for services rendered in promotion and organization to a reasonable sum agreed on all holders having knowledge of it. *Fitzpatrick v. O'Neill*, 43 Mont. 552, Ann. Cas. 1912 C 296, 118 Pac. 273.

The voting of 15,000 out of 25,000

shares "as a bonus for promoting, organizing and installing" the corporation was held in fact a gift. *McAllister v. American Hospital Ass'n*, 62 Ore. 530, 125 Pac. 286.

¹⁰ Capitalized expectations from use of property are not property. *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069.

A promissory note given for the stock is personal "property." *Quartz Glass & Manufacturing Co. v. Joyce*, 27 Cal. App. 523, 150 Pac. 648.

A privilege or "concession" at an exposition when taken at a fair value will support a full paid stock issue. *Bonet Const. Co. v. Central Amusement Co.*, 153 Mo. App. 185, 132 S. W. 270.

Good-will, patents and established trade-marks are property, and stock issued for them is not bonus stock. *Brown v. Weeks*, — Mich. —, 161 N. W. 945.

A process of refining which was in use elsewhere, was not secret and was not patented is not "property"; and the issue of stock against it violates Const. art. 9, § 39. *Webster v. Webster Refining Co. of Okmulgee*, 36 Okla. 168, 47 L. R. A. (N. S.) 697, 128 Pac. 261.

As to what is "property" or "serv-

scription not wholly extraneous to the corporation's purposes and powers,¹¹ or the forbearance of any right or granting of one¹² will sustain a stock issue as one made for value and paid up. Some consideration must move, however, and the stock cannot issue as paid up stock on a consideration of services otherwise fully paid for or to be paid for,¹³ and hence turning over to the corporation options running to it and to which it was already entitled,¹⁴ or a contract for a benefit which the promisor never became able to perform legally,¹⁵ or substituted property which it had not bargained for and did not intend to keep as payment,¹⁶ or property that was onerous rather than beneficial,¹⁷ or a conveyance without title in the grantor,¹⁸ or a worth-

ices" within the meaning of the statutes, see § 3525 et seq., *infra*.

¹¹ As to power of the corporation to take and hold or use property, see Chaps. 28, 29, *supra*.

As to statutes restrictive of the kind of property that may be taken, see §§ 3525-3575, *infra*.

¹² Issuance in consideration of extension of a forfeited lease and of time for payment is sufficient consideration. *Ingraham v. Commercial Lead Co.*, 177 Fed. 341.

¹³ Stock voted to a promoter is invalid where the pretended services were in part canvassing for subscribers, which was fully paid by commissions, and in the remaining part as president when no salary was attached to that office. *Central Consumers' Wine & Liquor Co. v. Madden* (N. J. Ch.), 68 Atl. 777.

Stock issued as paid up to promoters who were also to be paid for property contributed, for commissions on treasury stock sold, and who were reimbursed for expenses is to be regarded as unpaid. *Torrey v. Toledo Portland Cement Co.*, 158 Mich. 348, 122 N. W. 614, 16 Det. L. N. 645.

"Services as director" will not afford a consideration. *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606.

¹⁴ Options for controlling stock of three plants, in which the negotiator

had no interest and which ran to and were for the benefit of a proposed new corporation, are not a consideration for an issue of \$10,000,000 over the price of the stocks themselves by the new corporation. *Tooker v. National Sugar Refining Co. of New Jersey*, 80 N. J. Eq. 305, 84 Atl. 10.

¹⁵ Where stock of a lightning rod company was issued to promoters of an insurance company on consideration of a reduced insurance rate to be made on all property protected by its rods, and the insurance company never became authorized to do business, the consideration for the stock failed. *Coffin v. Struthers*, 169 Iowa 313, 151 N. W. 400.

¹⁶ Taking foreign patents in lieu of a domestic patent as agreed, which was denied by the Patent Office, with a new agreement to assign the domestic patent when allowed and then to take back the foreign ones, was not a payment, and the stock may be cancelled. *In re American Air Compressor Co.*, — Mich. —, 160 N. W. 388.

¹⁷ An onerous leasehold is not a consideration. *Fox v. Produce Cold Storage Exchange*, 192 Ill. App. 301.

¹⁸ Where the persons conveying property to a corporation by quitclaim deed, in exchange for stock issued as full paid, have never had any title to the property, before or since, the stock is not full paid, and the subscribers

less good-will¹⁹ will not be regarded as constituting payment at all.

The power of a corporation to sell its property and take stock of another corporation in payment needs to be mentioned here only for the purpose of showing that on the same facts, to-wit, an exchange of property for stock, the position of the parties is reversed. It is only from the standpoint of a stock issue that such a transaction is here considered.

This section only deals with the issue of stocks for property, and not with the sale of property for stock. The sale of corporate property for whatever consideration involves a set of principles that are fully treated elsewhere.²⁰

§ 3520. — Issue of stock gratuitously, or at a discount, or as a bonus. For a corporation to issue its stock as a gratuity violates the rights of existing stockholders who do not consent, and is a fraud upon subsequent subscribers, and upon subsequent creditors who deal with it on the faith of its capital stock. The former may sue to enjoin the issue of the stock, or to cancel it if it has been issued, and has not reached the hands of a bona fide purchaser;²¹ and the latter, according to the weight of authority, may compel payment by the person to whom it was issued, to such extent as may be necessary for the payment of their claims.²²

The issue of the stock, however, or at least the agreement not to require payment, is binding as between the corporation and the other party, unless it is in violation of some charter, statutory or constitutional provision, and the corporation cannot repudiate the agreement and compel payment therefor.²³ In a New York case, decided in 1887,

are liable, at least in favor of creditors of the corporation, for the full amount of their subscriptions. It can make no difference in such a case that there was no actual fraudulent intent. *Henderson v. Turngren*, 9 Utah 432, 35 Pac. 495.

¹⁹ Good-will of a failing corporation in desperate straits is not a consideration against which stock can issue. *Fox v. Produce Cold Storage Exchange*, 192 Ill. App. 301.

²⁰ As to power of corporation to sell property, see Chap. 32, *supra*.

As to power to take or deal in stocks of another corporation, see Chap. 30, *supra*.

Stockholders' suits to prevent or to redress such transactions, see this chapter, "Remedies of Stockholders, etc.," *infra*.

²¹ See § 3585, *infra*.

²² *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227, 41 Fed. 531; *Richardson v. Green*, 193 U. S. 30, 33 L. Ed. 516; *Peninsular Sav. Bank of Detroit v. Black Flag Stove Polish Co.*, 105 Mich. 535, 63 N. W. 514. See also § 3591, *infra*.

²³ *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648. And see § 3583 *et seq.*, *infra*.

The doctrine that it has a right to sell a new issue to extricate the cor-

stock and bonds were issued to its stockholders by a corporation, and forty per cent. of the nominal amount of the shares was credited thereon as a gratuity, because the stockholders had been called upon to pay calls upon their original subscriptions in excess of what was expected and what was represented would be necessary at the commencement of the enterprise. It was held, there being no express statutory prohibition, that a judgment creditor of the corporation, in asserting a claim against the stockholders on account of the stock so issued, could not stand upon any right existing in the corporation itself to proceed against them. Judge Andrews said in substance: "It is very plain, upon the facts, that the plaintiff, in asserting this claim, cannot stand upon any right existing in the corporation itself to proceed against the defendant. The transactions by which he acquired the shares as paid up shares to the extent of forty per cent. of their nominal amount, and received the bonds, created no obligation as between him and the company to pay the amount unpaid on the stock or to account to the company for the bonds or their proceeds. As between the defendant and the company it was not intended that the former should be accountable to the company for the amount unpaid on the stock or for the bonds. Viewing the transactions in the light most favorable to the plaintiff, the credit on the stock and the transfer of the bonds were intended as a gratuity to the stockholders who had been called upon to pay calls upon their original subscriptions in excess of what was expected and of what was represented would be necessary at the commencement of the enterprise. There can be no doubt that as between the corporation and its stockholders these transactions were binding according to the actual intention. The corporation itself would have no standing to demand that the defendant should pay the forty per cent. on the stock which it acknowledged had been paid, or that he should account for the proceeds of the bonds."²⁴ Bonus stock, however, is not necessarily gratuitous, and rests on a consideration if given to induce the doing of benefit to the corporation²⁵ as where it is given to persons lending money or buying bonds.²⁶

puration from financial difficulties is not recognized to the extent of allowing it to dispose of an original issue below par. In *re Remington Automobile & Motor Co.*, 139 Fed. 766, explaining *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227, and construing New Jersey statutes.

²⁴ *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648.

²⁵ That a holder of bonus stock was not injured by being deprived of his share in new stock, see *Proctor v. Piedmont Portland Cement & Lime Co.*, 134 Ga. 391, 67 S. E. 942.

²⁶ "Bonus" stock given as consideration for a loan to the corporation is based on consideration. *California Trona Co. v. Wilkinson*, 20 Cal. App. 694, 130 Pac. 190.

The power to increase stock, the mode in which the increase is effected and the rights of existing stockholders as to sharing therein are discussed in preceding sections of this chapter.²⁷

§ 3521. — Issue of new stock pursuant to increase of capital.

When a corporation increases its capital stock merely for the purpose of adding to the original capital stock, to enable it to do a larger and more profitable business, the increased stock is subject to the same rules as original capital stock. In the absence of statutory or constitutional provisions, its issue for less than its par value will be binding as between the corporation and the purchasers or subscribers, but full payment may be required by subsequent bona fide creditors.²⁸

According to the decided weight of authority, however, when an active corporation becomes embarrassed, and increases its capital stock in order to raise money for the payment of its debts, and to enable it to continue its business, it may issue the new stock for the best price that can be obtained, although it may be below par, or it may issue the same as a bonus to induce persons to purchase its bonds, and the transaction, if in good faith, will be valid, not only as against the corporation itself, but also as against dissenting stockholders and subsequent bona fide creditors.²⁹ Accumulated surplus and acquired property may be used as the basis for an increase,³⁰ but new stock

Issuance of authorized increased full paid stock as a bonus of 50 per cent. for loans of money by existing stockholders to rescue an insolvent corporation was on sufficient consideration. *Ingraham v. Commercial Lead Co.*, 177 Fed. 341.

An issue of new stock and new bonds worth more than old bonds for which they were exchangeable is not invalid where the refunding of overdue interest on the old bonds and procurement of new capital was accomplished. *Pollitz v. Wabash R. Co.*, 167 Fed. 145.

²⁷ See § 3457 et seq., *supra*.

²⁸ *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227.

As to the rights of creditors, see § 3589 et seq., *infra*.

²⁹ *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227; *Clark v. Bever*, 139 U. S. 96, 35 L. Ed. 88; *Kellerman v.*

Maier, 116 Cal. 416, 48 Pac. 377; *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662; *Dummer v. Smedley*, 110 Mich. 466, 38 L. R. A. 490, 68 N. W. 260; *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

Contra, *Jackson v. Traer*, 64 Iowa 469, 52 Am. Rep. 449, 20 N. W. 764.

See also *Peter v. Union Mfg. Co.*, 56 Ohio St. 181, 46 N. E. 894.

While the courts do not dispute the doctrine of *Handley v. Stutz* that a corporation finding itself financially embarrassed may sell a new issue of stock for the best price obtainable, the right of a corporation to sell an original issue of stock below par is in nowise deemed to be upheld by that decision. In *re Remington Automobile & Motor Co.*, 139 Fed. 766. And see § 3589 et seq., *infra*, where this question is further considered.

³⁰ The amount of assets over capi-

cannot be based on a fiction; there must be some value.³¹ It may be issued against money paid out to cancel debts or other lawful payments by the corporation, whereby a credit stands to the corporate capital account.³²

§ 3522. — Issues turned back into treasury, or otherwise reacquired by corporation. By repurchase, forfeiture, surrender or retirement, the corporation may come into possession of its own stock, assuming it to have the requisite power, or the stock may be contributed to its treasury thence to be sold for the purpose of financing its operations.³³ The latter is often done where mines, patents or other speculative or operative property is taken. Such stock need not be issued at par, but may be sold at the best price that can be obtained, and the purchasers will not incur liability beyond the agreed price, even to subsequent creditors.³⁴

The same is true of stock which has been lawfully issued by a cor-

poration and debts can be used to increase stock, which may then be issued to pay for property and the dividend rights of the existing holders, the parties having pooled their property and dividend rights into one fund to pay the subscription. *Lantz v. Moeller*, 76 Wash. 429, 50 L. R. A. (N. S.) 68, 136 Pac. 687.

³¹ A fictitious entry in the original capital account of a new venture for "good-will" carried along without application of earnings to give it value cannot be made the basis of a stock increase. *Coleman v. Booth*, 268 Mo. 64, 186 S. W. 1021.

³² Debts paid by application of surplus may be capitalized on a new issue as reasonably necessary for the purposes of the company. In re *Watertown Gas Light Co.*, 127 N. Y. App. Div. 462, 111 N. Y. Supp. 486.

A premium over par paid for old stock was held not a reasonably necessary element in new capitalization, there being no evidence as to surplus or dividends, though the old stock was worth that price. In re *Watertown Gas Light Co.*, 127 N. Y. App. Div. 462, 111 N. Y. Supp. 486.

³³ Stock held by the president as "trustee" to dispose of to parties to certain contracts is not treasury stock. *Rochelle Roofing Co. v. Burley & Stevens, Inc.*, — Mass. —, 115 N. E. 478.

Stock not issued for property because the seller took less than was agreed, is unissued and is not treasury stock. *Anderson v. Scandia Min. Syndicate*, 26 S. D. 558, 128 N. W. 1016.

As to power to purchase or take its own stock, see Chap. 30, *supra*.

As to rescission of subscription and surrender of shares, see Chap. 17, *supra*; this chapter, *Issue and Cancellation*, *infra*.

As to forfeiture for nonpayment of calls, see Chap. 17, *supra*, this chapter, *Assessments on Full Paid Stock*, *infra*.

³⁴ See *Davis v. Montgomery Furnace & Chemical Co.*, 101 Ala. 127, 8 So. 496; *Mosher v. Sinnott*, 20 Colo. App. 454, 79 Pac. 742; *Crosby v. Stratton*, 17 Colo. App. 212, 68 Pac. 130; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87. Compare *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551, *aff'g* 27 Ill. App. 511.

poration, and afterwards reacquired by it by forfeiture for nonpayment of assessments thereon, or by a valid compromise or purchase. It holds such stock as it holds its other assets, and may lawfully sell the same at its market price, even as against dissenting stockholders and subsequent creditors.³⁵ Such disposal is not to a "subscriber," but is essentially a sale of the stock.³⁶ It is necessary that treasury stock shall have been legally issued before being turned into the treasury; if it was inceptionally void, it cannot become valid by being sold from the treasury.³⁷

§ 3523. — Issue against profits or dividends; stock dividends. A stock dividend in correct speech is one of stock of the dividing corporation, and does not embrace a division of other stocks owned by it,³⁸ or of the surplus of a subsidiary owned corporation.³⁹ If a corporation has surplus profits which it may lawfully pay to the stockholders as dividends, or if it has lawfully declared dividends out of surplus profits,⁴⁰ it may lawfully, by agreement with the stockholders, credit

³⁵ *Chillicothe Branch of State Bank of Ohio v. Fox*, 3 Blatchf. 431, Fed. Cas. No. 2,683; *Pullman v. Railway Equipment Co.*, 73 Ill. App. 313; *Otter v. Brevoort Petroleum Co.*, 50 Barb. (N. Y.) 247; *Ramwell's Case*, 50 L. J. Ch. 827.

In an action on an agreement by a corporation to sell its own shares at less than par, where it does not appear how the company acquired the shares, it cannot be inferred in favor of the company that the stock has not been fully paid up and afterwards acquired by the company. *Otter v. Brevoort Petroleum Co.*, 50 Barb. (N. Y.) 247.

Cancelled stock could be disposed of by reissue for full value under Stock Corporation Law, § 55. *Archer v. Hesse*, 164 N. Y. App. Div. 493, 150 N. Y. Supp. 296.

Surrendered full paid stock may be sold for whatever price the corporation will accept. *Witt v. Nelson*, — Tex. Civ. App. —, 169 S. W. 381.

³⁶ Purchasers of stock from the president to whom it had been turned back as "trustee" are not subscrib-

ers. *Rochelle Roofing Co. v. Burley & Stevens, Inc.*, — Mass. —, 115 N. E. 478.

As to what constitutes a subscription, see Chap. 17, *supra*.

³⁷ *Enright v. Heckscher*, 240 Fed. 863.

³⁸ A dividend paid in stock of a subsidiary company owned by the corporation and bought with its surplus is not a stock dividend. A stock dividend is one which leaves corporate property the same and diminishes the value of the old shares. *Gray v. Hemenway*, 212 Mass. 239, 98 N. E. 789.

See also this chapter, "Dividends," *infra*.

³⁹ For a purchasing corporation to issue stock against surplus of a purchased one is not the making of a stock dividend, which is made a crime by P. S. c. 273, § 11. *Grafton County Elec. Light & Power Co. v. State*, 77 N. H. 539, 94 Atl. 193.

⁴⁰ As to dividends in general, including stock or scrip dividends, see this chapter, "Dividends," *infra*.

the same as a payment pro tanto on their subscriptions,⁴¹ or issue stock as a dividend,⁴² or profit sharing scrip⁴³ or distribute increased stock on that account⁴⁴ if there is no statutory obstacle.⁴⁵ Statutes forbidding or limiting the right to make stock dividends do not prohibit new issues by way of increase.⁴⁶ A corporation free from indebtedness, if acting in good faith, has the power, as between itself and its stockholders, if all consent, to agree, in consideration of the surrender by the stockholders to it of accumulated profits, and of the increased value of its property, to treat stock, upon which only fifty per cent. has been paid, as fully paid up stock; and the corporation cannot afterwards, on its own behalf, or on behalf of subsequent creditors with

⁴¹ *Kenton Furnace R. R. & Mfg. Co. v. McAlpin*, 5 Fed. 737; *Kryger v. Andrews*, 65 Mich. 405, 35 N. W. 405.

Whether there was fraud in such a transaction is a question for the jury. *Kryger v. Andrews*, 65 Mich. 405, 35 N. W. 245.

⁴² Such issues are valid if the total is kept within charter limits as increased and if actual surplus is not exceeded. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538.

Stock dividends are lawful out of earnings if no statute forbids; and they may be either in common or preferred. Stats. 1898, § 1759a, authorizing preferred stock, also sanctions a preferred stock dividend. *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

A dividend is a stock dividend notwithstanding it was turned into money by an agent of the holders and a distribution made of the proceeds. *Soehnlein v. Soehnlein*, 146 Wis. 330, 131 N. W. 739.

In an Oregon case the corporation made a dividend by passing its earnings pro rata to the credit of the stockholders. They simultaneously voted issuance of unissued stock to themselves pro rata and directed that their accounts be charged for it. This was held to be a valid stock issue, though it would not have been good as against creditors if not intended

to be paid for. *Grants Pass Hardware Co. v. Calvert*, 70 Ore. 103, 142 Pac. 569.

That there is no legal distinction between distribution in stock and distribution in money, see *Kimball v. Success Min. Co.*, 38 Utah 78, 110 Pac. 872, which was not a case involving power to issue, however, but only right to share in distribution.

⁴³ An obligation in a stated sum to pay an amount equal to the dividend paid on stock of a like sum, and to share pro rata in assets, is a scrip dividend where issued against an investment of accumulated and divisible profits in permanent improvements. In *re Robinson's Trust*, 218 Pa. 481, 67 Atl. 775.

⁴⁴ Payment of dividends with increased stock, see *Lantz v. Moeller*, 76 Wash. 429, 50 L. R. A. (N. S.) 68, 136 Pac. 687.

⁴⁵ A stock dividend against increment of property value was held void under the Alabama statutes. *Fitzpatrick v. Dispatch Pub. Co.*, 83 Ala. 604, 2 So. 727.

As to construction of a statute making it a crime, see *Grafton County Elec. Light & Power Co. v. State*, 77 N. H. 539, 94 Atl. 193.

⁴⁶ *Fall River Gas Works Co. v. Board of Gas & Electric Light Com'rs*, 214 Mass. 529, 102 N. E. 475.

notice, disturb the arrangement, and compel payment of the other fifty per cent. of the stock.⁴⁷ The effect of a stock dividend is to leave the assets unchanged and merely to increase the capitalization.⁴⁸

§ 3524. — Payment of commissions and expenses out of proceeds.

The rule that a corporation cannot, as against dissenting stockholders or subsequent creditors, lawfully issue its stock at less than its par value, does not make it unlawful or ultra vires for a corporation to enter into a contract to pay a broker or other agent a commission for procuring subscriptions to its capital stock, or selling stock, and paying the same out of the cash received upon the subscriptions or sales,⁴⁹ but as before shown, it cannot issue against such services when they have been or are to be paid for fully in some other way.⁵⁰

§ 3525. Charter provisions and statutes and constitutional regulations—In general. The charters of particular corporations, or the general law under which they are formed, sometimes expressly provide that they shall not issue their stock for less than its par value. And in many states, to prevent the evils arising from the issue of watered or fictitiously paid up stock, and protect the public who may purchase stock or become creditors of corporations, general constitutional or statutory prohibitions have been adopted or enacted. In a number of states it is provided, in substance, that no corporation shall issue stock or bonds except for "labor done" or "money or property actually received," and that "all fictitious increase of stock or indebtedness shall be void." In some, the labor or property is expressly required to be received at no greater value than the market price. There are also statutes in some states expressly prohibiting the issue of stock, whether for money or for property or labor, at less than the par value. Some of the provisions are so clear as to leave no doubt as to the intention of the legislature, while in construing others the courts have not agreed. So completely is this whole subject a matter of statutory construction, that the decisions and the statutes construed are hereafter grouped by states. In more recent years a class of statutes addressed to the prevention of the same evils has been enacted in numerous states, which are colloquially called "Blue Sky

⁴⁷ *Kenton Furnace R. & Mfg. Co. v. McAlpin*, 5 Fed. 737.

⁴⁸ *Lancaster Trust Co. v. Mason*, 152 N. C. 660, 136 Am. St. Rep. 851, 68 S. E. 235, and see also §§ 3455-3473, *infra*.

⁴⁹ *Mason v. Morin*, 19 Ky. L. Rep. 794, 42 S. W. 88; *Metropolitan Coal Consumers' Ass'n v. Serimgeour*, 73 L. T. 137.

⁵⁰ See § 3519, *supra*.

Laws." The general scheme of them is to require submission and examination of all corporate issues by a state board or commissioner without whose approval they may not be issued or marketed.⁵¹ Another class of statutes is that which regulates the issues of railroad, gas and other public utility corporations. The object of these is primarily to prevent the inclusion in the capital of elements which would expand it beyond a proper basis for the computation of just and remunerative rates for the service rendered, and thus hinder public regulation.⁵² They are not designed to take the place of the general corporation statutes which limit the power to issue stock, and have been construed as modifying it only so far as necessary to a harmonious construction.⁵³ The last two named classes of legislation both apply to bonds and perhaps other issues as well as stocks, and hence are extrinsic to this context. Public utilities regulations which limit the capitalization of the enterprises do not apply to corporations formed to take such property at the value indicated by sale on foreclosure

⁵¹ These statutes are fully considered in chapter on Governmental Regulation and Control, *infra*.

⁵² The general purpose of the public utility laws reposing in public boards a supervision over stock issues is to limit the former discretion which was vested in the corporate authorities. *Fall River Gas Works Co. v. Board of Gas & Electric Light Com'rs*, 214 Mass. 529, 102 N. E. 475.

As to these statutes, see chapter on Governmental Regulations, *infra*.

⁵³ Stock Corporation Law, § 55, was not repealed by provision of Public Service Commission Law, § 55, that the commission must authorize the issue before it can be made and must certify that the amount proposed was reasonably required for the purposes to which it was to be applied. The directors in good faith make the valuation, and it binds the commission. *People v. Public Service Commission for Second Dist. of New York*, 158 N. Y. App. Div. 251, 143 N. Y. Supp. 148.

Under the Gas Commission Law, § 12 (Laws 1905, c. 737), the assent of the commission was required to new issues, which must have been "rea-

sonably required for the purposes of the corporation." This modified Stock Corporation Law, § 42, which, regulating stock issues for money or property, in effect left the directors' judgment as to valuation conclusive. *In re Watertown Gas Light Co.*, 127 N. Y. App. Div. 462, 111 N. Y. Supp. 486.

The public utility regulations of Massachusetts (especially Rev. Laws, c. 109, § 24) requiring leave from commissioners to issue such stock as shall be "reasonably necessary for the purpose for which" they are to be used, does not enable the board to permit any issue beyond charter limits, or vest in the board the decision whether profits may be distributed or must be applied to improvements of the plant, when necessary or desirable. Accordingly the fact that the corporation distributed large dividends which would have sufficed to make desired improvements, was held no reason to deny leave for an additional issue. *Fall River Gas Works Co. v. Board of Gas & Electric Light Com'rs*, 214 Mass. 529, 102 N. E. 475.

of an antecedent mortgage. To do so would impair a property right it is said.⁵⁴ It has been held that the law of the domicile of the corporation governs the considerations for which stock shall issue;⁵⁵ and this would not seem open to doubt, though in one state the construction of the statutes leads to a virtual nullification of the rule and makes the law of the place of doing business the test.⁵⁶ In some states the common law is presumed to be in force in other states whose laws are not in proof as to the right to issue stock for less than par value.⁵⁷ In other states the foreign statutory law is presumed to be the same as that of the forum.⁵⁸ Most of the courts, in construing the prohibitions against the issue of stock or bonds except for money or property actually received or labor done, and against fictitious increase of stock or indebtedness, hold that they were intended to protect stockholders against spoliation, and to guard the public against securities that are absolutely worthless, by preventing the flooding of the market with stock and bonds which do not represent anything whatever of substantial value; and that it was not intended to make the validity of every issue of stock or bonds by a private corporation depend upon the inquiry whether the money, property or labor received therefor was of equal value in the market with the stock or bonds so issued, or to restrict private corporations, acting with the approval of their

⁵⁴ *People v. Public Service Commission for Second Dist. of New York*, 158 N. Y. App. Div. 251, 143 N. Y. Supp. 148.

⁵⁵ *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115.

Validity of a gift or bonus will be governed by the law of the domicile. *Central Consumers' Wine & Liquor Co. v. Madden* (N. J. Ch.), 68 Atl. 777.

As to the law governing foreign corporations in general and their powers, rights and disabilities, see chapter on Foreign Corporations, *infra*.

⁵⁶ The Texas courts hold that the statutes prohibiting the issue except for money, labor or property at the "reasonable worth" of it, apply alike to domestic and to foreign corporations doing business in Texas. See § 3567, *infra*.

⁵⁷ It cannot be assumed that by the

laws of another state the issue of full paid stock at 25 per cent. is invalid between corporation and stockholder. In such a case the common-law rules, under which it is binding on both. *Southworth v. Morgan*, 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490, rev'g 143 N. Y. App. Div. 648, 128 N. Y. Supp. 196, 71 N. Y. Misc. 214, 128 N. Y. Supp. 598.

⁵⁸ Presumption is that the laws of another state in this regard are the same as the statutory laws of Texas. *Sturdevant v. Falvey*, — Tex. Civ. App. —, 176 S. W. 908; *Farmers' & Merchants' State Bank v. Falvey*, — Tex. Civ. App. —, 175 S. W. 833.

This accords with the decisions of Texas, which reject the rule that sister states will be presumed to have the common law if no other is proved. *Blethen v. Bonner*, 93 Tex. 141, 53 S. W. 1016.

stockholders, in the sale or exchange of their stock or bonds for money, property or labor, upon such terms as they may deem proper; provided, always, the transaction is a real one, based upon a present consideration, and having reference to legitimate corporate purposes, and is not a mere device to evade the law, and accomplish that which is forbidden.⁵⁹

In a leading Illinois case it was said, with reference to railroad companies, that the object of such a provision "was to prevent reckless and unscrupulous speculators, under the guise or pretense of building a railroad or of accomplishing some other legitimate corporate purpose, from fraudulently issuing and putting upon the market bonds or stocks that do not, and are not intended to, represent money or property of any kind, either in possession or in expectancy, the stock or bonds in such case being entirely fictitious," and that it was not intended "to interfere with the usual and customary methods of raising funds by railroad companies * * * for the purpose of building their roads, or of accomplishing other legitimate corporate purposes."⁶⁰

In accordance with this construction, it has been held that the prohibition against a fictitious issue of stock or bonds does not prevent a corporation from increasing its capital stock, where it has authority to do so, and selling the same at the actual market value, for the purpose of raising money needed for legitimate corporate purposes.⁶¹

59 United States. *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 30 L. Ed. 595; *Continental Trust Co. v. Toledo, St. L. & K. C. R. Co.*, 82 Fed. 642; *Atlantic Trust Co. v. Woodbridge Canal & Irrigation Co.*, 79 Fed. 842; *Brown v. Duluth, M. & N. R. Co.*, 53 Fed. 889; *Coe v. East & W. R. Co.*, 52 Fed. 531.

Alabama. *Nelson v. Hubbard*, 96 Ala. 238, 17 L. R. A. 375, 11 So. 428.

California. *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377; *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662.

Illinois. *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187. See also *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362.

Texas. *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

See also the cases construing the various statutes cited under sections infra.

Where a complaint alleged that a corporation purchased property of another corporation worth at least \$1,200,000, and in payment assumed an indebtedness of \$1,050,000, and also issued to the vendor's stockholders shares of stock of the par value of \$2,475,000, but did not allege that the purchasing corporation had any property before such purchase, it was held that it did not show a fictitious issue of stock within the meaning of a constitutional provision against such an issue. *Smith v. Ferries & C. H. R. Co. (Cal.)*, 51 Pac. 710.

60 *Coe v. East & W. R. Co.*, 52 Fed. 531, aff'd *Grant v. East & W. R. Co.*, 54 Fed. 569; *Peoria & S. R. Co. v. Thompson*, 103 Ill. 187, 201.

61 *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377; *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662; *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

Nor is reorganization prevented. Thus a provision that "no private corporation shall issue stock or bonds except for money or property actually received, or labor done; and all fictitious increase of stock or indebtedness shall be void," does not prevent the carrying out of an agreement between the mortgage bondholders of an embarrassed railroad company, by which it is agreed that trustees shall buy in the mortgaged property on foreclosure, and convey it to a new company to be organized by the bondholders, and that the new company shall issue new mortgage bonds to pay the expenses of the sale, and other new mortgage bonds to be taken by the bondholders in lieu of their old bonds, and full paid up stock subject to the mortgage debt, to be delivered to and held by the bondholders without any payment of money.⁶²

A provision that no corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void, does not prevent a corporation from pledging its stock or bonds as collateral security for a debt less in amount than their par value. The issue of stock, as already seen, has a precise meaning, and the inhibitions against "issues" do not apply to any and all emanations of stock from the corporation. For example, a pledge is not an issue,⁶³ and neither is a sale by the corporation of stock returned into the treasury.⁶⁴ Where shares of stock have been fully paid for, there is nothing whatever to prevent the stockholders from returning the whole or a part thereof to the corporation or a trustee for its use; and if they do so, the corporation or the trustee, subject to the terms upon which the stock is transferred, may sell or dispose of the same, as it may see fit, without violating constitutional or statutory provisions regulating the issue of stock.⁶⁵

The good-will of a business, patents, formulae, and other intangibles, are property, and stock issued therefor is issued for property actually received, within the meaning of the constitutional and statutory provisions.⁶⁶

⁶² *Memphis & L. R. R. Co. v. Dow*, 120 U. S. 287, 30 L. Ed. 595.

⁶³ See this chapter, Issue and Payment, *supra*.

⁶⁴ See § 3522, *supra*.

⁶⁵ *Davis v. Montgomery Furnace & Chemical Co.*, 101 Ala. 127, 8 So. 496; *Pullman v. Railway Equipment Co.*,⁷³

Ill. App. 313. And see § 3594, *infra*, § 3522, *supra*.

⁶⁶ *Washburn v. National Wall-Paper Co.*, 81 Fed. 17. See also cases construing the word "property" as used in the statutes, cited in the sections following this. See also § 3519, *supra*.

§ 3526. — **Alabama.** There is a constitutional provision that no corporation shall issue stock except for money, labor done or money or property actually received, and that all fictitious increase of stock shall be void, and a statutory provision requiring all subscriptions to be made payable in money or in labor or property at its money value. Under these provisions it has been held that the original capital stock of a corporation, upon which it is to conduct its operations, and which must constitute the basis of its credit, cannot be lawfully issued to subscribers for less than its par value, whether it be paid for in money, or in property, labor or services; and a fortiori, it cannot be lawfully issued gratuitously.⁶⁷ Under such a prohibition, it was held illegal for a corporation to agree to issue to subscribers "five dollars of stock for one of subscription,"⁶⁸ or to issue two hundred and fifty thousand dollars of stock to subscribers, being the whole capital stock, for property worth only five thousand dollars,⁶⁹ or for a corporation with a capital stock of ten thousand dollars to double the same, and distribute the new stock among the stockholders as a stock dividend, on the mere statement that its capital stock was invested in property which had since more than doubled in value, and was then worth twenty thousand dollars over and above all liabilities.⁷⁰

This prohibition is also violated by a contract by which a corporation agrees to repay to a purchaser of stock, in dividends, an amount equal to the amount paid therefor.⁷¹

⁶⁷ Alabama Nat. Bank v. Halsey, 109 Ala. 196, 19 So. 522; Perry v. Tuskalooza Cotton-Seed Oil-Mill Co., 93 Ala. 364, 9 So. 217; Elyton Land Co. v. Birmingham Warehouse & Elevator Co., 92 Ala. 407, 12 L. R. A. 307, 25 Am. St. Rep. 65, 9 So. 129.

Under the statute the value of the property or services must be equal to that of the stock. Montgomery Iron Works v. Capital City Ins. Co., 137 Ala. 134, 34 So. 210.

Fictitious stock is void and no contract promotive of its issuance is enforceable. Const. 1901, § 234; Code 1907, § 3467. Minge v. Clark, 190 Ala. 388, 67 So. 510. Present statute is only "for money, labor done or property actually received." Const. § 234. The subscription list must show the names of the subscribers who are privileged to pay in labor, services or

property, the character or description thereof, and when it is to be transferred to the company. Code 1907, § 3467. The certificate must have attached a copy of the subscription list verified by a statement on oath. Code 1907, § 3447.

⁶⁸ Williams v. Evans, 87 Ala. 725, 6 L. R. A. 218, 6 So. 702. See also Alabama Nat. Bank v. Halsey, 109 Ala. 196, 19 So. 522; Beitman v. Steiner, 98 Ala. 241, 13 So. 87.

⁶⁹ Elyton Land Co. v. Birmingham Warehouse & Elevator Co., 92 Ala. 407, 12 L. R. A. 307, 25 Am. St. Rep. 65, 9 So. 129. And see Roman v. Dimmick, 115 Ala. 233, 22 So. 109.

⁷⁰ Fitzpatrick v. Dispatch Pub. Co., 83 Ala. 604, 2 So. 727. And see Parsons v. Joseph, 92 Ala. 403, 8 So. 788.

⁷¹ Smith v. Alabama Fruit Growing

• § 3527. — **Alaska.** Stock can issue only “in consideration of money, labor or property estimated at its true money value.”⁷²

§ 3528. — **Arizona.** The constitution provides that no corporation “shall issue stock, except to bona fide subscribers therefor or their assignees; nor shall any corporation issue any bond or other obligation, for the payment of money, except for money or property received or for labor done.”⁷³ A foreign court construing a statute which authorizes corporations to exempt the private property of members from liability for corporate debts, but provides that nothing therein shall exempt stockholders from individual liability to the amount of the unpaid instalments on the stock owned by them, has held that to render stockholders receiving stock in exchange for property liable to creditors on the ground of overvaluation, there must have been a fraud in the valuation.⁷⁴

§ 3529. — **Arkansas.** The constitution has a provision that it can issue only “for money or property actually received or labor done.”⁷⁵

§ 3530. — **California.** It is provided by statute that “no corporation shall issue stock or bonds except for money paid, labor done or property actually received, and all fictitious increase of stock or indebtedness shall be void.”⁷⁶ This provision, as we have seen, does not make stock illegal merely because it is issued for less than its par value. It is not fictitious if sold for its market value.⁷⁷ Stock can be issued for property or services⁷⁸ and a note taken in payment is property within the statute.⁷⁹ It has been held under this provision that a railroad company cannot issue a certificate of stock to a subscriber on payment by a note, the payment of which is conditional upon completion of the road within a certain time.⁸⁰ This also pre-

& Winery Ass’n, 123 Ala. 538, 26 So. 232.

⁷² See Comp. Laws 1913, § 811.

⁷³ Const. art. XIV, sec. 6.

⁷⁴ Johnson v. Tennessee Oil, etc., Co., 74 N. J. Eq. 32, 69 Atl. 788.

⁷⁵ Const. art. XII, § 8.

⁷⁶ Const. art. XII, § 11; also Civil Code, § 359, Laws 1907.

⁷⁷ Stein v. Howard, 65 Cal. 616, 4 Pac. 662. See also § 3525, supra.

⁷⁸ Ellsworth v. National Home & Town Builders, — Cal. App. —, 164 Pac. 14.

Parties in interest in a corporation having no property may agree to sell all or any part of its stock for mining claims. Turner v. Markham, 155 Cal. 562, 102 Pac. 272.

A note is property within Civil Code, § 359.

⁷⁹ Quartz Glass & Manufacturing Co. v. Joyce, 27 Cal. App. 523, 150 Pac. 648.

⁸⁰ Jefferson v. Hewitt, 103 Cal. 624, 37 Pac. 638.

vents the corporation, after it has marketed shares, from issuing additional shares to the earlier purchasers gratuitously so that the cost of their holdings and those of the later purchasers shall be equalized.⁸¹ The corporation need not be the absolute or beneficial owner of the property as against the stockholders.⁸²

§ 3531. — Colorado. There is a constitutional provision that "no corporation shall issue stocks or bonds, except for labor done, services performed, or money or property actually received, and all fictitious increase of stock or indebtedness shall be void," and this provision has been embodied in the statutes relating to corporations. Under this provision, stock issued to persons, without their paying or agreeing to pay anything at all, is absolutely void, and the holders do not thereby become in any sense shareholders of the corporation, so as to have a status to maintain an action as such.⁸³ A patent is property under this provision,⁸⁴ and there is a special statute permitting the taking of discovered mining property.⁸⁵

§ 3532. — Connecticut. Other things than money can be taken, if there is a statement entered in the corporate record book, detailing items and value; and in case of fraudulent overvaluation the directors are liable for the difference.⁸⁶

⁸¹ *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377.

⁸² Issuing its full paid stock for property of members to be sold as a trustee for them the corporation having no beneficial interest in the property is valid between stockholders. *Baldwin v. Miller & Lux*, 152 Cal. 454, 92 Pac. 1030.

⁸³ Const. art. XV, § 9; Gen. St. 1883, §§ 340, 863. When so issued it must be reported or stated according to the facts. Gen. St. § 251, Rev. St. § 851; *Arkansas River Land, Town & Canal Co. v. Farmers' Loan & Trust Co.*, 13 Colo. 587, 22 Pac. 954. See also § 3579 et seq., *infra*.

⁸⁴ Agreement that the corporation would pay all of a stockholder's assessments, he paying interest thereon, if he would assign the right to use of patents is valid and makes the stock paid up. *Mountain Water Works*

Const. Co. v. Holme, 49 Colo. 412, 113 Pac. 501.

⁸⁵ Under the statute allowing issuance of stock for mining property on which a lode or vein has actually been discovered, an issue for property on which no lode or vein has been discovered will not protect the holders. *Buck v. Jones*, 18 Colo. App. 250, 70 Pac. 951.

⁸⁶ If anything other than cash is taken, the record book of the corporation shall contain a signed statement of what it was and that it had an actual value equal to the amount for which it was received. The judgment of the directors shall be final as to the value, but in case of fraudulent overvaluation they shall be jointly and severally liable to the corporation for the difference between actual and real value. *Substance of Pub. Acts 1903, c. 194, § 12.*

§ 3533. — **Delaware; District of Columbia.** The constitution and statutes vary but little from the “money, labor and property formula.”⁸⁷

§ 3534. — **Florida.** The statutes require a statement if anything but money is to be taken. They also permit purchase of property or services with stock.⁸⁸

§ 3535. — **Georgia.** No statute has been found controlling this question.⁸⁹

§ 3536. — **Hawaii.** There is a statute requiring of described business and other corporations that they provide in the affidavit as to subscriptions a full description of the property to be taken. This likens it to other states which require a statement and description.⁹⁰

§ 3537. — **Idaho.** Money, labor or services or property are the bases of stock, and there are provisions regulating the valuation of them.⁹¹

⁸⁷ By Del. Const. art. IX, § 3, only “for money paid, labor done or personal property, or real estate or leases thereof actually acquired by such corporation.” To same effect, and also that the stock so issued shall be full paid, and in the absence of fraud that the judgment of the directors shall be conclusive as to value. Gen. Corp. Law 1899, as amended 23 Del. Laws, c. 155, § 1.

By District of Columbia Code, § 613, either in money or property at its actual value.

⁸⁸ All payments of stock shall be made in lawful money of the United States unless it be stated in the charter that the capital stock or some therein designated portion of the stock shall be payable in property, labor or services at a just valuation to be fixed by the corporators, or by the directors at a meeting called for such purpose. Property, labor or services may also be paid for with capital stock at a just valuation to be fixed by the directors at a meeting called for such purpose. Gen. Stats. § 2653.

⁸⁹ Payment may be in property or services but taking it for par when worth but ten per cent. is a fraud on creditors. *Allen v. Grant*, 122 Ga. 552, 50 S. E. 494.

⁹⁰ When the object of the corporation is to take over and conduct any existing agricultural, grazing, manufacturing, shipping or trading business or enterprise, the affidavit (as to stock and subscriptions) shall also contain a full description of the property intended to represent the capital stock of the proposed corporation, a detailed valuation of each item of the said property and a copy of the conveyance to be made to the proposed corporation. Rev. Laws 1905, § 2538; Rev. Laws 1915, § 3275.

⁹¹ Only “for labor done, services performed, or money or property actually received.” Const. art. XI, § 9. The judgment of the directors as to the value of the services or property shall in the absence of fraud be conclusive. Laws 1909, p. 164. Property, labor or services when credited on stock must be to “the full value

§ 3538. — **Illinois.** Stock may be paid for in property, and the statutes impliedly recognize it by providing for an appraisal, when it is done.⁹²

§ 3539. — **Indiana.** There is a statute allowing sale of stock for the best interests of the corporation, and another requiring payment within a stated time in manufacturing and mining corporations.⁹³

§ 3540. — **Iowa.** The statutes (Blue Sky Law) now impose a regulative and approving power on the executive council which must investigate values and grant leave to make the issue.⁹⁴ A note given under such law is enforceable though the requisite permission to issue for "any other thing than money" was not had.⁹⁵ The issuance of a certificate without such permission is a representation that it is full paid in money.⁹⁶

of the amount credited." Id. p. 161. "No preferred stock shall be issued except for cash or its equivalent nor for less than the par value of its shares." Id. p. 164.

⁹² *Farwell v. Great Western Tel. Co.*, 161 Ill. 522, 44 N. E. 891, rev'g 47 Ill. App. 579.

If any portion "has been paid in property, the same shall be appraised by said commissioners and they shall report the fair cash value thereof." Gen. Corp. Law, § 4, Act of May 16, 1905.

⁹³ Burns' St. 1908, § 5089 requiring payment of capital stock into treasury within 18 months in manufacturing and mining corporations, is construed with sections 4069, 4070 of the general corporation law empowering directors to sell stock to best interests of the corporation; and full payment within 18 months is not required. *Reel v. Brammer*, 56 Ind. App. 180, 101 N. E. 1043.

⁹⁴ "From and after this act no corporation * * * shall issue any capital stock, or any certificate * * * of shares or any substitute therefor, until the corporation has received the

par value thereof. If it is proposed to pay for said capital stock in property or in any other thing than money," the matter must be submitted to the executive council of that state for leave to do so, and such leave is given only after an investigation of values. As to this investigation, see the statute. Code, § 1641b, added by Acts 32 Gen. Assem. c. 71, § 1, amended 34 Gen. Assem. c. 76.

⁹⁵ Iowa Code Supp. § 1641b, providing that if "any other thing than money" is to be paid for stock the permission of the executive council must first be had, does not enable a subscriber, who gave his note, to avoid payment, the note having been good and have been given before stock issued. *First Nat. Bank of Ottumwa v. Fulton*, 156 Iowa 734, 137 N. W. 1019.

⁹⁶ Under Iowa law requiring consent of executive council of the state to issue stock for property and a certificate as to full payment, issuance of full paid stock represents that payment was in money. *Sykes v. Pure Food Cider Co.*, 157 Iowa 601, 138 N. W. 554.

§ 3541. — **Kansas.** The statute allows issuance for property without particularizing any limitations. Kansas, it must be remembered, led in the adoption of the so-called Blue Sky Laws.⁹⁷

§ 3542. — **Kentucky.** It is provided that "no corporation shall issue stock or bonds except for an equivalent in money paid, or labor done, or property actually received and applied to the purposes for which such corporation was created, and neither labor nor property shall be received in payment of stock or bonds at a greater value than the market price at the time the said labor was done or property delivered, and all fictitious increase of stock or indebtedness shall be void." Under this provision, it has been held that stock and bonds of a corporation cannot be issued for labor or property unless the market price thereof is equal to the par value of the stock or bonds.⁹⁸ It is not legal to agree to pay for land with part of the stock and to divide the remainder without giving value for it.⁹⁹

§ 3543. — **Louisiana.** Labor done or money or property actually received is the constitutional basis, and it is held that value must be equal to the face of the stock.¹

§ 3544. — **Maine.** The statutes regulate the issue of stock "in payment" for property purchased or for services rendered.² Some other states have very similar statutes, and this may be taken as typical of the class.

⁹⁷ Dassler's Gen. Stats. 1909, § 1709.

As to Blue Sky Laws, see chapter on Governmental Regulation, *supra*.

⁹⁸ Const. § 193; Carroll's Stats. 1915, § 568; *Altenberg v. Grant*, 85 Fed. 345, distinguishing *Memphis & L. R. R. v. Dow*, 120 U. S. 287, 30 L. Ed. 595.

⁹⁹ An executory contract to incorporate and to pay for land with part of the stock leaving all other parties to divide the remainder without rendition of value for it is invalid as opposed to Const. § 193. *Bennett v. Stuart*, 161 Ky. 264, 170 S. W. 642.

¹ Under Const. 1893, art. 266, value must be equal to face of stock. *Webre v. Christ*, 130 La. 450, 58 So. 145; *Dilzell v. Lehmann*, 120 La. 273, 45 So. 138.

² May "issue stock to the amount of the value thereof in payment (for property purchased), and may likewise issue stock for services rendered to such corporation, and the stock so issued shall be full paid stock and not liable to any further call or payment thereon; and in the absence of actual fraud in the transaction the judgment of the directors as to the value of the property purchased or the services rendered, shall be conclusive." Rev. St. c. 47, § 50. In addition there is the following enactment: No payment on any subscription to or agreement for the capital stock of any corporation shall be deemed a payment unless bona fide made in cash or in some other matter or thing at a bona

§ 3545. — Maryland. The statute requires that the issue for property or services be authorized in a meeting which shall also agree on the value.³

§ 3546. — Massachusetts. Both tangible and intangible property as well as expenses are mentioned in the statute, which see in the footnote. The officers are made liable to the stockholders for improperly issuing stock.⁴

§ 3547. — Michigan. The statute is similar to that of Maine, which see, but it additionally requires that the property be capable of sale and transfer by the corporation, and that it be subject to sale on "process." Good-will and secret formulae are property within this meaning.⁵ Under another statute bonus stock given nominally "as a further consideration" for work done was treated as unpaid.⁶

fide and fair valuation thereof. Rev. St. c. 47, § 87.

³ May issue stock, preferred or common, for services or for property of any description; provided (1) that services are rendered to or adopted by the corporation, (2) that the property is suitable for any of the purposes for which the corporation was formed, (3) that the value and the propriety of issuing stock therefor shall be agreed upon and the issue authorized by a majority of all the stock outstanding and entitled to vote, given at a meeting duly warned, etc., (4) that in counting a majority no stock shall be counted whose owner or holder is interested in such services or property, nor any stock that has been merely subscribed for, and payment for which is to be made in services. Code, art. 23, § 35.

⁴ May be issued for cash; property, tangible or intangible, services or expenses. No stock shall be at any time issued unless the cash so far as due, or the property, services or expenses for which it was authorized to be issued has been actually received or incurred by, or conveyed or rendered to the corporation; and the president, treasurer and directors shall be jointly

and severally liable to any stockholder of the corporation for actual damages caused to him by such issue. Bus. Corp. Law, § 14.

⁵ Pub. Acts 1903, No. 232.

Property which can be "sold and transferred by the corporation" and is subject to levy and sale on execution "or other process" includes patents, trade-marks and good-will, even though they are not leviable, and though good-will cannot be sold separately. *Brown v. Weeks*, — Mich. —, 161 N. W. 945.

A secret process was property and therefore could be taken in payment for full paid stock at a fair valuation under the Michigan statute (Pub. Acts 1903, No. 232, § 2), the later statute, restricted to property capable of sale and transfer, not applying. *Durand v. Brown*, 236 Fed. 609.

⁶ Bonus stock, given with railroad bonds but without rendition of any value, and stock turned over to a contractor as "a further consideration" after he was fully paid, will be treated as unpaid. (2 Comp. Laws, §§ 6231, 6344.) *Union City Lumber Co. v. Traverse City, L. & M. R. Co.*, 170 Mich. 205, 136 N. W. 463.

§ 3548. — **Minnesota.** It is provided by statute that "corporations having capital stock divided into shares, unless specially authorized, shall not issue any shares for a less amount to be actually paid in on each share than the par value of the shares first issued;" and this prevents a corporation, without special authority, from issuing stock as full paid upon payment of less than par.⁷ Hence an agreement between a corporation and subscribers for stock that, for every share paid for, two or more shares shall be issued, is illegal and void.⁸

§ 3549. — **Mississippi.** There seems to be no statute, except such as may be found within the charter.⁹

§ 3550. — **Missouri.** The constitution provides that no corporation shall "issue stock or bonds except for money paid, labor done, or property actually received; and all fictitious increase of stock or indebtedness shall be void." It is held that a corporation cannot legally issue original stock for property or labor, unless the property or labor is reasonably worth the face value of the stock. And it was held, therefore, that a party to a contract by which a large amount of paid up capital stock in a corporation, to be afterwards organized for the development of certain lands, was to be issued to him in exchange for his equitable rights in options on such lands, and for his services in promoting the corporation, could not enforce the contract, where it was apparent on the face of the instrument that his interest in the lands and his services, when taken together, were nothing like a fair equivalent for the face value of the stock.¹⁰ Fair value is the test.¹¹

⁷ Gen. St. 1894, § 3415; *Wallace v. Carpenter Elec. Heating Mfg. Co.*, 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189.

Where a statute prohibits a corporation, unless expressly authorized, from issuing any shares for a less amount, to be actually paid in on each share, than the par value of the shares first issued, and an amendment thereof contains the same provision, but with a proviso that certain corporations "shall have power to create, issue and dispose of such an amount of special, preferred, or full-paid stock * * * as may be deemed advisable by the board of directors," the proviso does not authorize such a corporation to issue stock as fully paid up,

and sell it for less than par, or on such terms as its directors deem advisable. *Wallace v. Carpenter Elec. Heating Mfg. Co.*, 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189.

⁸ *Rogers v. Gross*, 67 Minn. 224, 69 N. W. 894.

⁹ If charter does not provide otherwise, it may be paid in property at actual value. *Fargason v. Oxford Mercantile Co.*, 78 Miss. 65, 27 So. 877.

¹⁰ Const. art. XII, § 8; also *Rev. St. 1909*, § 2981; *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713, 20 S. W. 965. See also *Van Cleve v. Berkey*, 143 Mo. 109, 42 L. R. A. 593, 44 S. W. 743.

¹¹ Under Const. art. XII, § 8, and *Rev. St. 1909*, § 2981, property must

and fictitious elements of value cannot be included.¹² It has been held that a loan of credit to the corporation cannot be a consideration of itself.¹³

§ 3551. — **Montana.** Stock can issue only "for labor done, services performed, or money and property actually received," and all fictitious increase of stock shall be void.¹⁴ And further it is provided by statute that stockholders shall be individually liable to creditors, to the amount of their unpaid stock, for all acts of the company, until the whole amount of stock subscribed for shall have been paid in. It is also provided that the trustees of a company may purchase mines, and issue stock to the amount of the value thereof in payment, which shall be full paid stock, and not liable to any further call. Under these provisions, the purchase of a mine which the stockholders knew to be worth only \$125,000, and payment therefor in stock whose par value was \$7,500,000, which was repurchased by the stockholders at two and one-half per cent. of its par value, was held fraudulent as to creditors, and the stock was treated as unpaid stock to the extent of the difference between the actual value of the mine and the par value of the stock.¹⁵

§ 3552. — **Nebraska.** No statute has been found. Attention should, however, be paid to public utility regulations and to the chapter on governmental regulation.¹⁶

§ 3553. — **Nevada.** Labor or property may be the basis of an issue.¹⁷

be taken at its fair money valuation (stock issued for a title and abstract plant sold to a competitor). Dictum in *Luehrmann v. Lincoln Trust & Title Co.*, — Mo. —, 192 S. W. 1026.

¹² The statutes (Rev. St. 1909, § 3339) as amended by Acts 1911, p. 148, do not permit fictitious elements of value to be put into stock. *Rogers v. Stag Min. Co.*, 185 Mo. App. 659, 171 S. W. 676.

¹³ A loan of credit to the corporation culminating in no payment by the lender is not a legal consideration. *Schroeder v. Edwards*, 267 Mo. 459, 184 S. W. 108.

¹⁴ Const. art. XV, § 10; also Civil Code, § 3894.

¹⁵ *Kelly v. Clark*, 21 Mont. 291, 42 L. R. A. 621, 69 Am. St. Rep. 668, 53 Pac. 959.

¹⁶ See chapter on Governmental Regulation, *infra*.

¹⁷ May issue stock for labor done, or personal property or real estate or leases thereof; in the absence of fraud in the transaction, the judgment of the directors as to value shall be conclusive. Rev. Laws, § 1155.

§ 3554. — **New Hampshire.** The statute prohibits a corporation from disposing of its shares at less than par, except in sales at auction for nonpayment of assessments, and declares that all certificates of stock issued without full payment of the par value of the stock shall be void. It was held that certificates of shares of stock issued by a corporation upon its organization to pay promoters for certain patents, and by them transferred to one of their number to hold as treasury stock, were without consideration and void, and that a portion of such issue, reissued for less than par, was void.¹⁸

§ 3555. — **New Jersey.** The statute is similar to that of Maine, but adds further provisions, which are shown in the footnote.¹⁹ The stock must not exceed value of the property or services²⁰ and inflated values cannot be fictitiously introduced under cover of consolidation,²¹ reorganization expenses²² or the exchange of obligations for stocks at a discount.²³ Where there has been no finding by the directors that the property sought to be exchanged for stock is equal in value to the par thereof, an executory contract to exchange stock for property is nonenforceable where the value of the property is in fact less

¹⁸ Pub. St. c. 149, § 9; *Kimball v. New England Roller Grate Co.*, 69 N. H. 485, 45 Atl. 253.

¹⁹ Provision as to purchase of property is substantially same as Maine, which see; provided that when property is purchased, the purchasing corporation must receive in property or stock what the same is reasonably worth in money at a fair bona fide valuation; and provided further, that no fictitious stock shall be issued; that no stock shall be issued for profits not yet earned, but only anticipated; and provided further that when stock is issued on the basis of the stock of any other corporation it may purchase, no stock shall be issued thereon for an amount greater than the sum it actually pays * * *; and provided further that the property purchased or the property owned by the corporation whose stock is purchased shall be cognate in character and use to that of the purchasing corporation. There must in all cases be a statement

in writing filed as to such property. Corp. Act, § 49, as amended by Laws. 1913, c. 15.

²⁰ Under Gen. Corp. Act, §§ 49, 50, a gas company cannot issue stock above the value of property or services received. *McCartér v. Pitman*, *Glassboro & Clayton Gas Co.*, 74 N. J. Eq. 255, 69 Atl. 211.

²¹ Capitalizing at \$18,250,000 stocks in three companies and purchased for \$8,250,000 for purpose of consolidation is a conscious overvaluation obnoxious to the statute. *Tooker v. National Sugar Refining Co. of New Jersey*, 80 N. J. Eq. 305, 84 Atl. 10.

²² Stock cannot be issued against a supposed, but nonexistent, debt to a reorganization committee. *Carver v. Southern Iron & Steel Co.*, 78 N. J. Eq. 81, 78 Atl. 240.

²³ To issue debentures at 93 exchangeable for preferred stock at 70 is equivalent to selling it at a discount. *Carver v. Southern Iron & Steel Co.*, 78 N. J. Eq. 81, 78 Atl. 240.

than the par of the stock.²⁴ Even if an executory agreement to render services is bad, no objection can be made by the corporation after it is executed.²⁵

Under an earlier statute a purchaser of stock to increase capital was required to pay the full unpaid balance for the satisfaction of creditors, where he took below par;²⁶ but a factory site and services could be taken for the difference between the price, thirty per cent., at which the issue was made and the par value.²⁷ The provision for a valuation by directors in the earlier statute is said to have been declaratory of the general law.²⁸ An actual appraisement of value was required²⁹ but the statute did not make their valuation conclusive, if fraudulent.³⁰

§ 3556. — New Mexico. The statute is similar to that of Maine.³¹

§ 3557. — New York. The statute allows issue only "for money, labor done, or property actually received for the use and lawful purposes of such corporation."³² The services must have been rendered

²⁴ *Ecuadorian Ass'n v. Ecuador Co.*, 71 N. J. Eq. 757, 65 Atl. 1051.

²⁵ Services to be rendered and which were rendered of a value equal to the stock are a consideration. *Vineland Grape Juice Co. v. Chandler*, 80 N. J. Eq. 437, Ann. Cas. 1914 A 679, 85 Atl. 213.

²⁶ *New Jersey*, Pub. Laws 1896, p. 284, § 21, requires purchaser of stock at half par to increase capital, to respond to creditors for full unpaid balance. *Enright v. Heckscher*, 240 Fed. 863, distinguishing *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227.

²⁷ Under N. J. Laws 1896, c. 185, § 49, full paid stock subscribed at 30 per cent. by a chamber of commerce which furnished a free site for the corporation's factory was deemed to have been paid for by services and site to the extent of the remaining 70 per cent. In *re Remington Automobile & Motor Co.*, 139 Fed. 766.

²⁸ The statute (Rev. 1896, § 49) making directors' judgment conclusive in absence of fraud is declaratory of general law. *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82

Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069.

²⁹ *Enright v. Heckscher*, 240 Fed. 863.

³⁰ *Enright v. Heckscher*, 240 Fed. 863.

³¹ Corp. Act, §§ 54, 55; Ann. St. 1915, §§ 939, 940.

³² Consol. Laws, c. 59, Stock Corp. Law, § 55, which in addition contains a provision as to purchase and payment in stock very similar to that of Maine, which see.

There are two general chapters on corporation law in the New York statutes. General Corporations Law (Consol. Laws, c. —) and Stock Corporations Law (Consol. Laws, c. 59). *Moses v. Soule*, 63 N. Y. Misc. 203, 118 N. Y. Supp. 410, aff'd 136 N. Y. App. Div. 904, 120 N. Y. Supp. 1136.

Stock cannot be issued as a bonus with bonds, even though they together by reason of impairment of the capital are worth no more than the face of the bonds. *Kraft v. Griffon Co.*, 82 N. Y. App. Div. 29, 81 N. Y. Supp. 438.

As to fair amount of capitalization of a business based on earnings, see

to the corporation itself and not for promotion³³ and cannot be executory,³⁴ nor can executory contracts for services be regarded as property.³⁵ Worthless contracts³⁶ and make believe formulae or processes³⁷ will not support an issue. Under the provision of the act relating to manufacturing corporations, and authorizing the trustees of such a corporation to purchase property necessary for its business, and issue stock to the extent of the value thereof in payment, which stock shall be declared and taken to be full paid stock, and not liable to any further calls, a manufacturing corporation has no power to issue its stock in payment for property purchased at less than its par value, and the property must be taken at a reasonable valuation.³⁸ Under a statute providing that the capital stock of a corporation "shall all be paid in, one-half thereof within one year, and the other half thereof within two years, from the incorporation of said company or such corporation shall be dissolved," a corporation cannot issue its original capital stock at less than its par value.³⁹

§ 3558. — North Carolina. There is a statute similar to that of Maine.⁴⁰ Under it an indorsement of the corporate paper without any recourse on the indorser, was held not to be "services."⁴¹

Williams v. McClave, 168 N. Y. App. Div. 192, 154 N. Y. Supp. 38, aff'g 85 N. Y. Misc. 184, 148 N. Y. Supp. 93.

³³ Not for promotion services. *Lamphere v. Lang*, 157 N. Y. App. Div. 306, 141 N. Y. Supp. 967, rev'd on other grounds 213 N. Y. 585, 108 N. E. 82.

³⁴ *Stevens v. Episcopal Church History Co.*, 140 N. Y. App. Div. 570, 125 N. Y. Supp. 573.

Under Stock Corporation Law, § 55, stock cannot be issued "for [future] services to be rendered * * * to the company," to its satisfaction." *Morgan v. Bon Bon Co.*, 165 N. Y. App. Div. 89, 150 N. Y. Supp. 668.

Services to be rendered in future are not a good consideration for stock when no agreement exists with or for the corporation's benefit, under a law specifying "labor done" as the only services for which stock could issue. *Morgan v. Bon Bon Co.*, 165 N. Y. App. Div. 89, 150 N. Y. Supp. 668.

³⁵ Executory contracts for services

to be rendered in writing a history. *Stevens v. Episcopal Church History Co.*, 140 N. Y. App. Div. 570, 125 N. Y. Supp. 573.

³⁶ The New York statute does not allow issuance of stock against a worthless agency contract. *Trent Import Co. v. Wheelwright*, 118 Md. 249, 84 Atl. 543.

³⁷ Stock Corporation Law, § 55, prohibits issue of stock "except for services actually rendered or for property of equal value actually transferred." Hence a pretense of secret formulae is not sufficient. *Berger v. National Architects' Bronze Co.*, 173 N. Y. App. Div. 680, 160 N. Y. Supp. 331.

³⁸ *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201, rev'g 52 Hun (N. Y.) 166, 5 N. Y. Supp. 194.

³⁹ *Zelaya Min. Co. v. Meyer*, 28 N. Y. St. Rep. 759, 8 N. Y. Supp. 487.

⁴⁰ Revisal 1905, c. 21, §§ 1160, 1161.

⁴¹ *Bernard v. Carr*, 167 N. C. 481, 83 S. E. 816.

§ 3559. — **North Dakota.** The conventional provision as to money, labor or property is in force, with additional provisions as to valuation and one that a note cannot be regarded as payment.⁴²

§ 3560. — **Ohio.** A statute prohibiting purchases below par applies only to stocks of the corporation itself, and not to such as it may own issued by other corporations.⁴³

§ 3561. — **Oklahoma.** The constitution authorizes issue only "for money, labor done, or property actually received to the amount of the par value thereof."⁴⁴

§ 3562. — **Oregon.** There is a provision similar to that of Maine regulating purchase of property or payment with stock.⁴⁵

§ 3563. — **Pennsylvania.** The constitution provides that "no corporation shall issue stock or bonds, except for money, labor done, or money or property actually received; and all fictitious increase of stock or indebtedness shall be void." And a statute provides that "no railway corporation" shall issue stock for less than its par value, which par value in money shall be actually paid into the treasury of the corporation before the stock issues. The act then provides a form of procedure by the attorney general, by which the act may be enforced, and the stock or bonds, or both, issued in violation thereof be adjudged void, and the officer or officers issuing the same punished as provided in the act. The statute applies to street railroad companies, as well as other kinds of railroad companies.⁴⁶ The provision

⁴² Only "for money, labor done, or money or property actually received." Const. art. VII, Comp. Laws, § 138. Rev. Civ. Code, § 4195 adding that it must be "estimated at its true money value"; and all officers who consent to overvaluation or having knowledge do not dissent, "shall be jointly and severally liable to the creditors for the difference" between cash value and par value. (Rev. Civ. Code, § 4195. See Comp. Laws 1913, § 4528.) No note or other obligation given by any stockholder, whether secured by pledge or otherwise, shall be regarded as payment, etc. Rev. Civ. Code, § 4196. See Comp. Laws 1913, §§ 4528, 4529.

⁴³ Rev. St. § 3313, prohibiting purchase below par, and making "All stock, bonds * * * of a company * * * by a director thereof, either directly or indirectly," so purchased "null and void" applies only to those of the company whereof the purchaser is a director, not to those of other companies owned by it. *Cincinnati, H. & D. R. Co. v. Kleybolte*, 80 Ohio St. 311, 88 N.E. 879 (in this case bonds were involved).

⁴⁴ Const. art. IX, § 39.

⁴⁵ Lord's Oregon Laws, § 6696.

⁴⁶ Const. art. XVI, § 7. There is also a purchase provision similar to that of Maine. Act of April 29, 1874, § 17, Laws 1876, p. 32; *Cheetham v.*

that stock shall not be issued except for money, labor done or money or property actually received, does not prevent a corporation from issuing stock for services to be thereafter performed, if the transaction is bona fide,⁴⁷ but more recently the court has held void an agreement to enter employment in so far as it required stock to be set aside for the employee until it would pay for itself out of earnings.⁴⁸ When a certificate is issued as full paid, a recital that it was issued for cash and property does not disclose that it was issued for a patent.⁴⁹

§ 3564. — South Carolina. The constitution enacts a slightly varied form of the usual money, labor and property clause.⁵⁰

§ 3565. — South Dakota. The money, labor and property clause is contained in the constitution.⁵¹ Under it a note given for the stock is "property" ⁵² and if the maker is solvent, the stock is not fictitious.⁵³ Services must be rendered to the corporation.⁵⁴ Contracts between individuals looking towards a profit by selling property for stock and dividing the stock, are not within these statutes.⁵⁵

§ 3566. — Tennessee. Land at a fair cash value may be taken by certain corporations, while manufacturing corporations may take patents to the amount of value.⁵⁶

McCormick, 178 Pa. St. 186, 35 Atl. 631.

⁴⁷ Shannon v. Stevenson, 173 Pa. St. 419, 34 Atl. 218.

⁴⁸ Under Act of April 29, 1874, stock can be issued only for "labor done or money or property actually received," and hence an employment contract for a salary and a sum of stock to be set aside for the employee to be paid for out of earnings was void as to the stock provision. Gearhart v. Standard Steel Car Co., 223 Pa. 385, 72 Atl. 699.

⁴⁹ Statutes of Pennsylvania construed. In re Duryea Power Co., 159 Fed. 783.

⁵⁰ Only "for labor done, or money or property actually received or subscribed." Const. art. IX, § 10; also Civ. Code, § 2799.

⁵¹ Only "for money, labor done, or

money or property actually received." Const. art. XVII, § 8.

⁵² Schiller Piano Co. v. Hyde, — S. D. —, 162 N. W. 937.

⁵³ Schiller Piano Co. v. Hyde, — S. D. —, 162 N. W. 937.

⁵⁴ An issue for services rendered to an individual in aiding him to dispose of stock and in making assays is illegal. Rogers v. Gladiator Gold Mining & Milling Co., 21 S. D. 412, 113 N. W. 86.

⁵⁵ A contract between individuals to sell property to a corporation for stock and to divide profits made thereby is not a contract for an illegal stock issue offensive to Const. art. XVII, § 8. Chambers v. Mittnacht, 23 S. D. 449, 122 N. W. 434.

⁵⁶ As to mining, quarrying, boring and manufacturing companies, "nothing but cash * * * or land at a

§ 3567. — **Texas.** The statutes set out in the footnote are not substantially much more restrictive than those of other states, but the construction given them seems to have been stricter. In the cases which follow other statutes involved in the decisions are cited.⁵⁷ By reason of the wording of the statutes it has been held that they apply to foreign as well as to domestic corporations, if doing business in the state;⁵⁸ and, moreover, the statute laws of the other states are presumed to be the same as those of Texas.⁵⁹ There is an additional provision applicable to insurance corporations.⁶⁰ The foregoing statutes are held not applicable to sales of treasury stock below par to raise money.⁶¹ The money must be paid unconditionally by the subscriber or with his assent for his benefit.⁶² The property should be such as is capable of application to corporate debts or of distribution

fair cash valuation.” Shannon’s Ann. Code, § 2335. As to manufacturing companies, “assignment of any patent * * * to the amount of value of said patent.” Id. § 2351.

⁵⁷ Only “for money paid, labor done, which is reasonably worth at least the sum at which it was taken by the corporation, or property actually received reasonably worth at least the sum at which it was taken by the corporation.” Rev. St. art. 1146. Forfeiture of charter, rights, and franchises is penalty for violation. Id.

⁵⁸ Rev. St. 1911, art. 1146, forbidding corporations, domestic or foreign, etc., to issue stock except for “money paid, labor done * * * or property actually received,” applies to foreign corporations doing business in the state as well as to domestic corporations. *Sturdevant v. Falvey*, — Tex. Civ. App. —, 176 S. W. 908; *Farmers’ & Merchants’ State Bank v. Falvey*, — Tex. Civ. App. —, 175 S. W. 833.

Even to a foreign corporation not admitted to do business, but doing business in the state. *Farmers’ & Merchants’ State Bank v. Falvey*, — Tex. Civ. App. —, 175 S. W. 833.

⁵⁹ *Sturdevant v. Falvey*, — Tex. Civ. App. —, 176 S. W. 908; *Farmers’ & Merchants’ State Bank v. Falvey*,

— Tex. Civ. App. —, 175 S. W. 833. And see *Blethen v. Bonner*, 93 Tex. 141, 53 S. W. 1016, which sustains this presumption generally as to all foreign laws.

⁶⁰ The special provisions for payment in cash or securities of subscriptions to insurance companies (Acts 31st Leg. 1909, c. 108) adds to and prevails over the general law. *General Bonding & Casualty Ins. Co. v. Mosely*, — Tex. Civ. App. —, 174 S. W. 1031.

The fact that the corporation is one for insurance whose capital may in part consist of first mortgages (Rev. St. art. 4711) does not overcome the statute disabling it to issue stock for such consideration. *Prudential Life Ins. Co. of Texas v. Pearson*, — Tex. Civ. App. —, 188 S. W. 513.

⁶¹ Purchasers of treasury stock at below par to raise money for a going corporation are not subscribers, and are not liable to creditors (Rev. St. 1895, art. 661). *Witt v. Nelson*, — Tex. Civ. App. —, 169 S. W. 381.

⁶² A conditional advance of subscription money by a third person or corporation without the subscribers’ knowledge or ratification is not “money paid” for stock. *General Bonding & Casualty Ins. Co. v. Mosely*, — Tex. Civ. App. —, 174 S. W. 1031.

among stockholders, hence it was held that a secret formula was not "property actually received" by the corporation.⁶³ Though fictitious stock is declared void, this does not apply to stock issued in good faith for bonds which afterwards proved to have been forged and worthless.⁶⁴

Under the statutes a note for stock is not "money paid,"⁶⁵ nor, as between the parties, is it "property,"⁶⁶ even when secured by mortgage, nor is the mortgage "property" or "money" within the statute.⁶⁷ The result has been reached under this reasoning and construction of regarding the note as wholly void if the stock was "issued" on it, and hence it is not enforceable even by a bona fide holder for value; but, if the stock has not been "issued," and is held by the corporation as collateral security on an executory agreement to issue it when the note should be paid, then the note is valid.⁶⁸ So closely is this distinction drawn, that a mere recital in a pledge agreement of this kind that the certificate has been delivered and then re-delivered in pledge, was held sufficient to show that it was "issued" and, accordingly, that the note was void.⁶⁹

⁶³ A secret formula for rendering kerosene, etc., nonexplosive is not "property" within the constitution, since it was impossible for the corporation to receive it as property if the transferor retained knowledge of it. *O'Bear-Nester Glass Co. v. Antiexplor Co.*, 101 Tex. 431, 16 L. R. A. (N. S.) 520, 130 Am. St. Rep. 865, 109 S. W. 931, 108 S. W. 967.

The soundness of this decision might well be questioned. A contrary conclusion was reached under the Michigan statute. See § 3547, *supra*.

⁶⁴ *Houston Fire & Marine Ins. Co. v. Swain*, — Tex. Civ. App. —, 114 S. W. 149.

Such stock is property, the forgery not being known at the time. *Houston Fire & Marine Ins. Co. v. Swain*, — Tex. Civ. App. —, 114 S. W. 149.

⁶⁵ *Mason v. First Nat. Bank of Paint Rock*, — Tex. Civ. App. —, 156 S. W. 366.

⁶⁶ *McCarthy v. Texas Loan & Guaranty Co.*, — Tex. Civ. App. —, 142 S. W. 96.

⁶⁷ While a mortgage note is prop-

erty, it with the mortgage are neither "money paid, labor done [nor] property actually received" (Const. art. XI, § 6); whence stock cannot be issued for it. *Prudential Life Ins. Co. of Texas v. Pearson*, — Tex. Civ. App. —, 188 S. W. 513.

⁶⁸ There was no "issue" offensive to the law, where the unsigned certificate was retained by the corporation as collateral for the subscription note, applying dividends then to and allowing the subscriber to vote and be recognized as a stockholder. *Cattlemen's Trust Co. of Ft. Worth v. Pruett*, — Tex. Civ. App. —, 184 S. W. 716.

Another district held: The stock, but not the subscription note is made void in such a case; and if the certificate is not issued but is held to secure the note, it is enforceable. (The first case—*Cattlemen's Trust Co. of Ft. Worth v. Pruett*, *supra*, is expressly approved.) *Commonwealth Bonding & Casualty Ins. Co. v. Hill*, — Tex. Civ. App. —, 184 S. W. 247.

⁶⁹ In a case decided in another dis-

No executory agreement for issuance which involves the taking of notes is, therefore, enforceable;⁷⁰ and the note itself, as between the parties, is not enforceable because it is for an unlawful consideration,⁷¹ or by one who is affected by notice that it was for stock by reason of a recital to that effect.⁷² Another, but related, case held that this recital imparted notice that the stock was issued (in which event the note would have been void), but on examining the evidence found that there was in fact no such issue as was imported. Accordingly it was held good because the transaction was all executory.⁷³ An indorser of such a note is liable thereon by reason of his implied warranties, if the note be a void one, or by reason of the maker's liability if it was not void.⁷⁴ Notes thus void may be cancelled, and being invalid cannot be made good by estoppel.⁷⁵

§ 3568. — Utah. The statutes require a description of the property taken and a statement of its value supported by affidavits.⁷⁶

trict of Texas about the same time, it was held that such a note was void and not enforceable, the stock certificate having been pledged collaterally to secure it by an agreement reciting delivery and redelivery. *Republic Trust Co. v. Taylor*, — Tex. Civ. App. —, 184 S. W. 772.

⁷⁰ Stock cannot be issued under Const. art. XII, § 6, for part cash and the balance notes secured by solvent indorsements. Executory agreement for issuance is therefore unenforceable. *McCarthy v. Texas Loan & Guaranty Co.*, — Tex. Civ. App. —, 142 S. W. 96.

⁷¹ The note is for an unlawful consideration, to-wit, issuance of stock for other than "money paid," etc., and hence cannot be enforced even if the stock is not void or "fictitious." *Mason v. First Nat. Bank of Paint Rock*, — Tex. Civ. App. —, 156 S. W. 366.

⁷² A note given for stock, being illegal, cannot be enforced as between the parties, or by a transferee where it puts him on notice by reciting that it was given for stock. *Sturdevant v. Falvey*, — Tex. Civ. App. —, 176 S. W. 908.

The fact that the note, so imparting notice, is not the original one but a negotiable one substituted for a non-negotiable one is not material and is not a defense. *Sturdevant v. Falvey*, — Tex. Civ. App. —, 176 S. W. 908.

⁷³ A collateral agreement securing the note "this day given for the stock" imparts notice that the note was in payment for issued stock. Such a note would be void even in the hands of plaintiff, a bona fide holder. In this case, however, the evidence was held to show that the stock was not "issued," but that there was only an executory sale of it. *Farmers' & Merchants' State Bank v. Falvey*, — Tex. Civ. App. —, 175 S. W. 833..

⁷⁴ *Farmers' & Merchants' State Bank v. Falvey*, — Tex. Civ. App. —, 175 S. W. 833.

⁷⁵ *Commonwealth Bonding & Casualty Ins. Co. v. Hollifield*, — Tex. Civ. App. —, 184 S. W. 776.

⁷⁶ Where subscriptions consist in whole or in part of property necessary to the pursuit agreed upon, "there must appear in the articles of incorporation a description of the property

§ 3569. — **Vermont.** When property, rights or franchises are taken, their value and the amount of stock to be issued must be determined by vote of incorporators or stockholders.⁷⁷

§ 3570. — **Virginia.** The issue for services and property must be on approval of the corporation commission, acting on a statement of them and their value.⁷⁸

§ 3571. — **Washington.** A statute of this state applicable to "mining claims" turned over to "mining corporations" in full payment for stock, is held inapplicable to coal mining properties on the ground that they are not of that speculative character which the legislature had in mind.⁷⁹

§ 3572. — **West Virginia.** The propriety of selling below par is left to a vote of the stockholders. There is a special provision for purchases of property with stocks of mining and manufacturing corporations.⁸⁰ A valuation can be impeached only for fraud.⁸¹

so taken with a statement of the fair cash value thereof [supplemented with three affidavits except in case of mining or irrigation corporations]; and the owners of such property shall be deemed to have subscribed such amount as will represent the fair estimated cash value of the property." Comp. Laws 1907, § 316.

⁷⁷ Only "for (1) cash to the amount of each share of stock at par, or (2) real or personal property, rights or franchises at such value and to such amount as may be determined by a vote of the incorporators at a meeting held at the time of organization; and subsequent to organization" to like value and amount by vote of stockholders. Laws 1910, No. 143, § 6.

⁷⁸ A statement must be filed with corporation commission which "shall accurately specify and describe, * * * the services and property, together with the valuation at which the same are received or to be received." Const. art. XII, § 167. Subscriptions "may be paid in money, land or other property, real or personal, leases, options, mines, minerals, mineral rights,

patent rights, rights of way, or other rights or easements, contracts, labor or services." Subject to making statement the judgment of directors as to value is conclusive in absence of fraud. Corp. Act, c. 5, § 9.

⁷⁹ Rem. & Bal. Code, § 7347, permitting mining claims to be turned over to mining corporations in full payment for stock does not apply to coal mines. *Davies v. Ball*, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833. It seems doubtful whether this precedent would be followed elsewhere. The ground of the court's reasoning seems fanciful.

⁸⁰ "In no case shall stock be sold or disposed of at less than par, except by vote of three-fourths of all the stock of the corporation outstanding" and after notice and publication, etc.; but any mining or manufacturing corporation may issue and sell stock "in payment of real and personal estate for use of such corporation * * * at such and upon such terms and conditions as may be agreed upon." Code, c. 53, § 24.

⁸¹ Under West Virginia law valuation

§ 3573. — **Wisconsin.** Money, labor or property may be the basis of an issue at their "true money value, actually received by it, equal to the par value thereof."⁸² Formerly it was provided that "no corporation shall issue any stock, or certificate of stock, except in consideration of money, or labor, or property, estimated at its true money value, actually received by it, equal to the par value thereof; * * * and all bonds issued contrary to the provisions of this section, and all stock dividends or other fictitious increase of the capital stock of any corporation, shall be void: provided, however, that any corporation whose stock or bonds have been or shall hereafter be admitted to the stock exchange of Chicago, New York, Boston, or Philadelphia, or of either of said cities, may sell such stock or bonds so admitted at the best price or prices current for the time being obtainable therefor," etc. And it is held under this provision that a corporation cannot issue stock to subscribers either gratuitously or at less than its par value, and that a fictitious issue of stock is void.⁸³ Prepayment is not required by this statute.⁸⁴

§ 3574. — **Wyoming.** The statute regulates purchases with stock by a provision similar to that of Maine.⁸⁵ The value must be reasonably estimated at the time.⁸⁶

§ 3575. — **England.** It is provided by a statute that "every share in any company shall be deemed and taken to have been issued and to

tion can be impeached only for fraud and only by the corporation, or its stockholders not consenting thereto, or its creditors. In re Charles Town Light & Power Co., 199 Fed. 846.

⁸² Stat. 1917, § 1753. As to the issue by public service corporations, see Stat. 1917, § 1753-7.

⁸³ *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21; *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655, 18 N. W. 492. See *Gogebie Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427, 23 Am. St. Rep. 417, 47 N. W. 726.

Since certificates of stock issued in violation of this prohibition are void, and can impose no liability upon the corporation, it has been held that sureties on the bond of an officer of a corporation are not liable to the corporation for the value of stock so

issued by the officer. *First Ave. Land Co. v. Parker*, 111 Wis. 1, 87 Am. St. Rep. 841, 86 N. W. 604.

⁸⁴ The statute (St. 1898, § 1753) does not require all consideration to be prepaid, but only that such as is paid or to be paid shall equal par. *Whitewater Tile & Pressed Brick Mfg. Co. v. Baker*, 142 Wis. 420, 125 N. W. 984.

⁸⁵ Comp. St. 1910, § 3989.

⁸⁶ Under Comp. St. 1910, §§ 3988, 3989, the value necessary to support an issue as full paid must be the value of the property (permit to take water) reasonably estimated at the time in good faith and according to business sense. *Tuttle v. Rohrer*, 23 Wyo. 305, 149 Pac. 857, rehearing denied 153 Pac. 27.

be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and filed with the registrar of joint-stock companies at or before the issue of such shares." And it is held, under this provision, that any agreement to issue shares for cash at a discount is illegal and void, in the absence of a contract in writing, and that the persons who take shares under such an agreement are liable for the par value.⁸⁷

§ 3576. Valuation of property, labor or services received—In general. As we have seen, in some jurisdictions there are statutory or constitutional provisions expressly requiring that property, labor or services taken by a corporation in payment of stock shall be taken at a fair valuation. And sometimes the charter of a corporation contains such a provision.⁸⁸ Even in the absence of an express provision, it operates as a fraud upon dissenting stockholders,⁸⁹ and upon subsequent creditors relying upon the capital stock being fully paid,⁹⁰ for the corporation to issue stock for property, labor or services taken at an overvaluation. If a corporation, therefore, fraudulently issues its stock for property, labor, or services at an overvaluation, the transaction is illegal under some of the statutory or constitutional provisions referred to, and, even in the absence of such a provision, is illegal as

⁸⁷ In re Railway Time Tables Pub. Co., [1895] 1 Ch. 255, aff'd *Welton v. Saffery*, [1897] App. Cas. 299. See also *Ooregum Gold Min. Co. v. Roper*, [1892] App. Cas. 125, 66 L. T. 427; In re New Eberhardt Co., 43 Ch. Div. 118; In re London Celluloid Co., 39 Ch. Div. 190, 59 L. T. 109; In re Al-mada & Tirite Co., 38 Ch. Div. 415; In re Addlestone Linoleum Co., 37 Ch. Div. 191, 58 L. T. 428.

The corporation statutes of England were consolidated in 1908 into the Companies Act of 1908 (8 Edw. VII, c. 69). No cases appear to have been decided under that act, but in the present connection the following quotation may be given from 5 Halsbury's Laws of England, pp. 88, 89, title Companies. Shares may be paid for directly in property, or may be issued "for considerations which the

company has agreed to accept as representing in money's worth the nominal value of the shares * * *. While the transaction is unimpeached the court will not inquire into the value of the consideration, and it will not rip up a transaction, which is not impeached as and proved to be dishonest merely because the company have paid an extravagant price for the property."

To the foregoing statement are cited the following cases all decided before the enactment of the statute but on the same propositions carried into the statute: *Re Baglan Hall Colliery Co.*, 5 Ch. 346; *Chapman's Case*, [1895] 1 Ch. 771; *De Beville's Case*, 7 Eq. 11, 15; and others.

⁸⁸ See §§ 3525-3575, *supra*.

⁸⁹ See § 3585, *infra*.

⁹⁰ See § 3589 et seq., *infra*.

against dissenting stockholders and subsequent bona fide creditors.⁹¹

91 United States. *Camden v. Stuart*, 144 U. S. 104, 36 L. Ed. 363; *Altenberg v. Grant*, 85 Fed. 345; *Peck v. Elliott*, 79 Fed. 10, 38 L. R. A. 616; *Northwestern Mut. Life Ins. Co. v. Cotton Exchange Real Estate Co.*, 70 Fed. 155, 46 Fed. 22; *Grant v. East & W. R. Co.*, 54 Fed. 569; *New Castle Northern Ry. Co. v. Simpson*, 21 Fed. 533.

Alabama. *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala. 407, 12 L. R. A. 307, 25 Am. St. Rep. 65, 9 So. 129.

Illinois. *Sprague v. National Bank of America*, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, aff'g 66 Ill. App. 320; *Farwell v. Great Western Tel. Co.*, 161 Ill. 522, 44 N. E. 891, rev'g 47 Ill. App. 579; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725, aff'g 53 Ill. App. 82.

Indiana. *Bent v. Underdown*, 156 Ind. 516, 60 N. E. 307; *Clow v. Brown*, 150 Ind. 185, 49 N. E. 1057, 48 N. E. 1034; *Coffin v. Ransdell*, 110 Ind. 417, 11 N. E. 20.

Iowa. *Stout v. Hubbell*, 104 Iowa 499, 73 N. W. 1060; *Wishard v. Hansen*, 99 Iowa 307, 61 Am. St. Rep. 238, 68 N. W. 691; *Boulton Carbon Co. v. Mills*, 78 Iowa 460, 5 L. R. A. 649, 43 N. W. 290; *Chisholm v. Forny*, 65 Iowa 333, 21 N. W. 664; *Osgood v. King*, 42 Iowa 478.

Maine. *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904.

Maryland. *Crawford v. Rohrer*, 59 Md. 599.

Michigan. *Peninsular Sav. Bank of Detroit v. Black Flag Stove Polish Co.*, 105 Mich. 535, 63 N. W. 514; *Young v. Erie Iron Co.*, 65 Mich. 111, 31 N. W. 814.

Minnesota. *Wallace v. Carpenter Elec. Heating Mfg. Co.*, 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189;

Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28, 67 N. W. 652.

Missouri. *Van Cleve v. Berkey*, 143 Mo. 109, 42 L. R. A. 593, 44 S. W. 743; *Woolfolk v. January*, 131 Mo. 620, 33 S. W. 432; *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713, 20 S. W. 965; *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274, qualified in *Woolfolk v. January*, supra.

Montana. *Kelly v. Clark*, 21 Mont. 291, 42 L. R. A. 621, 69 Am. St. Rep. 668, 53 Pac. 959.

Nebraska. *Gilkie & Anson Co. v. Dawson Town & Gas Co.*, 46 Neb. 333, 64 N. W. 978, 1097.

New Jersey. See *v. Heppenheimer*, 55 N. J. Eq. 240, 36 Atl. 966; *Hebberd v. Southwestern Land & Cattle Co.*, 55 N. J. Eq. 18, 36 Atl. 122; *Wetherbee v. Baker*, 35 N. J. Eq. 501.

New York. *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201, rev'g 52 Hun 166, 5 N. Y. Supp. 124; *Herbert v. Uhl*, 66 Hun 626, 20 N. Y. Supp. 743; *National Tube-Works Co. v. Gilfillan*, 46 Hun 248, 124 N. Y. 302, 26 N. E. 538.

North Carolina. *Clayton v. Ore Knob Co.*, 109 N. C. 385, 14 S. E. 36.

Ohio. *Gates v. Tippecanoe Stone Co.*, 57 Ohio St. 60, 63 Am. St. Rep. 705, 48 N. E. 285.

Washington. *Adamant Mfg. Co. of America v. Wallace*, 16 Wash. 614, 48 Pac. 415, qualified in *Kroenert v. Johnston*, 19 Wash. 96, 52 Pac. 605; *Manhattan Trust Co. of New York v. Seattle Coal & Iron Co.*, 16 Wash. 499, 48 Pac. 333, 737.

Wisconsin. *National Bank of Merrill v. Illinois & W. Lumber Co.*, 101 Wis. 247, 77 N. W. 185; *Gogebie Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427, 23 Am. St. Rep. 417, 47 N. W. 726.

If there is no fraud and no disabling provision in the statutes or the charter, the corporation and its subscribers may agree on any value which they choose to adopt⁹² even though some of the parties are on both sides of the bargain.⁹³ The effect of such an issue from the standpoint of the various persons who may be interested is discussed at length in succeeding sections and in other parts of this work.⁹⁴ There are two distinct tests for valuation which will be binding on all persons where other than money is the medium. "In those states which adopt the 'true value' rule, motive, intent and good faith are disregarded. In order for a subscriber to relieve himself, he must show that the property conveyed in satisfaction of the subscription was its equivalent in money, and was worth in dollars the face of the shares. In those states which adopt the 'good faith' rule it is recognized that value is a matter about which men may honestly differ. In them it is therefore held that, if the parties fairly and in good faith value the property conveyed in payment of the subscription, the courts will not go behind their assessment."⁹⁵ Some of the courts have held,

A provision in the charter of a corporation, that the capital stock "shall be issued as full-paid stock," does not permit shares of stock to be issued to stockholders without payment for it by them in money, or its equivalent in property at an honest valuation. *Clayton v. Ore Knob Co.*, 109 N. C. 385, 14 S. E. 36.

⁹² *Maryland Rail Co. v. Taylor*, 231 Fed. 119; *Northern Trust Co. v. Columbia Straw-Paper Co.*, 75 Fed. 936, aff'd as *Dickerman v. Northern Trust Co.*, 80 Fed. 450; *Barr v. New York, L. E. & W. R. Co.*, 125 N. Y. 263, 26 N. E. 145; *Van Cott v. Van Brunt*, 82 N. Y. 535; *Whitehill v. Jacobs*, 75 Wis. 474, 44 N. W. 630.

But equity will inquire into the actual transaction. *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606.

"If there is a consideration of some sort, and the transaction is intended to redound to the benefit of the corporation in the prosecution of its corporate purposes, then we should

say that * * * the consideration is sufficient, and in a sense adequate, though it may not be equal in value to that of the stock." *California Trona Co. v. Wilkinson*, 20 Cal. App. 694, 130 Pac. 190 (agreement to furnish advances).

Injunction pendente lite against issuance will not be granted unless there is a showing of fraud in overvaluation. *McMahon v. Pneumatic Transit Co.*, 85 N. J. Eq. 544, 96 Atl. 999.

⁹³ Overvaluation is not a fraud as to the corporation simply because sellers dealt with themselves as directors or trustees. *Inland Nursery & Floral Co. v. Rice*, 57 Wash. 67, 106 Pac. 499.

⁹⁴ See § 3579 et seq., *infra*.

As to fraud vitiating or affecting subscriptions, see also Chap. 17, *supra*.

As to stockholders' suits in right of the corporation to obtain redress from such frauds, see also this chapter, subd. Remedies of Stockholders, etc., *infra*.

⁹⁵ *Allen v. Grant*, 122 Ga. 552, 50 S. E. 494.

or seem to have held, that there must be actual fraud;⁹⁶ but the weight of authority is to the effect that an actual fraudulent intent is not necessary if the overvaluation was intentional. An intentional overvaluation is fraudulent as a matter of law.⁹⁷

A margin, however, will always be allowed for honest differences of opinion as to value.⁹⁸ And, generally, the transaction will be upheld, even as against subsequent creditors, if the valuation was honestly made, although it may appear that there was an error of judgment, and that the valuation was in fact excessive.⁹⁹ In other words,

⁹⁶ *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 30 L. Ed. 420; *Kroenert v. Johnston*, 19 Wash. 96, 52 Pac. 605, qualifying *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415; *Whitehill v. Jacobs*, 75 Wis. 474, 44 N. W. 630.

Under L. O. L. § 6696, by the proviso added in 1903, the issuance of stock for a contract assigned to the corporation is not impeachable for valuation unless there was "actual fraud." Accordingly the facts were held to show no fraudulent overvaluation. *Farrell v. Davis*, — Ore. —, 161 Pac. 94.

⁹⁷ *Alabama*. *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala. 407, 12 L. R. A. 307, 25 Am. St. Rep. 65, 9 So. 129.

Illinois. *Sprague v. National Bank of America*, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, aff'g 66 Ill. App. 320; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725, aff'g 53 Ill. App. 82; *National Bank of America v. Pacific R. Co.*, 66 Ill. App. 320, aff'd 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, 172 Ill. 270, 50 N. E. 1123.

Iowa. *Boulton Carbon Co. v. Mills*, 78 Iowa 460, 5 L. R. A. 649, 43 N. W. 290.

Minnesota. *Hastings Malting Co. v. Iron Range Brewing Co.*, 65 Minn. 28, 67 N. W. 652.

Missouri. *Van Cleve v. Berkey*, 143 Mo. 109, 42 L. R. A. 593, 44 S. W.

743; *Carp v. Chipley*, 73 Mo. App. 22.

Montana. *Kelly v. Clark*, 21 Mont. 291, 42 L. R. A. 621, 69 Am. St. Rep. 668, 53 Pac. 959.

New York. *National Tube-Works Co. v. Gilfillan*, 124 N. Y. 302, 26 N. E. 538, 46 Hun 248; *Lake Superior Iron Co. v. Drexel*, 90 N. Y. 87; *Douglass v. Ireland*, 73 N. Y. 100; *Boynton v. Andrews*, 63 N. Y. 93.

Ohio. *Gates v. Tippecanoe Stone Co.*, 57 Ohio St. 60, 63 Am. St. Rep. 705, 43 N. E. 285.

Washington. *Manhattan Trust Co. of New York v. Seattle Coal & Iron Co.*, 16 Wash. 499, 48 Pac. 333, 737.

⁹⁸ *McBride v. Farrington*, 131 Fed. 797; *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala. 407, 12 L. R. A. 307, 25 Am. St. Rep. 65, 9 So. 129. Compare this with *See v. Heppenheimer*, 69 N. J. Eq. 36, 61 Atl. 843.

A provision of the constitution prohibiting the issuance of stock or bonds except for "money paid, labor done, or property actually received," does not mean "that the corporation shall receive a dollar in money for each dollar of indebtedness, but that the amount received shall bear some reasonable approximation to the amount of indebtedness." *Western Supply & Manufacturing Co. v. United States & M. Trust Co.*, 41 Tex. Civ. App. 478, 92 S. W. 986.

⁹⁹ *United States*. *Bank of Fort Madison v. Alden*, 129 U. S. 372, 32 L. Ed. 725; *Coit v. Gold Amalgamating*

“the transaction may be impeached for fraud, but not for error of judgment or mistaken views of the value of the property, inasmuch

Co., 119 U. S. 343, 30 L. Ed. 420; Northwestern Mut. Life Ins. Co. v. Cotton Exchange Real Estate Co., 70 Fed. 155, 46 Fed. 22; Brown v. Duluth, M. & N. R. Co., 53 Fed. 889; Grant v. East & W. R. Co., 54 Fed. 569, aff'g Coe v. East & W. R. Co., 52 Fed. 531; Holly Mfg. Co. v. New Chester Water Co., 48 Fed. 879.

Illinois. Higgins v. Lansingh, 154 Ill. 301, 40 N. E. 362; Cohen v. Toy Gun Mfg. Co., 172 Ill. App. 330.

Kentucky. John R. Proctor Land Co. v. Cooke, 19 Ky. L. Rep. 1734, 44 S. W. 391.

Maine. See Gillin v. Sawyer, 93 Me. 151, 44 Atl. 677.

Maryland. Brant v. Ehlen, 59 Md. 1.

Michigan. Young v. Erie Iron Co., 65 Mich. 111, 31 N. W. 814. See also Graves v. Brooks, 117 Mich. 424, 75 N. W. 932.

Minnesota. Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28, 67 N. W. 652.

Missouri. Woolfolk v. January, 131 Mo. 620, 33 S. W. 432, overruling to this extent, the dictum in Shickle v. Watts, 94 Mo. 410, 7 S. W. 274.

Nebraska. Troup v. Horbach, 53 Neb. 795, 74 N. W. 326; Gilkie & Anson Co. v. Dawson Town & Gas Co., 46 Neb. 333, 64 N. W. 978, 1097. See also Penfield v. Dawson Town & Gas Co., 57 Neb. 231, 77 N. W. 672.

New Jersey. Bickley v. Schlag, 46 N. J. Eq. 533, 20 Atl. 250. See also Donald v. American Smelting & Refining Co., 62 N. J. Eq. 729, 43 Atl. 771, 1116.

New Mexico. Medler v. Albuquerque Hotel & Opera House Co., 6 N. M. 331, 28 Pac. 551.

New York. Lake Superior Iron Co. v. Drexel, 90 N. Y. 87; Douglass v. Ireland, 73 N. Y. 100; Boynton v.

Andrews, 63 N. Y. 93; Schenck v. Andrews, 57 N. Y. 133; White Corbin & Co. v. Jones, 86 Hun 57, 34 N. Y. Supp. 203, rev'd on other grounds 155 N. Y. 475, 50 N. E. 289; Powers v. Knapp, 85 Hun 38, 32 N. Y. Supp. 622, 158 N. Y. 733, 53 N. E. 1131.

Pennsylvania. American Tube & Iron Co. v. Baden Gas Co., 165 Pa. St. 489, 30 Atl. 940; Carr v. Le Fevre, 27 Pa. St. 413.

Tennessee. Jones v. Whitworth, 94 Tenn. 602, 30 S. W. 736; Kelley v. Fletcher, 94 Tenn. 1, 28 S. W. 1099.

Texas. See Cole v. Adams, 92 Tex. 171, 46 S. W. 790.

Utah. See Richardson v. Treasure Hill Min. Co., 23 Utah 366, 65 Pac. 74.

Washington. Kroenert v. Johnston, 19 Wash. 96, 52 Pac. 605; Adamant Mfg. Co. v. Wallace, 16 Wash. 614, 48 Pac. 415; Turner v. Bailey, 12 Wash. 634, 42 Pac. 115.

Wisconsin. See National Bank of Merrill v. Illinois & W. Lumber Co., 101 Wis. 247, 77 N. W. 185.

In determining whether a transfer of property to the corporation in payment for stock constitutes fraud on the ground of overvaluation of the property, something more is necessary than a showing at the time action is brought that the property is of less value than the par value of the stock. While it is true that from a gross overvaluation of property possessing a known and easily ascertained value fraud may be presumed, yet where it is evident that the value of the property taken was a matter of judgment and the court is satisfied that the error, if error there was, consisted simply in the matter of judgment, the transaction will be permitted to stand. In determining whether or not the taking of the property at an overvaluation was with intent to defraud,

as good faith and the exercise of an honest judgment is all that is required.”¹ “Although there was in fact an overvaluation of the property, it will not render the stockholders liable for the deficiency if it was the result of an honest mistake or error of judgment.”² This is true, even though it may turn out that the property was in fact very greatly overvalued, if it affirmatively appears that the valuation was in good faith; ³ but since nothing can be worth more than itself, services in selling stock cannot be worth more than the stock itself.⁴ If the consideration was unreal or wholly failed, it makes no difference

it is proper to consider the nature of the property, the purpose for which it was desired by the corporation, and all attending conditions and circumstances. *Coler v. Tacoma Railway & Power Co.*, 64 N. J. Eq. 117, 53 Atl. 680; *Flour City Nat. Bank v. Shire*, 88 N. Y. App. Div. 401, 84 N. Y. Supp. 810; *Macbeth v. Banfield*, 45 Ore. 553, 106 Am. St. Rep. 670, 78 Pac. 693. And see *L. M. Rumsey Mfg. Co. v. Kaime*, 173 Mo. 551, 73 S. W. 470.

In order that an exchange of property for stock may be set aside on the ground of overvaluation, the overvaluation must have been fraudulent or intentional. No liability exists as to creditors where the overvaluation was a mere mistake of judgment. *Speer v. Bordelean*, 20 Colo. App. 413, 79 Pac. 332.

Not liable where valuation was made in good faith and was not so grossly excessive as to evince fraud. *Kunz v. National Valve Co.*, 29 Ohio Cir. Ct. 519.

Where stock has been exchanged for property and charges are made that the property was overvalued, under the decisions of the Supreme Court of Washington in order that an assessment may be laid upon the stock, it is necessary for a creditor to show both an intentional overvaluation on the part of the directors constituting bad faith and that the creditor did not know and was not put upon inquiry as to the fact that the stock was exchanged as full paid for the

property. If in the issuance of the stock for the property the parties honestly believed that the value of the property was equivalent to the par value of the stock, action may not be maintained. *Coler v. Tacoma Railway & Power Co.*, 64 N. J. Eq. 117, 53 Atl. 680.

Stockholders who have received their stock as full paid cannot be held liable to creditors for the difference between the par value of the stock held by them and the actual value of property turned in by them in payment of stock, where the corporation was organized by the members of a partnership for the purpose of continuing the business of such partnership and the valuation of the property was in entire good faith and any mistake in regard thereto was due simply to errors on the part of the book-keeper. *Taylor v. Cummings*, 127 Fed. 108.

¹ *In re Charles Town Light & Power Co.*, 199 Fed. 846; *Douglass v. Ireland*, 73 N. Y. 100.

² *Hastings Malting Co. v. Iron Range Brewing Co.*, 65 Minn. 28, 67 N. W. 652.

³ *Young v. Erie Iron Co.*, 65 Mich. 111, 31 N. W. 814, and other cases above cited.

⁴ Services in selling a sum certain of the stock cannot be considered a full consideration for the issue of a greater sum. *Bivens v. Hull*, 58 Colo. 338, 145 Pac. 694.

whether or not there was a fraudulent intent.⁵ It frequently is true that an overvaluation is the result of fraud or wrongdoing on the part of promoters or officers. The corporation or its stockholders in such a case may have an action for appropriate relief.⁶

The valuation should be made by the directors or stockholders, and some statutes specifically require this;⁷ and a record of it ought to be kept,⁸ some of the statutes in fact requiring a certificate or statement of it to be filed.⁹ With the advent of the public service regulations and the regulations of issues under what are known as the Blue Sky Laws, valuations have become more or less a public function, and the discretion of the directors or incorporators is correspondingly curtailed.¹⁰ The reasonable value to the public is prime test of such valuations;¹¹ and a valuation passed by such a board has been held to be conclusive.¹²

The valuation should be made as of the time, and is not to be judged by the subsequent success or failure of the investment;¹³ and the

⁵ Deed to property of which grantor never had any title. *Henderson v. Turngren*, 9 Utah 432, 35 Pac. 495.

⁶ See Chaps. 5, 42, 43, *supra*; also *infra*, this chapter, subd. Remedies of Stockholders, etc.

⁷ Unless all members of the board had notice of the time, place and object of the meeting, its vote to accept property at a stated price was void. *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, *aff'd* 82 N. J. Eq. 364, 91 Atl. 1069. See also § 3525 *et seq.*, *supra*.

⁸ It is better to enter the valuation on the minutes, but it is not necessary to do so. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538.

⁹ See §§ 3525-3575, *supra*.

¹⁰ The conclusiveness of the directors' valuation may be qualified by public service regulations which limit the capitalization of such companies to reasonable necessity. *In re Watertown Gas Light Co.*, 127 N. Y. App. Div. 462, 111 N. Y. Supp. 486.

See also chapter on Governmental Regulation, *infra*.

¹¹ Under the Public Utilities Act the reasonable value to the investing pub-

lic for the purpose proposed is the test of capitalized value (various factors stated). *Grafton County Elec. Light & Power Co. v. State*, — N. H. —, 100 Atl. 668.

The Stock and Bond Law, regulating valuation for railroad issues, was designed to prevent overcapitalization which might become a basis for rates, and also to protect purchasers of such stocks. Under it the railroad commission has the right and duty of making valuations. *United States & M. Trust Co. v. Delaware Western Const. Co.* (Tex. Civ. App.), 112 S. W. 447.

¹² Issuing \$40,000 full paid against a \$4,000 property does not enable creditors to recover when the statement required by Const. § 167 and Code 1904, § 1105e, ¶ 9, is rendered to the state corporation commission and by it approved. *Monk v. Barnett*, 113 Va. 635, 75 S. E. 185.

Even though the statement be vague and informal it suffices when so approved. *Id.*

¹³ The value at the time and not what the incorporators believe it may become is to be taken, at least as

property is properly valued at what it is actually worth, however much such value may exceed what it cost the vendor, for the cost is not the test of value,¹⁴ all elements of value or expenditure which have entered into the property or have been avoided by the corporation being properly considered.¹⁵ Accordingly one, who at an economy of

against creditors. *R. H. Herron Co. v. Shaw*, 165 Cal. 668, Ann. Cas. 1915 A 1265, 133 Pac. 488.

Market value of the property when turned over is to be the basis of credit allowed in a creditors' suit. *Union Pac. R. Co. v. Blair*, — Utah —, 156 Pac. 948.

Under a New York statute prohibiting the issuing of stock of a corporation organized under it for property except for "property actually received for the use and legitimate purpose of said corporation, at its fair value," the fair value of property taken by a corporation for stock is that which the property has at the time of the sale, and is not dependent upon the subsequent success or failure of the investment, further than that result may have been legitimately within evidential contemplation at the time of the sale, in view of the uses for which it may have had available advantages within itself. *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544.

Where the owners of land, having struck large gas wells thereon, organized a corporation, and conveyed the land to it in exchange for stock at a valuation of \$500,000, it was held that the fact that subsequent operations demonstrated that the property was of very small value did not throw upon them the burden of showing that the sale to the corporation was in good faith on a reasonable belief as to the value of the property. *American Tube & Iron Co. v. Baden Gas Co.*, 165 Pa. St. 489, 30 Atl. 940.

¹⁴*Dickerman v. Northern Trust Co.*, 80 Fed. 450, aff'g *Northern Trust Co. v. Columbia Straw-Paper Co.*, 75

Fed. 936; *Grant v. East & W. R. Co.*, 54 Fed. 569, aff'g *Coe v. East & W. R. Co.*, 52 Fed. 531; *Com. v. Central Passenger R. Co.*, 52 Pa. St. 506.

Under the constitutional provision in Alabama prohibiting the issue of stock or bonds except for money, labor or property actually received, and declaring all fictitious increase of stock or indebtedness to be void, and the statutory provision requiring all subscriptions for railroad stock to be paid in money, labor or property at its money value, railroad property sold by one company to another, and paid for in stock and bonds of the latter, may be valued according to its net earning power, and the cost of building it de novo, and it can make no difference that the seller originally acquired it for much less than its actual value. *Grant v. East & W. R. Co.*, 54 Fed. 569, aff'g *Coe v. East & W. R. Co.*, 52 Fed. 531.

Where all that was promised (a finished theater building) was turned over, it is immaterial in the absence of fraud on other holders that the cost of it was misstated. *Eggleston v. Pantages*, 93 Wash. 221, 160 Pac. 425.

A franchise, though it cost nothing, may be a valid consideration for stock. *Thomas v. Barthold*, — Tex. Civ. App. —, 171 S. W. 1071.

¹⁵ That payments for stock represented by expenditures in developing the property of the corporation before it was organized, the benefits of which are received by it, and which expenditures would have been necessary if the stock had been otherwise paid for, may be considered in com-

cost and by the expenditure of skill and judgment had constructed a plant of suitable nature to be used by the corporation, may sell it to the corporation for stock representing the actual value, including therein interest and a fair profit on work of that nature.¹⁶ While the expression "market value" is sometimes used in this connection¹⁷ that is not an accurate or correct test, at least where a property may have a real value in excess of the price it would bring on the market. Such a case is illustrated by the taking of an old corporation and its properties into a new one.¹⁸ The going and established value rather

putting the stock actually paid in, see *Geneva Mineral Spring Co. v. Coursey*, 45 N. Y. App. Div. 268, 61 N. Y. Supp. 98.

Where the promoters of a corporation had secured a \$17,000 contract for work and materials, and a valuable option contract, afterwards exercised, which were turned over to the company after its incorporation, together with land of the value of \$14,000, and afterwards the net earnings were invested in the corporation, and, some nine months thereafter, \$28,000 of stock was issued and divided among the promoters, it was held that, in determining whether the stock was fully paid up, the value of the land, the contract, and the net earnings invested before the issue of the stock should all be considered, as they were "property actually received" by the corporation, within the meaning of a constitutional provision as to the issue of stock. *Cole v. Adams*, 92 Tex. 171, 46 S. W. 790.

Compare *Cole v. Adams*, 19 Tex. Civ. App. 507, 49 S. W. 1052.

Modes of valuation stated as to: an unexpired lease, a lighting service, savings in cost, and property, personal in nature, used in an amusement park. *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069.

¹⁶ A stockholder in a New York water company erected for his own use and benefit a system of pipes, etc.,

which were suitable for an extension to the company's plant, and sold it to the company, receiving in return stock and bonds. On the question whether there had been an overvaluation in determining the cost of construction, the court held that money saved by careful and fortunate purchase of materials, four months' interest on the actual expenditures for the work, reasonable charges for services rendered by himself and his assistant in superintending the work, and a fair profit calculated with reference to the nature and risks of the work, might be added to the money actually expended by him for materials and labor. And as it appeared that the cost of the work, calculated on such a basis, was about \$85,000, it was held that payment therefor in stock and bonds of the company of the par value of \$110,000 was not so large a price as necessarily to indicate a fraudulent overvaluation. *Gamble v. Queens County Water Co.*, 123 N. Y. 91, 9 L. R. A. 527, 25 N. E. 201, rev'g 52 Hun (N. Y.) 166, 5 N. Y. Supp. 124.

¹⁷ *Union Pac. R. Co. v. Blair*, — Utah —, 156 Pac. 948.

¹⁸ In issuing stock for that of old corporation the real value of it, based on plant franchise and assets, should be taken rather than the market value. *State v. Citizens Light & Power Co.*, 172 Ala. 232, 55 So. 193.

It has been held that the provision

than reproduction cost is to be taken in such cases¹⁹ and the sale price on a foreclosure, if fair in view of the prospects, may be taken though the present rate limitations will prevent the earning of a profit thereon until greater volume of business is developed.²⁰ By similar reasoning consolidation of plants may import into the whole a greater value than the cost of the components²¹ provided that no mere fictional value can be thus introduced.²² The principles of valuation applicable ordinarily do not govern when the owners of a business incorporate and take the stock to represent the property and business.²³ In capitalizing the accumulated surplus, or what represents it, or in putting out a new issue some problems of valuation arise. It is necessary, when the

in the New York Stock Corporation Law that no stock shall be issued for less than its par value for stock of another corporation, does not prohibit a gas company from purchasing all the stock of another company by issuing its own stock therefor, merely because the plant and tangible property thus purchased are less than the par value of the stock issued, if the benefits otherwise derived warrant the transaction. *Rafferty v. Buffalo City Gas Co.*, 37 N. Y. App. Div. 618, 56 N. Y. Supp. 288.

¹⁹ A factor to be considered is that a going railroad with a settled road-bed and no engineering expense to meet is worth more, depreciation allowed for, than the reproduction cost. *People v. Public Service Commission for Second Dist. of New York*, 158 N. Y. App. Div. 251, 143 N. Y. Supp. 148.

²⁰ A street railway sold on foreclosure may be capitalized at the sale price, where it was fairly realized, and the property has a prospect of better business, though burdened with a five-cent fare franchise which prevented earning a profit under existing volume of traffic. *People v. Public Service Commission for Second Dist. of New York*, 158 N. Y. App. Div. 251, 143 N. Y. Supp. 148.

²¹ Where a corporation is organized to purchase several manufacturing

plants from persons holding options upon them, the fact that the amounts in the stock of the corporation, at its par value, which are issued in payment of such options, are greater than the prices fixed on the plants in the options, is not evidence of overvaluation of the plants in the sale and the issue of the stock. *Dickerman v. Northern Trust Co.*, 80 Fed. 450, aff'g *Northern Trust Co. v. Columbia Straw-Paper Co.*, 75 Fed. 936.

²² Turning over options to the new corporation calling for \$8,250,000 for the purchase of three plants, and arranging for friendly instead of destructive competition with a powerful rival, was held not to sustain an issue of \$18,250,000; where the options ran in favor of the new corporation, and the stock of \$10,000,000 was for real benefit of the rival interests. *Tooker v. National Sugar Refining Co. of New Jersey*, 80 N. J. Eq. 305, 84 Atl. 10.

Bonds and stock issued on a consolidation and reorganization held to have had no adequate value to support them. *In re Wyoming Valley Ice Co.*, 153 Fed. 787.

²³ \$150,000 on a business long established and earning \$25,000 to \$50,000 a year was not overvaluation though by reason of conditions earnings declined and afterwards a loss was experienced. *Williams v. McClave*, 168 N. Y. App. Div. 192, 154 N. Y. Supp.

surplus is represented by expenditures augmenting the value of the total assets, to inquire what is the amount of augmentation,²⁴ and in putting out an increase to inquire what it represents in value.²⁵

§ 3577. — Good-will, franchises and other intangibles or prospects. The fact that the property taken in payment for stock is of such a character that it is not easy to assign to it a determinate value, as in the case of patents and mines, does not necessarily render the transaction illegal, if the valuation is really made in good faith,²⁶ though development proves that it was overestimated.²⁷ Courts will

38, aff'g 85 N. Y. Misc. 184, 148 N. Y. Supp. 93.

²⁴ For an example involving a new issue against old stocks purchased at a premium, see *In re Watertown Gas Light Co.*, 127 N. Y. App. Div. 462, 111 N. Y. Supp. 486.

²⁵ As to capital to take up debts created in improvement of the plant of a public service corporation, see *In re Watertown Gas Light Co.*, 127 N. Y. App. Div. 462, 111 N. Y. Supp. 486.

As to the power to make such new issues, see §§ 3521, 3523, *supra*.

²⁶ "In the absence of fraud, an agreement may ordinarily be made by which stockholders can be allowed to pay for their shares in patents, mines, or other property, to which it is not easy to assign a determinate value." *New Haven Horse Nail Co. v. Linden Springs Co.*, 142 Mass. 349, 7 N. E. 773.

Valuation of patents held binding after all parties had agreed for several years and where there was no fraud. *Sternbergh v. Duryea Power Co.*, 161 Fed. 540.

Directors' valuation of patents held conclusive when made on investigation and with advice. *Alpha Portland Cement Co. v. Schratweiser*, 221 Fed. 258, aff'g decree 215 Fed. 982.

²⁷ *American Tube & Iron Co. v. Baden Gas Co.*, 165 Pa. St. 489, 30 Atl. 940.

In *Richardson v. Treasure Hill Min. Co.*, 23 Utah 366, 65 Pac. 74, however, the court, speaking with reference to the validity of an exchange of property for stock, said: "The question in such a case always is, what was the fair estimated cash market value at the time of the incorporation and not at some future time, when, through large expenditures of money or capital, the property has been demonstrated to possess no value. If this were otherwise,—if stockholders in such a corporation, the moment the property, which had, in good faith, been deemed of ample value, and taken in full payment of their stock, was, by development thereof, shown to be worthless, were to be held liable to creditors for the value of the stock,—it is apprehended that few persons, especially those of limited means, would be willing to assume the risk of developing mines, and, no doubt, a purchaser of such stock, in the daily transactions of a stock board, would, in case it should turn out that the mine was valueless, and the corporation insolvent, be exceedingly surprised to discover that by his mere purchase of the mining stock he had contracted to pay the share of the nominal capital represented by his stock, should the same be required to liquidate the corporate indebtedness." In *Donald v. American Smelting & Refining Co.*, 62 N. J. Eq. 729, 48 Atl.

not interfere without proof of bad faith, misrepresentation or recklessness,²⁸ unless the law in force required "true value" to be rendered without discretion to estimate such properties.²⁹ There must be some reality of property and value, however,³⁰ and payment in a patent right or other property which has no ascertained value is not a payment in money or its equivalent, within the meaning of a statute. In such a case it was said: "The transfer of a patent which had no ascertained value; which, in the language of the witness, 'as it turned out was worth nothing,' cannot be regarded as 'money,' or its equivalent, because those engaged in the management of the company believe at the time it is valuable, and receive it after organization, upon some fixed estimate of its value, between them and the subscriber, as so much money. Before a thing can be regarded as money or its equivalent, it must have an actual, positive, and ascertained value—a value so thoroughly ascertained and fixed at the time, that it can at once be changed into money, of which it is regarded as the equivalent."³¹ Indeed, it has been held that payment in an invention or patent right or other property, which turns out to have been absolutely worthless, is not a good payment as against subsequent bona fide creditors, even where the parties believed it to be valuable. In such a case, proof of an actual fraudulent intent is not necessary to entitle such creditors to enforce payment,³² or to enable the corporation to defend an action for refusing to issue the stock pursuant to a contract.³³ Mining properties should be valued with respect to the mineral in place as estimated.³⁴

The good-will of a business purchased by a corporation, and paid for by stock, is property, and is to be taken into consideration in de-

771, 1116, a full discussion of the matter will be found.

²⁸ Foreign patents are a valid consideration and presumably fair. In re American Air Compressor Co., — Mich. —, 160 N. W. 388.

²⁹ Where the "true value doctrine" does not prevail, patent rights may be taken in full though they are untried. Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538.

³⁰ As to fictitious good-will or the like, see § 3519, *supra*.

³¹ Tasker v. Wallace, 6 Daly (N. Y.) 364. See also National Tube Works Co. v. Gilfillan, 46 Hun (N. Y.) 248.

³² Chisholm Bros. v. Forny, 65 Iowa 333, 21 N. W. 664; Van Cleve v. Berkey, 143 Mo. 109, 42 L. R. A. 593, 44 S. W. 743; Henderson v. Turngren, 9 Utah 432, 35 Pac. 495.

³³ See Edgerton v. Electric Improvement & Construction Co., 50 N. J. Eq. 354, 24 Atl. 540.

³⁴ Method of ascertaining value of coal in place discussed. Babbitt v. Read, 215 Fed. 395.

As to mode of valuing mining properties with ore in place, see Hyams v. Calumet & H. Min. Co., 221 Fed. 529.

termining the value paid for the stock,³⁵ and is to be valued on the basis of worth and not arbitrarily.³⁶

§ 3578. — Questions of law and fact; evidence and proof.

Whether or not property taken by a corporation and paid for by the issue of stock, has been intentionally taken at an overvaluation, and the overvaluation was fraudulent, is ordinarily a question of fact for the jury.³⁷ But, as we have seen, when it appears that property, the value of which is well known and understood, or capable of being easily ascertained, is exchanged for stock at a price which is far beyond its real value, and there is no evidence explaining the apparent bad faith, the transaction is fraudulent as a matter of law, and may be so held by the court without submitting the question to the jury.³⁸ When

³⁵ Washburn v. National Wall-Paper Co., 81 Fed. 17; Beebe v. Hatfield, 67 Mo. App. 609.

In Camden v. Stuart, 144 U. S. 104, 36 L. Ed. 363, however, where a partnership was converted into a corporation, and the property of the partners transferred to it in exchange for stock, it was held that, in ascertaining whether the stock was full paid as against creditors, no allowance could be made for the experience and goodwill of the partners, or for their trouble or loss of time, as such elements of value were too unsubstantial to be estimated for such a purpose.

Issuing \$150,000 of stock for a business incorporated by owner and earning \$25,000 to \$50,000 a year was not offensive to Stock Corp. Law, § 55. Williams v. McClave, 168 N. Y. App. Div. 192, 154 N. Y. Supp. 38, aff'g 85 N. Y. Misc. 184, 148 N. Y. Supp. 93.

³⁶ Good-will founded on sale of one manufacturer's product held not to have been a valid consideration for stock in a corporation to manufacture a like product. In re Schuylkill-Heim Brewing Co., 208 Fed. 70.

³⁷ Enright v. Heckscher, 240 Fed. 863; De Shelter v. American Spring Water Supply Co., 182 Ill. App. 403; Herbert v. Uhl, 66 Hun (N. Y.) 626,

20 N. Y. Supp. 743, and other cases cited §§ 3576, 3577, supra.

Value of patents held a jury question. Whitlock v. Alexander, 160 N. C. 465, 76 S. E. 538.

Mining stock in an undeveloped prospect held not shown to have been worth par. California Trona Co. v. Wilkinson, 20 Cal. App. 694, 130 Pac. 190.

Evidence held to show a property value slightly exceeding the value necessary to make assets up to par, the property being sheep and equipment for sheep growing. Union Pac. R. Co. v. Blair, — Utah —, 156 Pac. 948.

³⁸ Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28, 67 N. W. 652; Lake Superior Iron Co. v. Drexel, 90 N. Y. 87; Boynton v. Andrews, 63 N. Y. 93. And see other cases in notes, §§ 3576, 3577, supra.

“Where property, whose value is well known or can be easily learned, is taken at an exaggerated estimate, a strong presumption is raised that the valuation is not in good faith and is made for a fraudulent purpose. This presumption will be conclusive unless rebutted by satisfactory evidence explanatory of the apparent fraud. Where the overvaluation is so great that the fraudulent intent ap-

stock has been paid for by conveyance of property to the corporation, or performance of services, and there is no evidence at all as to the value of the property or services, it will be presumed that it was adequate, and even where it appears that there was in fact overvaluation, yet, if the overvaluation was not so gross and palpable as to show that it must have been intentional, it will be presumed that the valuation was honestly made, and the burden will be upon the creditor attacking the transaction.³⁹ Obviously, where the property exchanged

appears on its face, and is not explained, the court will hold it to be fraudulent as matter of law." *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725, aff'g 53 Ill. App. 82.

Under a statute requiring the capital stock of a corporation to be subscribed before it can do business, a subscription for substantially all of the stock of a corporation having a capital stock of \$5,000,000, and payment thereof in undeveloped coal lands, for which the subscriber has paid \$70,000 only, is *prima facie* fraudulent. *Manhattan Trust Co. of New York v. Seattle Coal & Iron Co.*, 16 Wash. 499, 48 Pac. 333, 737.

³⁹ **Alabama.** *Davis v. Montgomery Furnace & Chemical Co.*, 101 Ala. 127, 8 So. 496.

California. *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70.

Colorado. *Speer v. Bordelean*, 20 Colo. App. 413, 79 Pac. 332.

Pennsylvania. *American Tube & Iron Co. v. Baden Gas Co.*, 165 Pa. St. 489, 30 Atl. 940; *Carr v. Le Fevre*, 27 Pa. St. 413.

Tennessee. *Shields v. Clifton Hill Land Co.*, 94 Tenn. 123, 26 L. R. A. 509, 45 Am. St. Rep. 700, 28 S. W. 668; *Kelley v. Fletcher*, 94 Tenn. 1, 28 S. W. 1099.

"Where property is given in payment for stock, and the value is not expressly agreed upon, or the question of its value left for subsequent determination, the fair implication is that its value is the same as the par value

of the stock." In *re Remington Automobile & Motor Co.*, 139 Fed. 766. In this case the facts and holding were as follows: A manufacturing corporation was organized under a statute of New Jersey which made provision that in the absence of fraud the judgment of the directors should be conclusive with reference to the value of property taken in exchange for stock. The corporation made a contract with a board of trade by the terms of which the board of trade was to take certain of the corporation's stock at less than par and furnish to the corporation a site for its buildings without charge. The board of trade sold the stock it received to its members at the price it paid on the strength of statements setting out the contract and the advantages the location of the factory would prove to the city. The board of trade conveyed the site to the corporation as agreed. The court held that the difference between par and the amount paid must be deemed paid up by the site.

Not presumed that full value in services was not rendered for stock given in payment. *Bostwick v. Young*, 118 N. Y. App. Div. 490, 103 N. Y. Supp. 607, aff'd 194 N. Y. 516, 87 N. E. 1115.

Presumption is that issue was for value and regular. In *re Seneca Oil Co.*, 153 N. Y. App. Div. 594, 138 N. Y. Supp. 78, aff'd 208 N. Y. 545, 101 N. E. 1121.

Property taken for necessary and proper corporate uses is *prima facie*

for stock is vast in amount, its value being constituted by different elements, the court cannot do otherwise, in the absence of evidence, than presume that the directors acted honestly and in good faith in appraising the value of the property taken in exchange for stock.⁴⁰ The burden of proving overvaluation is on the creditor⁴¹ but may be proper matter of rebuttal, according to the form of the action.⁴²

Any facts and circumstances bearing on the issue of value may be admitted⁴³ on a proper foundation being laid,⁴⁴ if it tends to prove fair valuation at the time of the transaction;⁴⁵ and one who knows

a good payment for stock. *Morgan Bros. v. Dayton Coal & Iron Co.*, 134 Tenn. 228, 183 S. W. 1019.

⁴⁰ *Donald v. American Smelting & Refining Co.*, 61 N. J. Eq. 458, 48 Atl. 786.

⁴¹ *Ingraham v. Commercial Lead Co.*, 177 Fed. 341.

To show fraud in valuation. *Kunz v. National Valve Co.*, 29 Ohio Cir. Ct. 519.

⁴² Inadequacy of consideration for stock may be shown in rebuttal in a suit for underpaid amount. *Webre v. Christ*, 130 La. 450, 58 So. 145.

⁴³ As to the admissibility of evidence, see *Huntington v. Attrill*, 118 N. Y. 365, 23 N. E. 544; *Blake v. Griswold*, 103 N. Y. 429, 9 N. E. 434; *White Corbin & Co. v. Jones*, 86 Hun 57, 34 N. Y. Supp. 203, 155 N. Y. 475, 50 N. E. 289; *Ferguson v. Gill*, 64 Hun (N. Y.) 284, 19 N. Y. Supp. 149; *Thurber v. Thompson*, 21 Hun (N. Y.) 472.

All circumstances attending the formation of a corporation to take over and operate a plant, the nature and condition of the property, its former and prospective uses, expected earning capacity, improvements to be made, its proposed management and financing, and the opinions of experts were considered in *Rathbone v. Ayer*, 121 N. Y. App. Div. 355, 105 N. Y. Supp. 1041, rev'd 196 N. Y. 503, 89 N. E. 1111, on dissenting opinion of Kellogg, J., in court below.

It is competent to show what promoters paid for the property turned in, as bearing on whether preferred stock was preferred in assets as well as dividends. E. g., that \$100,000 common stock was issued for leases costing \$1,100. In *re Seneca Oil Co.*, 153 N. Y. App. Div. 594, 138 N. Y. Supp. 78, aff'd 208 N. Y. 545, 101 N. E. 1121.

It is not inferred that patent rights were overvalued from the fact that other stock was sold from the treasury at 25 per cent. of par. *Harrison v. Armour*, 169 Cal. 787, 147 Pac. 1166.

Evidence held to show that slight modification of an old process was not a secret process which could be put in against stock. *Berger v. National Architects' Bronze Co.*, 173 N. Y. App. Div. 680, 160 N. Y. Supp. 331.

Sales of the stock at par about the same time are some evidence of the worth of the stock which directors issued to themselves. *Lamphere v. Lang*, 157 N. Y. App. Div. 306, 141 N. Y. Supp. 967.

⁴⁴ The value of property used by other plants in the vicinity is admissible only on a foundation of proof that the material factors of utility were the same. *Loud v. Solomon*, 188 Mich. 7, 154 N. W. 73.

⁴⁵ A subsequent demonstration that the property (gas wells) was of little value does not put on the owners who took stock for it the burden of showing that they reasonably believed it

the value may testify to it though he is not an expert.⁴⁶ The valuation by the directors need not be proved by a formal record;⁴⁷ and it may be shown by parol that property was the consideration where the action is to enforce liability as on an unpaid subscription.⁴⁸ The transaction or the disparity of values may of themselves evince fraudulent overvaluation;⁴⁹ and it has been said that "a gross and obvious overvaluation of property would be strong evidence of fraud,"⁵⁰ but, ac-

worth the price fixed. *American Tube & Iron Co. v. Baden Gas Co.*, 165 Pa. St. 489, 30 Atl. 940.

⁴⁶ One who is familiar with value of the thing. *State v. Citizens Light & Power Co.*, 172 Ala. 232, 55 So. 193.

⁴⁷ Formal valuation by meeting of directors is competent if not impeached for fraud, and need not be proved by a minuted entry of the valuation on the records. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538.

But see § 3525 et seq., *supra*, for cases where the statute requires a certificate or statement of valuation to be made and filed.

⁴⁸ Parol evidence may be admitted to show that the stock was issued as full paid in exchange for the property. *Cunningham v. Holley, Mason, Marks & Co.*, 121 Fed. 720.

⁴⁹ *United States*. In *re Remington Automobile & Motor Co.*, 139 Fed. 766. See also *McBride v. Farrington*, 131 Fed. 797.

Arkansas. *Lester v. Bemis Lumber Co.*, 71 Ark. 379, 74 S. W. 518.

Illinois. *Cohen v. Toy Gun Mfg. Co.*, 172 Ill. App. 330.

Missouri. *First Nat. Bank of Deadwood v. Rockefeller*, 195 Mo. 15, 93 S. W. 761; *Berry v. Rood*, 168 Mo. 316, 67 S. W. 644. See also *L. M. Rumsey Mfg. Co. v. Kaime*, 173 Mo. 551, 73 S. W. 470.

New York. *Rathbone v. Ayer*, 121 N. Y. App. Div. 355, 105 N. Y. Supp. 1041, rev'd 196 N. Y. 503, 89 N. E. 1111, on dissenting opinion of Kellogg, J., in court below.

The price paid on a bona fide purchase of a plant (\$85,000) is evidence that it was overvalued when the real beneficiaries of the purchase four days later capitalized and paid much more for it (\$500,000) redistributing the profit to themselves. *Rathbone v. Ayer*, 121 N. Y. App. Div. 355, 105 N. Y. Supp. 1041, rev'd 196 N. Y. 503, 89 N. E. 1111, on dissenting opinion of Kellogg, J., in court below. In this case Kellogg, J., dissenting, pointed out that unless the circumstances of the purchase for a low sum were in evidence as well as those of the resale to the corporation, a finding of fraudulent overvaluation was not responsive to the evidence; since it appeared that the purchasers thought it worth more than \$85,000, but there was nothing to show it overvalued at \$500,000. See opinion 121 N. Y. App. Div. 362 et seq.

Intentionally fraudulent overvaluation will not be implied from its being worth less than the stock. *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115.

It does not follow because the aggregate of the stock and bonds (\$1,407,000) exceeds the actual cost of construction (\$407,000) that the issuance was fraudulent. *People v. Union Consol. El. R. Co.*, 263 Ill. 32, Ann. Cas. 1915 C 388, 105 N. E. 12.

⁵⁰ *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 30 L. Ed. 420.

ording to the better opinion, it is more than this. If a gross and obvious overvaluation is unexplained, it is conclusive evidence that the overvaluation was intentional and fraudulent.⁵¹ "Where the nature and condition of the property," said the Minnesota court, "are such that its value is well known and understood, or is capable of being readily estimated and ascertained, and the property is transferred to the corporation at a gross overvaluation for paid-up shares, the transaction is prima facie fraudulent as to subsequent creditors, and as against them the burden is upon the shareholder to rebut the presumption by clear and satisfactory evidence. If he knew or ought to have known that he was paying for his stock in property at a material overvaluation, it will not be sufficient for him to show, as a mental operation, that he did not intend to defraud any one. He must go further, and show that, in the exercise of ordinary business since, he was justified in believing, and did honestly believe, that the property was being turned in at a fair valuation. Where the facts are undisputed, and the overvaluation so great as to show that the stockholder ought to have known it if he had exercised ordinary business prudence, his actual belief or intention in the premises will not avail him; he will be presumed to have intended the reasonable and natural consequences

⁵¹ **Elyton Land Co. v. Birmingham Warehouse & Elevator Co.**, 92 Ala. 407, 12 L. R. A. 307, 25 Am. St. Rep. 65, 9 So. 129, where \$200,000 of stock was issued to subscribers for property which cost them, and which was only worth, \$5,000. See also in this connection:

United States. *Camden v. Stuart*, 144 U. S. 104, 36 L. Ed. 363.

Illinois. *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725, aff'g 53 Ill. App. 82.

Iowa. *Chisholm v. Forny*, 65 Iowa 333, 21 N. W. 664; *Osgood v. King*, 42 Iowa 478.

Minnesota. *Wallace v. Carpenter Elec. Heating Mfg. Co.*, 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189; *Hastings Malting Co. v. Iron Range Brewing Co.*, 65 Minn. 28, 67 N. W. 652.

Missouri. *L. M. Rumsey Mfg. Co. v. Kaime*, 173 Mo. 551, 73 S. W. 470; *Van Cleve v. Berkey*, 143 Mo. 109, 42

L. R. A. 593, 44 S. W. 743.

Montana. *Kelly v. Clark*, 21 Mont. 291, 42 L. R. A. 621, 53 Pac. 959.

Nebraska. *Gilkie & Anson Co. v. Dawson Town & Gas Co.*, 46 Neb. 333, 64 N. W. 978, 1097.

New Jersey. *Hebberd v. Southwestern Land & Cattle Co.*, 55 N. J. Eq. 18, 36 Atl. 122; *Wetherbee v. Baker*, 35 N. J. Eq. 501.

New York. *National Tube-Works Co. v. Gilfillan*, 124 N. Y. 302, 26 N. E. 538, 46 Hun 248; *Douglass v. Ireland*, 73 N. Y. 104; *Boynton v. Andrews*, 63 N. Y. 93; *Boynton v. Hatch*, 47 N. Y. 232.

Washington. *Manhattan Trust Co. of New York v. Seattle Coal & Iron Co.*, 16 Wash. 499, 48 Pac. 333, 737.

Valuing land worth about \$4,500 at \$184,500 is fraud, and under New York laws the holders are liable. *McDermott v. Woodhouse* (N. J. Ch.), 99 Atl. 103.

of his act, which is to defraud creditors in case of the insolvency of the corporation.”⁵² Whether or not the valuation made by the directors or stockholders is to be taken as conclusive by the courts, therefore depends on a variety of questions. First, where the statutes or decisions have imposed the requirement that full actual value must have been rendered, the fact of value and not the estimate of it is binding.⁵³ Second, where the estimation is committed to them, the courts will always inquire into alleged fraud affecting it.⁵⁴ Third, in the absence of intentional fraud or disability imposed by law, it may be binding between the parties to it or assenting to it, though not binding on creditors or dissenting stockholders.⁵⁵ No general statement or rule can be laid down without one of the foregoing predicates, but subject to them it may be said that no finding of value by the directors is conclusively correct as against any one whom they had no power to bind by it, or who did not assent or participate.⁵⁶

§ 3579. Effect of issue, or agreement to issue, watered stock; fraudulent aspect—In general. In the preceding sections we have considered merely the powers of corporations with respect to the issue of stock without receiving full payment, and what transactions are within particular charter, statutory or constitutional prohibitions, and the valuation of property, labor or services taken in payment for stock. This and the following sections will deal with the rights and liabilities arising out of the issue of watered or fictitiously paid up stock, assuming that the issue is fraudulent, *ultra vires* or illegal. At the outset it may be well to refer shortly to certain general principles which are applicable, viewing the issue as a fraud. Since the authorized or required capital stock of a corporation constitutes the basis of its credit, persons dealing with a corporation have a right to assume that the full amount of the stock has been actually paid in, or at least that it has been secured to be paid in, so that it will be

⁵² *Hastings Malting Co. v. Iron Range Brewing Co.*, 65 Minn. 28, 67 N. W. 652.

⁵³ See § 3525 et seq., *supra*, § 3589 et seq., *infra*.

⁵⁴ See *supra* this and two preceding sections.

⁵⁵ See § 3519, *supra*, §§ 3585, 3589 et seq., *infra*.

⁵⁶ *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, *aff'd* 82 N. J. Eq. 364, 91 Atl. 1069.

False valuation not binding. *McBryan v. Universal Elevator Co.*, 130 Mich. 111, 97 Am. St. Rep. 453, 89 N. W. 683.

The court is not bound by the valuation placed on property exchanged for stock by the stockholders. *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807. See also *Coler v. Tacoma Railroad & Power Co.*, 65 N. J. Eq. 347, 103 Am. St. Rep. 786, 54 Atl. 413.

available for the payment of the corporate debts. It follows from this that any secret arrangement between the corporation and subscribers for its capital stock, or purchasers thereof from it, to issue the stock as full paid, when in fact it is issued gratuitously, or is to be paid for in part only, either in money, or in property, labor or services, will operate as a fraud, not only upon persons who subsequently become creditors of the corporation on the faith of its capital stock being fully paid, but also upon other persons who may subscribe for or purchase stock of the corporation, and pay for the same in full. On equitable principles, therefore, and aside from any question as to the powers of the corporation in the absence of fraud, persons who are defrauded by such an issue of watered stock are entitled to appropriate relief in a court of equity, whether they seek such relief as creditors⁵⁷ or as stockholders.⁵⁸ In such a case, a court of equity has the undoubted power to set the transaction aside so as to prevent the fraud, or relieve against it, if rights of innocent third persons have not intervened.⁵⁹ Or, according to the overwhelming weight of authority, it may treat the secret agreement as a nullity, and require the holders of the watered or fictitiously paid up stock to pay the full par value of the shares, so as to compel them to make good their express or implied representation that the shares are full paid.⁶⁰ To constitute fraud, however, there must be injury, and if there was not, the stock is not invalid on that ground.⁶¹ Hence, relief on the ground

⁵⁷ *Camden v. Stuart*, 144 U. S. 104, 36 L. Ed. 363; *Sawyer v. Hoag*, 17 Wall. (U. S.) 610, 21 L. Ed. 731; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725, aff'g 53 Ill. App. 82; *First Nat. Bank of Deadwood v. Gustin Minerva Consol. Min. Co.*, 42 Minn. 327, 6 L. R. A. 676, 18 Am. St. Rep. 510, 44 N. W. 198; *Wetherbee v. Baker*, 35 N. J. Eq. 501. And see § 3589 et seq., *infra*.

⁵⁸ *Fitzpatrick v. Dispatch Pub. Co.*, 83 Ala. 604, 2 So. 727; *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199; *Fisk v. Chicago, R. I. & P. R. Co.*, 53 Barb. (N. Y.) 513. And see § 3585, *infra*.

⁵⁹ *Fitzpatrick v. Dispatch Pub. Co.*, 83 Ala. 604, 2 So. 727; *Fisk v. Chicago, R. I. & P. R. Co.*, 53 Barb. (N. Y.) 513.

⁶⁰ *United States. Camden v. Stuart*,

144 U. S. 104, 36 L. Ed. 363.

Alabama. *Fitzpatrick v. Dispatch Pub. Co.*, 83 Ala. 604, 2 So. 727.

Illinois. *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199.

New Jersey. *Wetherbee v. Baker*, 35 N. J. Eq. 501.

New York. *Fisk v. Chicago, R. I. & P. R. Co.*, 53 Barb. 513.

⁶¹ An overvaluation is not ground for cancellation by the corporation if no one including subsequent transferees was injured, and if in consequence there was no fraud. *Inland Nursery & Floral Co. v. Rice*, 57 Wash. 67, 106 Pac. 499.

A holder of bonus stock was held not to have been injured by deprivation of his share in new issue. *Proctor v. Piedmont Portland Cement & Lime Co.*, 134 Ga. 391, 67 S. E. 942.

of fraud is not granted except to persons defrauded, and no relief against an issue of watered stock can be granted, on the ground of fraud, to persons who are not defrauded thereby,—as the corporation itself,⁶² the state,⁶³ stockholders participating or becoming such with notice of the facts,⁶⁴ and transferees who stand in their shoes,⁶⁵ or creditors who became such prior to the issue of the stock, or afterwards with notice,⁶⁶ etc. Their rights and remedies must be based upon some other ground than fraud. They depend upon the powers of the corporation with respect to the issue of its stock, and the effect of its exceeding its powers. An agreement to issue stock, being executory, has other effects. The directors or the corporation may refuse to perform such an agreement⁶⁷ and it cannot be enforced⁶⁸ and may be treated as void without judicial decree of cancellation.⁶⁹ The contract of subscription cannot be separately enforced if it is an integral part of a contract to issue stock unlawfully without lawful payment.⁷⁰

§ 3580. — Effect in ultra vires aspect. Assuming that an agreement to issue or issue of watered or fictitiously paid up stock by a corporation is merely ultra vires or beyond its powers, and laying aside any element of fraud or illegality by reason of express charter, statutory or constitutional prohibition, as shown in a former section,⁷¹ the rights, remedies and liabilities arising out of such an issue or agreement must be ascertained by applying the general principles in rela-

⁶² See § 3583, *infra*.

⁶³ See § 3582, *infra*.

⁶⁴ See § 3586, *infra*.

⁶⁵ See § 3587, *infra*.

⁶⁶ See § 3595, *infra*.

⁶⁷ Where a statute provides that the directors of a corporation may buy necessary property, and issue full-paid stock to the amount of the value thereof, the directors are justified in refusing to issue stock for patents, in pursuance of an agreement of the corporations, where one of the patents has not been perfected, and the articles made under the other are worthless. *Edgerton v. Electric Improvement & construction Co.*, 50 N. J. Eq. 354, 24 Atl. 540.

⁶⁸ If the agreement for two classes of stock is inseparable and invalid as to one, it is unenforceable as to both.

Trent Import Co. v. Wheelwright, 118 Md. 249, 84 Atl. 543.

While a contract for sale of stock may be enforced though it was based on a fictitious valuation of property or services, yet a contract to withdraw all the real paid in capital and to sell the remaining fictitious stock will not be aided in equity. *Minge v. Clark*, 190 Ala. 388, 67 So. 510.

⁶⁹ Under New Jersey laws (contract to issue for fraudulent undervalue). *Enright v. Heckscher*, 240 Fed. 863.

⁷⁰ *Trent Import Co. v. Wheelwright*, 118 Md. 249, 84 Atl. 543. But see *Tooker v. National Sugar Refining Co. of New Jersey*, 80 N. J. Eq. 305, 84 Atl. 10, holding that a separable issue may be cancelled, leaving another which was part of the same transaction in force.

⁷¹ See § 3525 et seq., *supra*.

tion to ultra vires acts and contracts, which have been treated at length in a former chapter.⁷² In accordance with these principles, the following propositions may be laid down:

An ultra vires issue of watered or fictitiously paid up stock by a corporation may be ground for proceedings by the state to forfeit its charter for the misuser or abuse of power, although it is not necessarily so.⁷³

Dissenting stockholders may proceed in equity to enjoin the ultra vires issue, or, subject to qualifications, to cancel the same.⁷⁴ But stockholders who participate in an ultra vires issue of stock cannot complain.⁷⁵

Since an ultra vires contract which is wholly executory is void and unenforceable, a bill in equity or an action at law cannot be maintained either by or against a corporation to compel specific performance of an ultra vires contract to take or issue stock at a discount or otherwise for less than par, or to recover damages for breach thereof.⁷⁶

As we have seen, however, in an earlier chapter, an executed ultra vires contract of a corporation is not necessarily void, but, on the contrary, the general rule is that neither the corporation nor the other party to the contract can question its validity, or sue to set it aside.⁷⁷ On general principles, therefore, where a contract for the issue of watered stock has been fully executed, on both sides, by delivery of the certificates and payment as agreed, neither the corporation nor the holders of the stock, nor participating or consenting holders of other stock, can afterwards attack the transaction merely on the ground that it was ultra vires, there being no express prohibition or established public policy rendering the transaction absolutely null and void.⁷⁸

⁷² See Chap. 37, *supra*. See also *Fisk v. Chicago, R. I. & P. R. Co.*, 53 Barb. (N. Y.) 513; *West Cornwall Ry. Co. v. Mowatt*, 12 Jur. 407.

Issue for property to be transferred to corporation, but which it later had to pay for because the stockholder did not, is ultra vires because prohibited. *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 80 Atl. 666.

⁷³ *State v. Webb*, 97 Ala. 111, 38 Am. St. Rep. 151, 12 So. 377; *Holman v. State*, 105 Ind. 569, 5 N. E. 702. And see chapter on Forfeiture, etc., and § 3582, *infra*.

⁷⁴ *Fitzpatrick v. Dispatch Pub. Co.*,

83 Ala. 604, 2 So. 727; *Fisk v. Chicago, R. I. & P. R. Co.*, 53 Barb. (N. Y.) 513. See § 3586, *infra*.

⁷⁵ *Washburn v. National Wall-Paper Co.*, 81 Fed. 17; *Winston v. Dorsett Pipe & Paving Co.*, 129 Ill. 64, 4 L. R. A. 507, 21 N. E. 514, *aff'd* 27 Ill. App. 546. And see § 3586, *infra*.

⁷⁶ *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713, 20 S. W. 965; *West Cornwall Ry. Co. v. Mowatt*, 12 Jur. 407. And see §§ 3583, 3584, *infra*.

⁷⁷ See Chap. 37, *supra*.

⁷⁸ See §§ 3583, 3584, 3586, *infra*.

We have also seen that, according to the weight of authority, when a contract with a corporation is merely *ultra vires*, not being expressly prohibited nor contrary to public policy, and has been fully executed on one side, the other party may be estopped to set up the defense of *ultra vires* to defeat an action against him or it on the contract.⁷⁹

The mere fact that a contract or transaction on the part of a corporation is *ultra vires* can give strangers no right to complain; and the creditors of a corporation are strangers, at least for this purpose. The only ground upon which they can attack an issue of watered stock, assuming it to be merely voidable and not void, is that of fraud.⁸⁰

§ 3581. — Effect in illegal aspect. If a particular act or contract of a corporation is expressly prohibited by its charter or by the constitution or general statutory law, or if it violates express provisions of the law, it is, as a general rule, not merely *ultra vires*, but illegal; and the same is true of an act or contract which, although not expressly prohibited, is contrary to public policy.⁸¹ An illegal contract cannot, as a rule, be enforced. It follows that no action can be maintained by or against a corporation on a contract to take or issue stock which is illegal because it is contrary to an express charter, statutory or constitutional provision, or because it is contrary to the public policy of the state.⁸² It is also a well-established principle that, when an illegal contract has been carried out, the courts will leave the parties where they have placed themselves, and will not entertain a suit by either party for relief from the effect of the contract. This is true of an illegal issue of stock in violation of a constitutional or statutory provision.⁸³

⁷⁹ See Chap. 37, *supra*.

⁸⁰ See § 3589 et seq., *infra*.

⁸¹ See Chap. 38, *supra*.

⁸² *Minge v. Clark*, 190 Ala. 388, 67 So. 510; *Williams v. Evans*, 87 Ala. 725, 6 L. R. A. 218, 6 So. 702; *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713, 20 S. W. 965. See §§ 3583, 3584, *infra*.

Issue without the statutory certificate as to property taken. *Ecuadorian Ass'n v. Ecuador Co.*, 71 N. J. Eq. 757, 65 Atl. 1051.

Since Stat. § 1753 makes stock issued for less than par void, a rescission and recovery of the purchase money from the corporation will be

denied, leaving the parties where they stand. The rule applies equally to a foreign corporation. *Thronson v. Universal Mfg. Co.*, 164 Wis. 44, 159 N. W. 575.

The subscriber is not estopped to deny liability to the corporation where the contract is executory and *ultra vires* as well as against public policy. *Trent Import Co. v. Wheelwright*, 118 Md. 249, 84 Atl. 543.

⁸³ *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655, 18 N. W. 492.

An action to cancel stock issued for an illegal consideration does not sound in *pari delicto*, and that is no defense. *Prudential Life Ins. Co. of Texas v.*

If stock is issued at a discount for cash, in violation of an express statutory prohibition, the issue of the stock is not void, but the agreement that it shall be paid for at less than its par value is illegal and void, and cannot be enforced. In such a case, the subscriber or purchaser is liable for the full par value.⁸⁴

§ 3582. — Effect as against the state. When a corporation is guilty of ultra vires or illegal acts which constitute an injury to or fraud upon the public, or which will tend to injure or defraud the public, the state may institute quo warranto proceedings to forfeit its charter for the misuser or abuse of its franchises.⁸⁵ Such an issue may be called a fraud on the state.⁸⁶ The attorney general, therefore, may institute such proceedings to enforce a forfeiture of the charter of a corporation for an ultra vires or illegal issue of watered or fictitiously paid up stock, and the court will decree a forfeiture if the circumstances are such as to bring the case within the general principles governing the forfeiture of charters,⁸⁷ as elsewhere stated and explained.⁸⁸

Leave to institute such proceedings (when leave of court is required), or a decree of forfeiture, will be denied where there has been unreasonable delay in instituting such proceedings,⁸⁹ or where the state has waived the right to enforce a forfeiture,⁹⁰ or where the cir-

Pearson, — Tex. Civ. App. —, 188 S. W. 513.

⁸⁴ In re Railway Time Tables Pub. Co., [1895] 1 Ch. 225, aff'd Welton v. Suffery, [1897] App. Cas. 299.

⁸⁵ See chapter on Forfeiture, etc., *infra*.

⁸⁶ Ellis v. Penn Beef Co., 9 Del. Ch. 213, 80 Atl. 666.

⁸⁷ State v. New Orleans Debenture Redemption Co., 51 La. Ann. 1827, 26 So. 586; State v. Hogan, 163 Mo. 43, 63 S. W. 378. And see State v. Webb, 97 Ala. 111, 38 Am. St. Rep. 151, 12 So. 377; People v. City Bank of Leadville, 7 Colo. 226, 3 Pac. 214; Holman v. State, 105 Ind. 569; State v. Atchison & N. R. Co., 24 Neb. 143, 8 Am. St. Rep. 164, 38 N. W. 43.

Thus it has been held ground for forfeiture that a corporation violated a constitutional provision that no corporation should issue stock or bonds

except for labor done, or money or property actually received, and a charter provision that no stock should be issued or certificate given therefor until the amount subscribed for should be fully paid. State v. New Orleans Debenture Redemption Co., 51 La. Ann. 1827, 26 So. 586.

⁸⁸ Chap. 49 and chapter on Forfeiture, etc., *infra*.

⁸⁹ State v. Janesville Water Co., 92 Wis. 496, 32 L. R. A. 391, 66 N. W. 512.

⁹⁰ State v. Webb, 110 Ala. 214, 20 So. 462.

Where a corporation has been fraudulently organized by the corporators issuing the authorized capital stock for property worth only one-half of the par value of the stock, the legislature may by special act correct and waive the vice of the fraudulent organization by reducing the amount of the stock one-half, and cancelling the re-

cumstances are such that the interests of the public do not require a forfeiture.⁹¹

If a threatened act of a corporation will constitute a public nuisance, and prompt action is necessary to prevent injury to the public therefrom, the attorney general, as we have seen, may proceed in equity for an injunction.⁹² It is perhaps safe to say, however, that this principle does not authorize a suit by the attorney general to enjoin the issue of watered stock. The state cannot maintain a suit to enjoin or cancel an issue of watered or fictitiously paid up stock, where private rights only will be affected.⁹³ The state cannot maintain a suit in equity to cancel watered stock and bonds and to enjoin foreclosure of a mortgage given to secure the bonds.⁹⁴

§ 3583. — Effect as against the corporation. It has been said broadly that a corporation, after issuing its stock as paid up, and declaring it to be so, when it is not so in fact, cannot subsequently repudiate the declaration and agreement, where no actual fraud enters into the transaction, and proceed to collect, either from the person receiving the stock or his transferee, the unpaid part of the par value, as it is estopped from doing so.⁹⁵ But this is not necessarily true under all circumstances. It is not true under statutory or constitutional provisions in some jurisdictions,⁹⁶ and it is not always true where all the stockholders do not consent.⁹⁷ Where it was not in

mainder of the shares, which have been surrendered to the corporation by the stockholders, and thereby purge the corporation of the fraud, and render it a de jure corporate body. *State v. Webb*, 110 Ala. 214, 20 So. 462.

⁹¹ *State v. Minnesota Thresher Mfg. Co.*, 40 Minn. 213, 3 L. R. A. 510, 41 N. W. 1020.

⁹² See Chap. 37, and Chap. 51.

⁹³ *Minnesota v. Guaranty Trust & Safe-Deposit Co.*, 73 Fed. 914; *State v. Farmers' Loan & Trust Co.*, 81 Tex. 530, 17 S. W. 60.

⁹⁴ Under the Minnesota statute prohibiting railroad companies from selling or disposing of any shares of stock until the same are fully paid, or issuing any stocks or bonds except for money, labor or property actually received, and declaring all fictitious increase of stock or in-

debtedness void, it was held that the purpose was to protect stockholders and creditors, and that the state had no right to protect their private rights by a suit in its own name to cancel stock and bonds issued in violation of the statute, and to enjoin foreclosure of a mortgage given to secure the bonds. *Minnesota v. Guaranty Trust & Safe-Deposit Co.*, 73 Fed. 914.

⁹⁵ 1 Cook on Corporations, § 38.

⁹⁶ *Morrow v. Nashville Iron & Steel Co.*, 87 Tenn. 262, 3 L. R. A. 37, 10 Am. St. Rep. 658, 10 S. W. 495; *In re Railway Time Tables Pub. Co.*, 71 L. T. 682. See *infra*, this section.

⁹⁷ *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199; *Robinson v. Pittsburgh & C. R. Co.*, 32 Pa. St. 334, 72 Am. Dec. 792. See § 3585, *infra*, also Chap. 17, *supra*, as to sub-

legal sense issued, it will not bind the corporation unless it comes into the hands of an innocent purchaser.⁹⁸

It is undoubtedly true, however, as was stated in a former section, that where a corporation issues watered or fictitiously paid up stock, with the consent of all the stockholders, and when there is no charter, statutory or constitutional provision rendering the transaction void, the agreement is valid and binding as against the corporation, and it cannot afterwards repudiate the same and exclude the holders of the stock, or compel them to pay the difference between the par value of the stock and what has been paid or agreed upon as full payment.⁹⁹ The

scriptions on discriminating conditions.

⁹⁸ As to stock not in legal sense issued, but given out for sale and account, see *Cortelyou v. Imperial Land Co.*, 156 Cal. 373, 104 Pac. 695.

⁹⁹ **United States.** *Seoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Hallett v. New England Roller Grate Co.*, 105 Fed. 217; *Harrison v. Union Pac. Ry. Co.*, 13 Fed. 522; *Kenton Furnace R. R. & Mfg. Co. v. McAlpin*, 5 Fed. 737. See also *Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co.*, 75 Fed. 554.

California. *Smith v. Martin*, 135 Cal. 247, 67 Pac. 779; *Merchants' Mut. Adjusting Agency v. Davidson*, 23 Cal. App. 274, 137 Pac. 1091; *California Trona Co. v. Wilkinson*, 20 Cal. App. 694, 130 Pac. 190.

Colorado. *Mountain Water Works Const. Co. v. Holme*, 49 Colo. 412, 113 Pac. 501.

Illinois. *Parmelee v. Price*, 208 Ill. 544, 70 N. E. 725; *Union Mut. Life Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537, 37 Am. Rep. 129.

Indiana. *Bent v. Underdown*, 156 Ind. 516, 60 N. E. 307; *Clow v. Brown*, 150 Ind. 185, 49 N. E. 1057, 48 N. E. 1034; *Bruner v. Brown*, 139 Ind. 600, 38 N. E. 318.

Iowa. *Esgen v. Smith*, 113 Iowa 25, 84 N. W. 954; *Callanan v. Windsor*, 78 Iowa 193, 42 N. W. 652.

Maryland. *Granite Roofing Co. v. Michael*, 54 Md. 65.

Michigan. See *Jones v. Green*, 129 Mich. 203, 95 Am. St. Rep. 433, 88 N. W. 1047.

Minnesota. *First Nat. Bank of Deadwood v. Gustin Minerva Consol. Min. Co.*, 42 Minn. 327, 6 L. R. A. 676, 18 Am. St. Rep. 510, 44 N. W. 198.

Missouri. *Hill v. Atoka Coal & Mining Co.*, 124 Mo. 153, 32 S. W. 111, 25 S. W. 926.

New Jersey. *Goodnow v. American Writing Paper Co.*, 72 N. J. Eq. 645, 66 Atl. 607; *Coler v. Tacoma Railroad & Power Co.*, 64 N. J. Eq. 117, 53 Atl. 680.

New York. *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648; *Miller v. University Magazine Co.*, 10 Misc. 311, 30 N. Y. Supp. 969.

Pennsylvania. See *McDowell v. Lindsay*, 213 Pa. 591, 63 Atl. 130.

Wisconsin. *Whitehill v. Jacobs*, 75 Wis. 474, 44 N. W. 630.

Compare New Haven Trust Co. v. Gaffney, 73 Conn. 480, 47 Atl. 760.

The corporation issuing stock for property as full paid is estopped towards the stockholder to deny it. *St. Louis Charcoal Co. v. Moore*, 178 Mo. App. 692, 162 S. W. 745.

Even if anticipated services cannot be the basis of stock issuance, the corporation having received them cannot object. *Vineland Grape Juice Co. v. Chandler*, 80 N. J. Eq. 437, Ann. Cas. 1914 A 679, 85 Atl. 213.

A mining corporation was organized with dummy directors at the instance

corporation's privies in estate are likewise bound.¹ This is true, whether the stock was issued for cash or property at a discount,² or

of the corporate promoters and was caused to purchase certain mining claims possessing a small value and to issue in exchange therefor shares of stock having par value immensely greater than the value of the claims. The court held that the transaction could not be rescinded at the instance of the complainant company since the promoters constituted all the stockholders. The court said: "Ordinarily, when a director or promoter contracts to sell property to his corporation, the corporation not being independently represented, it may rescind the contract, upon the theory, of course, that the relation between the parties is fiduciary and that the other stockholders and subscribers to the stock are to be protected against an abuse of trust. But where there are no other stockholders nor subscribers, there is no one who is deceived, no stockholder or subscriber who is defrauded, since all the profit put into one pocket by the 'faithless' directors is taken out of their other pocket as the sole stockholders." *Old Dominion Copper Min. Co. v. Lewisohn*, 136 Fed. 915.

At the time a corporation was organized the entire capital stock was issued to promoters as full paid. The consideration was, in fact, little more than nominal. One of the promoters thereafter donated a large block of his stock to the corporation and this stock was later sold under authority of the trustees and the respondent obtained a portion thereof. The court said: "Whatever the rights of creditors might be as between the corporation and the subscribers, this stock was fully paid up and the corporation will not be heard to gainsay it. The corporation lawfully became the owner of this stock and had a right

to sell or reissue it." *Krisch v. Interstate Fisheries Co.*, 39 Wash. 381, 81 Pac. 855.

Where the rights of creditors are not involved, officers of a corporation organized for the manufacture of a patented article of purely speculative value, who in good faith, and with the assent of the other stockholders, give their time and means in developing the business of the corporation, and placing it on a firm basis, in consideration of a transfer to them of a portion of unissued stock which has no present marketable value, are not liable to the corporation for the par value of the stock. *Divine v. Universal Sew. Mach. Motor Attachment Co.* (Tenn. Ch. App.), 38 S. W. 93.

It has been held that a statute prohibiting a corporation from issuing stock to subscribers for less than the par value is simply to render any agreement between the corporation and its stockholders ineffective to relieve the latter from full liability to creditors of the corporation to the extent of the par value of the stock, and does not render an issue of stock for less than par illegal for other purposes. *Barcus v. Gates*, 89 Fed. 783, construing the Virginia statute.

Selling a mining claim to a corporation for its stock at a valuation adopted by themselves, they also comprising it, is binding if there are no creditors prejudiced by it. *Gold Ridge Mining & Development Co. v. Rice*, 77 Wash. 384, 137 Pac. 1001.

¹ Sufficiency of consideration cannot be questioned by one who is merely successor in title to the corporate property. *Lindsey v. Pasco Power & Water Co.*, 203 Fed. 251.

² *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Kenton Furnace R. R. & Mfg. Co. v. McAlpin*, 5 Fed. 737;

for property taken at an overvaluation,³ or gratuitously.⁴ An agreement by which a corporation, with the consent of all the stockholders, and without prejudice to creditors, treats stock as full paid in consideration of the surrender by the stockholders to it of dividends declared, or of accumulated profits and increased value of its property, is binding upon the corporation.⁵ The holders of such stock have full standing to maintain a stockholders' suit where the corporation will not or cannot sue.⁶

In some jurisdictions the general doctrine that an agreement by which a corporation issues or agrees to issue stock as full paid upon payment in part only, in money, or in property, labor or services,

Hill v. Atoka Coal & Mining Co., 124 Mo. 153, 32 S. W. 111, 25 S. W. 926; *Barr v. New York, L. E. & W. R. Co.*, 125 N. Y. 263, 26 N. E. 145.

After certifying that the entire stock was issued for property it cannot take back the stock and contradict such certificate. *Dickerson v. Appleton*, 123 N. Y. App. Div. 903, 108 N. Y. Supp. 293, aff'd 195 N. Y. 507, 88 N. E. 1117.

3 United States. *Northern Trust Co. v. Columbia Straw Paper Co.*, 75 Fed. 936, aff'd *Dickerman v. Northern Trust Co.*, 80 Fed. 450.

Alabama. *Nicrosi v. Irvine*, 102 Ala. 648, 48 Am. St. Rep. 92, 15 So. 429.

Colorado. *Arapahoe Cattle & Land Co. v. Stevens*, 13 Colo. 534, 22 Pac. 823.

Indiana. *Bruner v. Brown*, 139 Ind. 600, 38 N. E. 318.

Missouri. *Woolfolk v. January*, 131 Mo. 620, 33 S. W. 432.

New York. *Barr v. New York, L. E. & W. R. Co.*, 125 N. Y. 263, 26 N. E. 145.

Wisconsin. *Wells v. Green Bay & M. Canal Co.*, 90 Wis. 442, 64 N. W. 69; *Whitehill v. Jacobs*, 75 Wis. 474, 44 N. W. 630.

In *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362, the owner of an equity of redemption in land mortgaged be-

yond its value assigned it for the benefit of creditors, and afterwards, with their co-operation, organized a cemetery corporation, and caused the land to be conveyed to it, the company assuming payment of the mortgage, and issuing all its stock to the vendor and persons whom he named. It was held that, notwithstanding the amount of the mortgage exceeded the value of the land, the issue of the stock in exchange for the equity of redemption was not without consideration, and was valid as against the corporation itself, and those of its stockholders and creditors who had notice of the transaction when their rights were acquired.

⁴ *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648, as to which see § 3520, supra.

⁵ *Kenton Furnace R. R. & Mfg. Co. v. McAlpin*, 5 Fed. 737; *Kryger v. Andrews*, 65 Mich. 405, 35 N. W. 245. See § 3523, supra.

⁶ Bonus stock issued with bonds or stock issued against overvalued property may be valid as against the corporation, in the absence of fraud; and holders may maintain a stockholders' suit. *Shaw v. Staight*, 107 Minn. 152, 20 L. R. A. (N. S.) 1077, 119 N. W. 951; *Arnold v. Searing*, 73 N. J. Eq. 262, 67 Atl. 831.

or by which it issues stock as a gratuity, is binding as between the corporation and the stockholders, so that the corporation cannot repudiate the agreement and recover from the stockholders as upon unpaid subscriptions, is rendered inapplicable by express charter, constitutional or statutory provisions.⁷

It has been held that the doctrine does not apply to subscriptions preliminary to the organization of a corporation, where the charter or law, for the protection of the public, and on grounds of public policy, requires that the capital stock of the corporation shall be subscribed in good faith as a condition precedent to the right to organize and commence business, and that the stock shall be paid in full at its par value, and that, in such a case, any agreement or stipulation that subscribers shall not be required to pay the full amount of their subscriptions, or that the amount paid shall be returned to them directly or indirectly, is not only ultra vires, but is contrary to public policy and void, as a fraud upon the law, and it cannot be set up by the subscribers, after they have become stockholders, in an action by the corporation itself to recover the full amount of the subscriptions.⁸ It was held, therefore, in a late Tennessee case, that a stipulation in the contracts with the subscribers to the initiatory or organization stock of a manufacturing corporation, which was required by the statutes of the state to be paid in full at its par value, by which the corporation agreed to issue to the subscribers, in addition to their shares of stock, interest bearing bonds to the full amount of their subscriptions, secured by a first mortgage on its plant, was ultra vires, without consideration, and void as against the public policy of the state, not only as against creditors, but also as between the corporation and the subscribers, and that the failure of the company to carry out the illegal stipulation could not be set up by subscribers as releasing them from liability on their subscriptions.⁹

In England, where it is provided by statute that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing," it is held that an agreement to issue shares for cash at a discount, without such a contract, is not merely ultra vires, but illegal, because contrary to the prohibition of the statute. Where the

⁷ See references to statutes and excerpts from them, § 3525 et seq., supra.

⁸ *Morrow v. Nashville Iron & Steel Co.*, 87 Tenn. 262, 3 L. R. A. 37, 10 Am. St. Rep. 658, 10 S. W. 495.

⁹ *Morrow v. Nashville Iron & Steel Co.*, 87 Tenn. 262, 3 L. R. A. 37, 10 Am. St. Rep. 658, 10 S. W. 495.

shares are issued, however, the issue is not illegal and void, but the agreement by which they are paid for at less than par is so, and the holders may be compelled to pay for the shares in full, not only for the purpose of paying creditors, but also for the purpose of adjusting the rights of the stockholders inter se, on a winding up of the corporation.¹⁰

In some of the states, under the constitutional or statutory provision that no corporation shall issue stock except for money paid, labor done or property actually received, and that all fictitious increase of stock shall be void, it is held that certificates of stock issued in violation of the prohibition, and which are altogether fictitious, nothing being paid on them, are absolutely null and void, even as between the parties, and that they do not make the persons to whom they are issued stockholders, or confer any rights or impose any liabilities upon them as such.¹¹ Thus, in Wisconsin, where it is provided in effect that no corporation shall issue stock except at its par value for money, labor or property estimated at its true money value, and actually received, and that all fictitious increase of stock shall be void, it was held that a certificate of stock issued gratuitously was absolutely void, and did not make the holder a stockholder, so as to give him a standing to sue as such on behalf of the corporation to compel a creditor to return bonds illegally issued to him.¹² There was a like decision in Colorado under a similar provision, where a certificate of stock was issued without any consideration.¹³

Where certificates of stock are not altogether fictitious, but merely in excess of the amount paid in, as where they represent shares fully paid for, and also additional shares, for which no consideration has been paid, so that they are fictitious as to the latter only, they are void, not altogether, but only as to the shares not paid for.¹⁴

When property is conveyed to a corporation in payment for stock, and certificates issued to the subscribers or purchasers, the fact that

¹⁰ *In re Railway Time Tables Pub. Co.*, [1895] 1 Ch. 225, aff'd *Welton v. Saffery*, [1897] App. Cas. 299. See also *In re Weymouth & C. I. Steam Packet Co.*, [1891] 1 Ch. 66; *In re Almada & Tiritto Co.*, 38 Ch. Div. 415.

¹¹ *Beitman v. Steiner*, 98 Ala. 241, 13 So. 87; *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377; *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638; *Arkansas River Land, Town & Canal Co. v. Farmers' Loan & Trust Co.*, 13

Colo. 587, 22 Pac. 954; *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21; *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655, 18 N. W. 492.

¹² *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21.

¹³ *Arkansas River Land, Town & Canal Co. v. Farmers' Loan & Trust Co.*, 13 Colo. 587, 22 Pac. 954.

¹⁴ *Beitman v. Steiner*, 98 Ala. 241, 13 So. 87.

the property is overvalued does not render the transaction void, even when there is a constitutional or statutory provision that no corporation shall issue stock except at its par value, for money, labor or property estimated at its true value and actually received, and that all fictitious increase of stock shall be void. As between the corporation and its stockholders, it cannot be claimed that the property conveyed to them by it in payment for their stock was not a sufficient consideration.¹⁵

So long as an ultra vires or illegal contract by a corporation to issue stock at a discount, or for property or services to be taken at an overvaluation, is wholly executory, it is void, and it cannot be enforced either by or against the corporation, either at law or in equity. The parties to such a contract are in *pari delicto*.¹⁶ A corporation cannot be compelled by mandamus to issue stock at less than its par value, in

¹⁵ *Nicrosi v. Irvine*, 102 Ala. 648, 48 Am. St. Rep. 92, 15 So. 429; *Wells v. Green Bay & M. Canal Co.*, 90 Wis. 442, 64 N. W. 69; *Whitehill v. Jacobs*, 75 Wis. 474, 44 N. W. 630. And see *Arapahoe Cattle & Land Co. v. Stevens*, 13 Colo. 534, 22 Pac. 823; *Woolfolk v. January*, 131 Mo. 620, 33 S. W. 432. But see Texas cases, § 3567, *supra*, holding such stock void.

¹⁶ **Alabama.** *Williams v. Evans*, 87 Ala. 725, 6 L. R. A. 218, 6 So. 702.

Minnesota. See *Rogers v. Gross*, 67 Minn. 224, 69 N. W. 894.

Missouri. *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713, 20 S. W. 965.

New Jersey. *Edgerton v. Electric Improvement & Construction Co.*, 50 N. J. Eq. 354, 24 Atl. 540.

New York. *Zelaya Min. Co. v. Meyer*, 28 N. Y. St. Rep. 759, 8 N. Y. Supp. 487.

Wisconsin. *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655, 18 N. W. 492.

England. See *West Cornwall Ry. Co. v. Mowatt*, 12 Jur. 407.

Compare *Otter v. Brevoort Petroleum Co.*, 50 Barb. (N. Y.) 247.

Const. art. IX, § 39, is prohibitive of fictitious issues and binds the corporation towards its stockholders as

well as they towards creditors. An executory agreement for such an issue is not enforceable. *Webster v. Webster Refining Co. of Okmulgee*, 36 Okla. 168, 47 L. R. A. (N. S.) 697, 128 Pac. 261.

A party to a contract by which a large amount of paid up capital stock in a corporation, to be organized for the development of certain lands, is to be issued to him in exchange for his equitable rights in options on such lands, and for his services in promoting the corporation, cannot sue in equity to enforce the contract, where it appears that his interest in the lands and his services, when taken together, are not a fair equivalent for the face value of the stock which he is to receive, and where the issue of the stock under such circumstances contravenes the express provisions of the constitution and statutes of the state, as well as the general policy of the law, requiring that the subscribers to corporate stock shall pay in money or money's worth. *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713, 20 S. W. 965.

Nonenforceability as against subscriber or purchasers, see § 3584, *infra*.

pursuance of a vote of the stockholders, but in violation of law.¹⁷

A corporation cannot maintain an action on a note given in payment of a subscription for stock, where the only consideration for the note is an agreement to issue stock at the rate of two dollars of stock for every dollar to be paid, in violation of a statutory or constitutional provision, and the stock has not yet been issued. As the agreement is void, the note is without consideration, as well as illegal.¹⁸ Texas represents, perhaps, the extreme to which this has been carried under a statute of this type. It is there held not only that stock issued for promissory notes is void, but that the notes also are void, they not being regarded as property within the statute.¹⁹

A subscriber for stock under an agreement which is illegal and void because it is in violation of a statutory or constitutional provision acquires no rights, by virtue of his subscription, which he can assign, so as to entitle him to maintain an action against the assignee upon an executory contract to pay for the rights assigned.²⁰ An issue *malum prohibitum*, and hence void, may, as against the corporation, give the purchaser or subscriber a cause of action to recover the money paid.²¹

If the directors or managing officers of a corporation issue its stock fraudulently or without authority for less than its par value in money or property, the corporation may undoubtedly hold them liable in damages, and if it has been issued to themselves, it may compel them to surrender or return the same or account for its value, unless it is barred by laches or ratification. Even when the stock is issued to third persons, it may sue to cancel the same or recover the full value, unless they are bona fide holders.²²

¹⁷ Morton v. Timken, 48 N. J. L. 87, 2 Atl. 783.

¹⁸ Alabama Nat. Bank v. Halsey, 109 Ala. 196, 19 So. 522. Compare Pacific Trust Co. v. Dorsey, 72 Cal. 55, 12 Pac. 49; First Nat. Bank of Baldwinville v. Cornell, 8 N. Y. App. Div. 427, 40 N. Y. Supp. 850.

In California, under a statutory prohibition against the issue of stock except for money paid, labor done or property actually received, it was held that a certificate of stock of a railroad company issued upon payment by a note conditioned upon the completion of the road within a given time

was illegal and void, and that the note therefor was without consideration, and void, and the assignees thereof (the note being non-negotiable) could not recover upon it. Jefferson v. Hewitt, 103 Cal. 624, 37 Pac. 638.

¹⁹ See § 3567, supra.

²⁰ Williams v. Evans, 87 Ala. 725, 6 L. R. A. 218, 6 So. 702.

²¹ See § 3584, infra.

As to the rights of subscribers paying money under fraudulent or illegal contracts of subscription in general, see Chap. 17, supra.

²² See Chaps. 42 and 43, supra.

Under statutes providing that stock may not be sold by corporations at less than par, and that officers participating in an issuance below par shall be deemed subject to penalty, the court held that the statutes were not to be regarded as declaring any general public policy but as enactments of regulations governing corporations to protect stockholders and corporate creditors. It held, further, accordingly, that for a violation of these statutes the attendant penalties, where the contract had been executed, were such only as the statute prescribed.²³

§ 3584. — Effect as against subscribers or purchasers. In the absence of some special statutory or constitutional provision, an agreement between a corporation and the subscribers for or purchasers of its stock, under which the stock is issued at less than par, or for property taken at an overvaluation, with the understanding that it shall be regarded as full paid, is binding as between the parties thereto, not only as against the corporation,²⁴ but also as against the subscribers or purchasers,²⁵ although invalid as against dissenting stockholders²⁶ and subsequent bona fide creditors.²⁷ As to such valid, though inflated, stock the holders cannot require application of earnings until the water is overcome by the earnings.²⁸

In some jurisdictions, however, as we have seen, under the constitutional or statutory provision that no corporation shall issue stock except for money paid, labor done or property actually received, and that all fictitious increase of stock shall be void, or other provisions on the subject, it is held that certificates issued in violation of the prohibition, and which are fictitious, are absolutely void, and do not

²³ Hallett v. New England Roller-Grate Co., 105 Fed. 217.

²⁴ See preceding section.

²⁵ Scoville v. Thayer, 105 U. S. 143, 26 L. Ed. 968; Bruner v. Brown, 139 Ind. 600, 38 N. E. 318; Callanan v. Windsor, 78 Iowa 193, 42 N. W. 652; Walburn v. Chenault, 43 Kan. 352, 23 Pac. 657.

Evidence held insufficient to show breach of agreement to incorporate in that the corporation capitalized the properties twice as high as agreed and thereby defaced value of the stock. Carter v. Tucker, 138 Ky. 34, 127 S. W. 498.

They cannot attack stock issued as fully paid even though issued to one as trustee to distribute to old corpo-

ration whose property was taken over. O'Dea v. Hollywood Cemetery Ass'n, 154 Cal. 53, 97 Pac. 1.

When issued on a legal consideration an attempted cancellation is a nullity as against them. Fitzpatrick v. O'Neill, 43 Mont. 552, Ann. Cas. 1912 C 296, 118 Pac. 273.

²⁶ See § 3585, *infra*.

²⁷ See § 3589 *et seq.*, *infra*.

²⁸ It is not obligatory on a corporation which issued stock against overvalued plants entering into a consolidation to forbear dividends until such time as the accumulated earnings will extinguish the inflated value. Goodnow v. American Writing Paper Co., 72 N. J. Eq. 645, 66 Atl. 607.

make the persons to whom they are issued stockholders, or confer upon them any rights whatever, and any promise made by them in consideration of the issue of such a certificate is without consideration and void.²⁹ The Texas doctrine on this subject that both notes and stock issued thereon are void, and that notes are not "property," has been treated in an earlier section depending particularly on the construction given to the statute.³⁰ Such stock or notes may be cancelled at suit of the holder³¹ unless the parties are in equal wrong.³² Overvaluation, unless intentionally fraudulent, will not enable the taker to cancel under the West Virginia statute.³³ The corporation can have cancellation of such stock and the holder, who paid nothing, cannot for lack of prejudice plead laches to such a suit.³⁴

The nature of a contract of subscription, as distinguished from other contracts related to stock and from the liabilities incident to stockholdings, must be here mentioned.³⁵

²⁹ See §§ 3525-3575, *supra*, and see also *Beitman v. Steiner*, 98 Ala. 241, 13 So. 87; *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377; *Jefferson v. Hewitt*, 103 Cal. 624, 37 Pac. 638; *Arkansas River Land, Town & Canal Co. v. Farmers' Loan & Trust Co.*, 13 Colo. 587, 22 Pac. 954; *Hinckley v. Pfister*, 83 Wis. 64, 53 N. W. 21; *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655, 18 N. W. 492.

An agreement with subscribers that, for every share paid for, two or more shares shall be issued, is void under the Minnesota statute, § 3548, *supra*, and not enforceable as between the subscribers, and no equitable rights in their favor can arise out of it. *Rogers v. Gross*, 67 Minn. 224, 69 N. W. 894.

The taker of a certificate not legally paid for is estopped to defeat his note for the subscription price on the ground that stock could not issue against notes. *Schiller Piano Co. v. Hyde*, — S. D. —, 162 N. W. 937.

³⁰ See § 3567, *supra*.

Stock of an insurance company issued when there was outstanding a note and mortgage for part of the subscription price is void; and the rule is not evaded by having another "or-

ganization" corporation make advances of such balance to the issuing corporation, of which the subscriber had no knowledge, and did not ratify. *General Bonding & Casualty Ins. Co. v. Mosely*, — Tex. Civ. App. —, 174 S. W. 1031.

³¹ Subscriber may cancel notes where stock is void. *General Bonding & Casualty Ins. Co. v. Mosely*, — Tex. Civ. App. —, 174 S. W. 1031.

³² Where the stock issue and the note are void and a suit for cancellation and refund of payments is met by a cross-complaint for enforcement, the court will leave the parties in *pari delicto* where it finds them. *General Bonding & Casualty Ins. Co. v. Mosely*, — Tex. Civ. App. —, 174 S. W. 1031.

³³ *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115.

³⁴ The holder of void overvalued stock cannot plead laches as a bar to cancellation where having paid nothing and having received large dividends, he is not prejudiced. *Tooker v. National Sugar Refining Co. of New Jersey*, 80 N. J. Eq. 305, 84 Atl. 10.

³⁵ See the distinctions made in Chap. 17, *supra*.

A contract to do work and take full

So long as an *ultra vires* or illegal contract for the issue of watered stock is executory, the corporation cannot enforce it against the subscribers or purchasers, either by a suit in equity or by an action at law, for no action will lie to enforce an executory *ultra vires* or illegal contract,³⁶ no more than they could enforce it against the corporation.³⁷

In another chapter it has been shown that a subscription on special terms violative of the statutes may be sustained and the illegal conditions disregarded.³⁸ So the subscription may be valid and binding on the subscriber notwithstanding a gift of stock to him was also attempted.³⁹ When creditors are involved another set of rights intervenes,⁴⁰ and under the rule that acceptance of stock implies a subscription, the portion representing overvaluation cannot be released to evade liability towards creditors.⁴¹

paid stock in payment is not a subscription to stock; and the taker is not liable unless it appears that he took the stock without paying value for it, so that an implied promise would arise to do so. *Bostwick v. Young*, 118 N. Y. App. Div. 490, 103 N. Y. Supp. 607, aff'd 194 N. Y. 516, 87 N. E. 1115.

36 Alabama. *Knox v. Childersburg Land Co.*, 86 Ala. 180, 5 So. 578.

Minnesota. *Rogers v. Gross*, 67 Minn. 224, 69 N. W. 894.

Missouri. *Garrett v. Kansas City Coal Min. Co.*, 113 Mo. 330, 35 Am. St. Rep. 713, 20 S. W. 965.

New Jersey. *Morton v. Timken*, 48 N. J. L. 87, 2 Atl. 783; *Edgerton v. Electric Improvement & Construction Co.*, 50 N. J. Eq. 354, 24 Atl. 540.

New York. *Zelaya Min. Co. v. Meyer*, 28 N. Y. St. Rep. 759, 8 N. Y. Supp. 487.

Wisconsin. *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655, 18 N. W. 492.

England. *West Cornwall Ry. Co. v. Mowatt*, 12 Jur. 407. See also §§ 3579-3581, *supra*.

Where there has been no finding by the directors as to the value of the property to be exchanged for stock, and it is less in value than par, an executory contract for the exchange is not enforceable. *Ecuadorian Ass'n v.*

Ecuador Co., 71 N. J. Eq. 757, 65 Atl. 1051.

³⁷ See § 3583, *supra*.

³⁸ See Chap. 17, *supra*.

³⁹ One who subscribed the half necessary to organize and was also voted a sum equal to three-fifths of the authorized issue as a gift was to be regarded as a subscriber of the former sum. *McAllister v. American Hospital Ass'n*, 62 Ore. 530, 125 Pac. 286.

Shares issued with design to be a bonus may be affirmed as valid and the subscription price recovered. *White-water Tile & Pressed Brick Mfg. Co. v. Baker*, 142 Wis. 420, 125 N. W. 984.

⁴⁰ See § 3589 *et seq.*, *infra*.

⁴¹ The persons who accept stock fraudulently and invalidly issued are liable to creditors as if they had subscribed without paying. *Enright v. Heckscher*, 240 Fed. 863. And they cannot be released to the prejudice of creditors by release of all overvalue by surrendering the corresponding part of the shares. *Id.*

Acceptance of stock is equivalent to subscription. *Davies v. Ball*, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

Such an implied subscription is not based on the doctrine of ratification of an invalid issue. *Holcombe v. Trenton*

When it is a contract executed so far as to pay for or to issue the stock a different question arises. In England there is a conflict in the decisions as to whether a person to whom stock has been illegally issued at a discount may repudiate his subscription and recover what he has paid.⁴² In Iowa it has been held, applying the so-called Blue Sky Law, that stock issued without leave of the official body was thereby represented by the officers to be stock paid in full, and that the purchaser could recover from the corporation what he paid for it.⁴³ A similar redress was regarded proper in federal courts where the stock was void under the statutes.⁴⁴ In Wisconsin it has been held that, since the transaction is illegal, and the parties in *pari delicto*, such an action will not lie, but the courts will leave the parties where they have placed themselves. According to this doctrine, although the certificate of stock issued to a subscriber or purchaser in violation of a statutory or constitutional prohibition is void, and confers no rights upon him as against the corporation, he cannot maintain an action against it to recover what he has paid therefor.⁴⁵ It has been suggested that ignorance of foreign law in this respect is a mistake of fact, and that recovery as of money paid under mistake is allowable, the stock being that of a foreign corporation,⁴⁶ but this seems to be unsound reasoning, since with respect to the

White City Co., 80 N. J. Eq. 122, 82 Atl. 618, *aff'd* 82 N. J. Eq. 364, 91 Atl. 1069.

⁴² See *In re Railway Time Tables Pub. Co.*, 42 Ch. Div. 98; *In re Almada & Tirito Co.*, 38 Ch. Div. 415; *In re Midland Elec. Light & Power Co.*, 60 L. T. 666; *In re Zoedone Co.*, 60 L. T. 383.

⁴³ *Sykes v. Pure Food Cider Co.*, 157 Iowa 601, 138 N. W. 554.

⁴⁴ Under a statute prohibiting sale of stock at less than par, and providing that certificates issued for less than par should be deemed void, the federal court held that while an executory contract in violation of the statutes could not be enforced, that where stock had been purchased and paid for by a nonresident of the state at less than par, the nonresident having acted in good faith and having received his certificate of stock without knowledge of the statute, the stat-

ute did not preclude the purchaser from maintaining action for the recovery of the money paid where the issue had been held void by the courts. (He was held barred, however, by delay.) *Hallett v. New England Roller-Grate Co.*, 105 Fed. 217.

⁴⁵ *Thronson v. Universal Mfg. Co.*, 164 Wis. 44, 159 N. W. 575; *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655, 18 N. W. 492.

But when stock in a corporation is sold in good faith for less than its full value, and a certificate issued therefor, which is void because issued for stock not fully paid, the consideration paid may be recovered. *Potter v. Necedah Lumber Co.*, 105 Wis. 25, 81 N. W. 118, 80 N. W. 88.

⁴⁶ It has been held that, while a person who purchases stock in a foreign corporation, issued at less than par, in violation of the statutes of the foreign state, and which is afterwards de-

corporation the stockholder ought to be held chargeable with knowledge of its charter limitations.⁴⁷ The mistake theory might, perhaps, be sound if applied in an action against the transferrer of stocks, but that is not pertinent to this context.⁴⁸

Whether or not one who has entered into a contract with a corporation to take stock at a discount in violation of its charter or of statutory or constitutional provisions can repudiate the contract, and recover what he has paid thereunder, before the stock has been issued, depends upon whether the courts in the particular jurisdiction recognize the doctrine that where an illegal agreement is not *malum in se*, but merely *malum prohibitum*, a *locus poenitentiae* remains, and so long as the illegal object has not been carried out by performance of the agreement, it may be repudiated, and money paid under it recovered back.⁴⁹ This doctrine was recognized in a federal case which went up to the Supreme Court of the United States, and it was held that a person who had subscribed for stock in furtherance of an illegal increase of stock could repudiate the agreement before issue of the stock, and recover money paid under it.⁵⁰ Several of the state courts, however, have refused to recognize such a doctrine, and have held that the courts will leave the parties, being in *pari delicto*, in the position in which they have placed themselves.⁵¹

clared void by the courts of such state, may have the right to rescind for mistake, and recover what he paid for the stock, on the ground that his ignorance of the laws of the other state was ignorance of fact, he must have used reasonable diligence to ascertain the law governing his relations to the corporation, and a delay of eight years before demanding the return of the money paid bars his right to rescind and recover the same. *Hallett v. New England Roller-Grate Co.*, 105 Fed. 217.

⁴⁷ See chapter on Foreign Corporations, *infra*.

It would seem, contrary to the dictum in the case last cited, that the stockholder cannot recover at all in such a case, aside from any question of laches, for a subscriber for stock in a foreign corporation should be deemed, in so far as his relationship with the corporation is concerned, a resident of the domicile of the corpo-

ration. See *McKean v. New York National Building & Loan Ass'n*, 24 Pa. Co. Ct. 458. See, however, the Texas cases, § 3567, *supra*, holding that the Texas statutes apply alike to domestic and foreign corporations doing business in the state, also that the statutes are presumed to be the same as those of Texas.

⁴⁸ As to the rights and remedies between parties to a sale of shares, see this chapter, subd. xxv, *Contracts for Sale of Shares*.

⁴⁹ See Clark on Contracts, 494.

⁵⁰ *Knowlton v. Congress & Empire Spring Co.*, 14 Blatchf. 364, Fed. Cas. No. 7,903, *aff'd sub nom.* *Spring Co. v. Knowlton*, 103 U. S. 49, 26 L. Ed. 347.

⁵¹ *Goff v. Hawkeye Pump & Windmill Co.*, 62 Iowa 691, 18 N. W. 307; *Knowlton v. Congress & Empire Spring Co.*, 57 N. Y. 518. And see *Clarke v. Lincoln Lumber Co.*, 59 Wis. 655, 18 N. W. 492.

There may be fraud and illegality in an issue of stock aside from the mere fact that it is not paid for, so as to prevent any rights arising in favor of the stockholders. Where a stockyards company was organized by the officers of a railroad company and others, and the only means put into the same was by the railroad company, through its officers, who controlled the stockyards company, and the stockyards company issued its full capital stock, and a part thereof was used as a corruption fund for the purpose of corrupting certain public officials in the interest of the company, and the balance was divided between certain members of the company without any payment therefor, it was held that the issue of the stock was in violation of law, and in fraud of the rights of the stockholders of the railroad company, and vested in the recipients of the same no rights which a court of equity would enforce or protect.⁵²

§ 3585. — Effect as against dissenting stockholders. In the absence of an express provision or agreement to the contrary, persons who have become stockholders in a corporation by subscribing for or purchasing shares, and paying or agreeing to pay for them, have a right to assume that other stockholders have come in on the same terms, and contributed or agreed to contribute a like amount of capital in proportion to their shares, and they also have a right to expect that subsequent subscribers or purchasers will come in on the same terms. Any secret agreement, therefore, between the officers of the corporation and subscribers or purchasers of shares, although authorized or ratified by a majority of the stockholders, by which such subscribers or purchasers have been permitted to acquire their shares without payment, or on part payment only, or by which they are given the right to withdraw and receive back what they have paid, is a fraud upon subsequent bona fide subscribers or purchasers, and void as to them. And if the corporation refuses to enforce full payment, or repays what has been paid in, they may maintain a suit in equity on behalf of themselves and other stockholders to compel payment in full or repayment of what has been withdrawn,⁵³ or a stockholders'

⁵² *Tobey v. Robinson*, 99 Ill. 222. In this case the holder of certificates issued by the stockyards company surrendered the same to an officer of the company under an agreement that new certificates should be issued in lieu of those surrendered, a portion of the new certificates to be used for the purpose of corrupting certain public officers in

the interest of the company, and the rest to be returned to the holder. It was held that, as the agreement was illegal and void, the return of the balance of the certificates or payment of damages could not be enforced either at law or in equity.

⁵³ *Melvin v. Lamar Ins. Co.*, 80 Ill. 446, 22 Am. Rep. 199; *White Moun-*

suit in right of the corporation, provided a cause of action by it exists and it will not or cannot sue.⁵⁴

If a corporation is about to issue stock without receiving payment in full, in violation of the common-law rights of stockholders, or in violation of a charter, statutory or constitutional provision, a dissenting stockholder may maintain a suit in equity on behalf of himself and other stockholders to enjoin it from doing so.⁵⁵ Or, if the stock has already been issued, he may maintain a suit to annul and cancel the same,⁵⁶ provided he is not barred by laches or acquiescence,⁵⁷ or the rights of bona fide purchasers for value.⁵⁸

tains R. Co. v. Eastman, 34 N. H. 124; *Blodgett v. Morrill*, 20 Vt. 509. And see Chap. 17, § 650, *supra*.

Dissentient subsidiary holder held to have made out a prima facie case of unfair valuation in a consolidation scheme. *Hyams v. Calumet & H. Min. Co.*, 221 Fed. 529.

⁵⁴ Dissenting stockholder may sue in corporate right to recover for issue of stock for other less valuable stock followed by gift of stock to directors, both corporations having same directors. *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721, modifying 150 N. Y. App. Div. 715, 135 N. Y. Supp. 789.

Unless an issue paid for by cancelling corporate indebtedness was harmful or fraudulent on the corporation the stockholder cannot maintain a derivative action. *Waters v. Horace Waters & Co.*, 201 N. Y. 184, 94 N. E. 602, *aff'g* 130 N. Y. App. Div. 678, 115 N. Y. Supp. 432.

As to such suits by minority, see generally *infra* this chapter, subd. xxxii, Remedies of Stockholders, etc.

⁵⁵ *Fitzpatrick v. Dispatch Pub. Co.*, 83 Ala. 604, 2 So. 727. And see *Langgan v. Francklyn*, 29 Abb. N. Cas. 102, 20 N. Y. Supp. 404.

An issue of stock for property possessing inadequate value may be restrained at the instance of dissenting stockholders, although the issue may in fact have been voted for by the board of directors and the necessary majority

of the stockholders. *Donald v. American Smelting & Refining Co.*, 62 N. J. Eq. 729, 48 Atl. 771, 1116.

Authorized by the stockholders, the directors passed a resolution to issue full paid preferred stock on which \$20 only had been paid in exchange for unpaid shares of preferred stock which were outstanding and place the remaining shares in the corporate treasury. The court held that the proper remedy of an objecting stockholder was by suit to restrain consummation of the proposed scheme. *American Alkali Co. v. Campbell*, 113 Fed. 398.

⁵⁶ *Perry v. Tuskaloosa Cotton-Seed Oil-Mill Co.*, 93 Ala. 364, 9 So. 217; *Parsons v. Joseph*, 92 Ala. 403, 8 So. 788; *Gilman, C. & S. R. Co. v. Kelly*, 77 Ill. 426; *Campbell v. Morgan*, 4 Bradf. (Ill.) 100; *Kimball v. New England Roller-Grate Co.*, 69 N. H. 485, 45 Atl. 253; *Fisk v. Chicago, R. I. & P. R. Co.*, 53 Barb. (N. Y.) 513.

As against dissenting stockholders a sale of treasury stock at less than par to enable certain other stockholders to obtain control of the corporation may be set aside. *Essex v. Essex*, 141 Mich. 200, 104 N. W. 622.

⁵⁷ *Keeney v. Converse*, 99 Mich. 316, 58 N. W. 325; *Foster v. Belcher's Sugar Refining Co.*, 118 Mo. 238, 24 S. W. 68. And see *Taylor v. South & North Alabama R. Co.*, 13 Fed. 152.

⁵⁸ See *infra* this chapter, subd. xix, Rights of Bona Fide Transferees.

The issue of watered stock by a corporation is no ground for proceedings by a dissenting stockholder to have the corporation wound up and dissolved, unless it is made so by statute.⁵⁹

§ 3586. — Effect as against consenting or acquiescing stockholders. When a corporation has issued its stock as full paid, without receiving its par value in money or property, the transaction cannot be assailed by stockholders who participated, consented or acquiesced. They are estopped.⁶⁰ And a stockholder who does not object within a reasonable time, when he has knowledge of the transaction, will be deemed to have acquiesced,⁶¹ but the assent must not have been induced by fraud⁶² or have been on an unfulfilled condition.⁶³

⁵⁹ *Morrison v. Globe Panorama Co.*, 28 Fed. 817; *In re Gold Co.*, 11 Ch. Div. 701; *In re Pioneers of Mashonaland Syndicate*, 68 L. T. 163.

See generally chapter on Forfeiture, Dissolution, etc., *infra*.

⁶⁰ **United States.** *In re Charles Town Light & Power Co.*, 199 Fed. 846; *Cunningham v. Holley, Mason, Marks & Co.*, 121 Fed. 720; *Washburn v. National Wall-Paper Co.*, 81 Fed. 17; *Wood v. Corry Water-Works Co.*, 44 Fed. 146, 12 L. R. A. 168.

Alabama. *Nicrosi v. Calera Land Co.*, 115 Ala. 429, 22 So. 147.

California. *Richardson v. Chicago Packing & Provision Co.*, 131 Cal. xviii, 63 Pac. 74; *Green v. Abietine Medical Co.*, 96 Cal. 322, 31 Pac. 100.

District of Columbia. *Ambler v. Archer*, 1 App. Cas. 94.

Illinois. *Winston v. Dorsett Pipe & Paving Co.*, 129 Ill. 64, 4 L. R. A. 507, 21 N. E. 514, *aff'g* 27 Ill. App. 546.

Indiana. *Bent v. Underdown*, 156 Ind. 516, 60 N. E. 307.

Iowa. *Esgen v. Smith*, 113 Iowa 25, 84 N. W. 954; *Clark v. American Coal Co.*, 86 Iowa 436, 17 L. R. A. 557, 53 N. W. 291; *Callanan v. Windsor*, 78 Iowa 193, 42 N. W. 652.

Louisiana. *Wisner v. Delhi Land & Improvement Co.*, 46 La. Ann. 1223, 15 So. 690.

Michigan. *Ten Eyck v. Pontiac, O.*

& P. A. R. Co., 114 Mich. 494, 72 N. W. 362.

Missouri. *Schroeder v. Edwards*, 267 Mo. 459, 184 S. W. 108; *Woolfolk v. January*, 131 Mo. 620, 33 S. W. 432; *Schilling & Schneider Brewing Co. v. Schneider*, 110 Mo. 83, 19 S. W. 67.

New Jersey. *Knoop v. Bohmrich*, 49 N. J. Eq. 82, 23 Atl. 118.

New York. *Lorillard v. Clyde*, 86 N. Y. 384; *Drake v. New York Suburban Water Co.*, 26 App. Div. 499, 50 N. Y. Supp. 826.

Texas. *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

As to notice of fraud in turning in property at an overvaluation, see *Flour City Nat. Bank v. Shire*, 88 N. Y. App. Div. 401, 84 N. Y. Supp. 810.

⁶¹ *Taylor v. South & North Alabama R. Co.*, 13 Fed. 152; *Keeney v. Converse*, 99 Mich. 316, 58 N. W. 325.

Other stockholders are estopped after a long delay and the earning of large dividends to say that theater booking privileges and connections were overvalued. *Eggleston v. Pantages*, 93 Wash. 221, 160 Pac. 425.

Evidence held to rebut knowledge or notice as basis for laches. *Tooker v. National Sugar Refining Co. of New Jersey*, 80 N. J. Eq. 305, 84 Atl. 10.

⁶² *McMahon v. Pneumatic Transit Co.*, 85 N. J. Eq. 544, 96 Atl. 999.

⁶³ Not estopped by assenting to is-

This principle not only applies when the participating, consenting or acquiescing stockholder attacks the transaction as a stockholder, as where he seeks, by reason of his relation as stockholder, to set the transaction aside and cancel the stock,⁶⁴ or to compel payment of its full par value, or the difference between its par value and what has been paid,⁶⁵ or claims that the holder of such stock has no right to vote thereon at a meeting of the stockholders of the corporation,⁶⁶ but it also applies where he seeks relief as a creditor of the corporation, and as such claims the right to compel the holders of such stock to pay the difference between the amount paid by them and the par value of the stock.⁶⁷ But if they can sue without resting on it as a part of the cause of action and will contribute ratably, their participation is no defense.⁶⁸

If a person subscribes for stock with the understanding that he is to be released from liability on his subscription, and all the stockholders assent to the agreement, payment of the subscription will be required, notwithstanding the agreement, if it is necessary in order to satisfy the claims of creditors of the corporation;⁶⁹ but if its enforcement is not necessary for the payment of creditors, the agreement is binding as against the corporation and the other stockholders.⁷⁰ And it follows that, in winding up a corporation, and providing for the

sue for property which the incorporator did not own and which later the company had to pay for. *Ellis v. Penn Beef Co.*, 9 Del. Ch. 213, 80 Atl. 666.

⁶⁴ *Clark v. American Coal Co.*, 86 Iowa 436, 17 L. R. A. 557, 53 N. W. 291.

⁶⁵ *Green v. Abietine Medical Co.*, 96 Cal. 322, 31 Pac. 100; *Winston v. Dorsett Pipe & Paving Co.*, 129 Ill. 64, 4 L. R. A. 507, 21 N. E. 514, aff'g 27 Ill. App. 546; *Esgen v. Smith*, 113 Iowa 25, 84 N. W. 954.

⁶⁶ *Wisner v. Delhi Land & Improvement Co.*, 46 La. Ann. 1223, 15 So. 690.

⁶⁷ *Alabama*. *Nicrosi v. Calera Land Co.*, 115 Ala. 429, 22 So. 147.

District of Columbia. *Ambler v. Archer*, 1 App. Cas. 94.

Iowa. *Callanan v. Windsor*, 78 Iowa 193, 42 N. W. 652.

Michigan. *Ten Eyck v. Pontiac, O. & P. A. R. Co.*, 114 Mich. 494, 72 N. W. 362.

Missouri. *Woolfolk v. January*, 131 Mo. 620, 33 S. W. 432.

New Jersey. *Knoop v. Bohmrich*, 49 N. J. Eq. 82, 23 Atl. 118.

Texas. *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

⁶⁸ Creditors, who were also stockholders, may be satisfied out of underpaid stockholders notwithstanding they too were parties to the agreement by which stock was issued underpaid; where no reliance is placed thereon as part of the cause of action; where they did not defraud or mislead the others; and where they are called on to contribute ratably as stockholders. *Easton Nat. Bank v. American Brick & Tile Co.*, 70 N. J. Eq. 732, 8 L. R. A. (N. S.) 271, 10 Ann. Cas. 84, 64 Atl. 917.

⁶⁹ See § 3589 et seq., *infra*.

⁷⁰ *Winston v. Dorsett Pipe & Paving Co.*, 129 Ill. 64, 4 L. R. A. 507, 21 N. E. 514, aff'g 27 Ill. App. 546.

payment of creditors, all the other stockholders will be required to pay in what may remain due on their subscriptions before payment will be required of one who subscribes with the understanding, consented to by all the stockholders, that he should be released from liability on his subscription.⁷¹

The principle that participating or consenting stockholders are estopped to complain of an issue of watered or fictitiously paid up stock applies even when the stock is issued in violation of an express charter, statutory or constitutional provision,⁷² subject to the exception that no validity can be given to void issues by ratification.⁷³

In England, where it is provided by statute that "every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing," it has been held that an issue of shares at a discount, without such a contract in writing, is not only *ultra vires*, but illegal, because contrary to the prohibition of the statute, that the agreement not to require payment in full is void, and that persons who take shares at a discount are not only liable to be called upon to contribute, if necessary, for the benefit of creditors, to the extent of the difference between the amount paid and the par value of the shares, but are also liable for the purpose of adjusting the rights of the stockholders *inter se*.⁷⁴

§ 3587. — Effect as against subsequent transferees. A transferee of stock in a corporation occupies the same position as his transferor with respect to the right to complain of an issue of watered or fictitiously paid up stock, and is therefore estopped to complain if his transferor was estopped. This is true, whether he is a transferee of shares of the watered stock, or a transferee of shares of other stock, which was held by a participating or consenting stockholder; and it is true notwithstanding the fact that he purchased the stock in good faith and in ignorance of the fraudulent or unlawful issue.⁷⁵ Neither

⁷¹ *Winston v. Dorsett Pipe & Paving Co.*, 129 Ill. 64, 4 L. R. A. 507, 21 N. E. 514, *aff'd* 27 Ill. App. 546.

⁷² *Wood v. Corry Water-Works Co.*, 44 Fed. 146, 12 L. R. A. 168, and other cases cited *supra* this section, note 60.

⁷³ A void issue (overvalued consciously) cannot be ratified. *Tooker v. National Sugar Refining Co.* of New

Jersey, 80 N. J. Eq. 305, 84 Atl. 10.

⁷⁴ *In re Railway Time Tables Pub. Co.*, [1895] 1 Ch. 255, *aff'd* *Welton v. Saffery*, [1897] App. Cas. 299.

⁷⁵ **United States.** *Church v. Citizens' St. R. Co.*, 78 Fed. 526; *Brown v. Duluth, M. & N. Ry. Co.*, 53 Fed. 839; *Wood v. Corry Water-Works Co.*, 44 Fed. 146, 12 L. R. A. 168; *Venner v.*

can such as have received full value for what they paid complain.⁷⁶

As we shall hereafter see, however, a purchaser of watered or fictitiously paid up stock, without notice, may maintain an action to recover damages sustained by him, either against the transferrer, if the latter knew the character of the stock, or against the promoters, or the directors or other officers who issued the same, or against the corporation itself if it can be regarded as a party to the fraud.⁷⁷

That a corporation is prohibited from issuing stock until fully paid and that nothing has been paid for his stock by a stockholder does not permit the corporation to deny the validity of the title of an innocent transferee from one holding such stock where the transferee has paid full value in reliance upon a recital in the certificate that the person to whom same is issued is the owner of the stock referred to therein and that same is full paid and nonassessable.⁷⁸ And if the seller of watered stock was a party to the fraudulent or illegal issue, or if he had knowledge of the fraud or illegality, the purchaser may rescind

Atchison, T. & S. F. R. Co., 28 Fed. 581; **Flagler Engraving Mach. Co. v. Flagler**, 19 Fed. 468.

Colorado. **Gumaer v. Cripple Creek Tunnel, Transportation & Mining Co.**, 40 Colo. 1, 122 Am. St. Rep. 1024, 13 Ann. Cas. 781, 90 Pac. 81.

Illinois. **Higgins v. Lansingh**, 154 Ill. 301, 40 N. E. 362.

Iowa. **Clark v. American Coal Co.**, 86 Iowa 436, 17 L. R. A. 557, 53 N. W. 291; **Callanan v. Windsor**, 78 Iowa 193, 42 N. W. 652.

Kansas. **Walburn v. Chenault**, 43 Kan. 352, 23 Pac. 657.

New York. **Barr v. New York, L. E. & W. R. Co.**, 125 N. Y. 263, 26 N. E. 145; **In re Syracuse, C. & N. Y. R. Co.**, 91 N. Y. 1; **Drake v. New York Suburban Water Co.**, 26 App. Div. 499, 50 N. Y. Supp. 826; **Miller v. University Magazine Co.**, 10 Misc. 311, 30 N. Y. Supp. 969; **Nott v. Clews**, 14 Abb. N. Cas. 437; **Parsons v. Hayes**, 14 Abb. N. Cas. 419.

England. **Pfooks v. South Western Ry. Co.**, 1 Smale & G. 142.

Contra, Parsons v. Joseph, 92 Ala. 403, 8 So. 788.

Estopped to deny as against bona fide purchaser. **New York & E. Telegraph & Telephone Co. v. Great Eastern Tel. Co.**, 74 N. J. Eq. 221, 69 Atl. 528, aff'd 75 N. J. Eq. 298, 78 Atl. 1135 (mem. dec.).

A bona fide holder for security will be protected against cancellation. **Cuba Colony Co. v. Kirby**, 149 Mich. 453, 112 N. W. 1133, 14 Det. L. N. 494.

Stock issued in consideration for an illegal suppression of bidding will not be cancelled in the hands of third persons. **Southern Mut. Aid Ass'n v. Blount**, 112 Va. 214, 70 S. E. 487.

⁷⁶ Subsequent stockholders who got stock of full value for what they paid cannot complain of an overvaluation. **Eggleston v. Pantages**, 93 Wash. 221, 160 Pac. 425.

⁷⁷ See subd. XIX, *infra*, this chapter.

⁷⁸ **Westminster Nat. Bank v. New England Electrical Works**, 73 N. H. 465, 3 L. R. A. (N. S.) 551, 111 Am. St. Rep. 637, 62 Atl. 971.

and set up the fraud to defeat an action for the price; or if the price, or any part thereof, has been paid, he may rescind and recover the same.⁷⁹ The stock must be within the issuable limit, and if over, is not stock at all;⁸⁰ and if a subscription for stock is illegal and void because of an agreement to issue the stock in violation of a constitutional or statutory provision, no relief can be granted upon an executory contract to pay for a transfer of the subscriber's rights under the subscription.⁸¹ The liability of transferees of watered or fictitiously paid up stock to creditors of the corporation is considered in a subsequent section.⁸²

§ 3588. Issuance to directors, officers or favored persons. The rule that the directors and managing officers of a corporation are to be held to strict good faith in all dealings between themselves and the corporation applies as well when they issue stock to themselves as in other cases. If they act in bad faith, and obtain a profit or advantage not enjoyed by other stockholders, they may be called to account, or the transaction may be set aside.⁸³ When they deal in good faith and fairly they, on the other hand, may hold stock that has come to them or been issued to them at a price below par⁸⁴ or for property trans-

⁷⁹ See subd. XIX, *infra*, this chapter.

⁸⁰ See §§ 3467-3469, *supra*, and § 3598, *infra*.

⁸¹ *Williams v. Evans*, 87 Ala. 725, 6 L. R. A. 218, 6 So. 702.

⁸² See subd. XXXIII, *infra*.

⁸³ See *Arkansas Valley Agr. Society v. Eichholtz*, 45 Kan. 164, 25 Pac. 613; *Hilles v. Parrish*, 14 N. J. Eq. 380; *Morris v. Stevens*, 178 Pa. St. 563, 36 Atl. 151; *Reese v. Bank of Montgomery Co.*, 31 Pa. St. 78, 72 Am. Dec. 726.

As to duty of good faith by officers, see generally Chaps. 42 and 43, *supra*.

Stock issued to promoters on overvaluation held fraudulent. *Cuba Colony Co. v. Kirby*, 149 Mich. 453, 112 N. W. 1133, 14 Det. L. N. 494.

Exchange of stocks for those of another corporation having same officers and then donating them to themselves with the second corporation as donor. *Pollitz v. Wabash R. Co.*, 207 N. Y. 113, 100 N. E. 721, modifying 150 N.

Y. App. Div. 715, 135 N. Y. Supp. 789.

Directors who take stock gratuitously are charged with a trust therein for creditors. *Lamphere v. Lang*, 157 N. Y. App. Div. 306, 141 N. Y. Supp. 967.

A sale at par near in time affords evidence of the value of stock issued by directors to themselves. *Lamphere v. Lang*, 157 N. Y. App. Div. 306, 141 N. Y. Supp. 967.

Issuing treasury stock to one who would unite in forming a majority control is fraudulent, though the price otherwise would have been fair, if the hostile faction given an opportunity would have paid more. *Elliott v. Baker*, 194 Mass. 518, 80 N. E. 450.

Unissued stock cannot be issued by directors to themselves for the purpose of ousting a stockholder of control. *Trask v. Chase*, 107 Me. 137, 77 Atl. 698.

⁸⁴ In an Ohio case, in which stockholders of a corporation who had paid

ferred to the corporation;⁸⁵ and where the directors are the sole beneficiaries of the association and the rights of creditors are not involved, a resolution of the directors providing for the issue of the stock on certain terms may not be attacked on the ground of the personal interest of the directors voting therefor.⁸⁶

Stock may not be issued to the directors without consideration.⁸⁷ Under a constitutional provision that stock shall not be issued except for money paid, labor done or property actually received, an issue of unsubscribed stock by the directors, who constitute all the stockholders, to themselves and certain others, in exchange for franchises and stock of other corporations, is not invalid as without consideration.⁸⁸ Where directors have transferred property to the corporation

par for their stock sought to hold the directors and managing officers and others liable upon stock taken by them at less than par for the difference between what they paid and the par value, it appeared that the corporation at the time, and before the stock was taken, was deeply in debt, and pressed for money to continue its business; that a large part of its capital stock remained unsubscribed, a great part of which was created by an unauthorized increase of the same, for which the directors and managing officers were chiefly responsible, though acting in good faith, and in the belief that their action was regular; that the directors and managing officers, believing that the only practical means of obtaining money to relieve the necessities of the corporation was by disposing of this stock, and after having made diligent but unsuccessful efforts to dispose of it at par, offered it at a large discount to all of its stockholders, and generally to others, without takers, and then they themselves, and some others, without intending to secure any personal advantage, but with a view to aid the corporation, took parts of the stock at the discount price, either paying cash therefor, or cancelling debts due to them from the corporation, but did not then or

afterwards derive any profit on account of the stock. Under these circumstances it was held that bad faith was not imputable to them with respect either to such increase of the stock or their acquisition of it; that, on the corporation becoming insolvent, the difference between the discount price and the par value of the stock thus purchased should not be regarded as assets of the corporation, as between those who bought at a discount and those who did not; and that the holders of previously issued stock, for which they had paid par, should not be allowed to assert the invalidity of the issue of the discounted stock without consenting that its purchasers be placed in statu quo. *Peter v. Union Mfg. Co.*, 56 Ohio St. 181, 46 N. E. 894.

⁸⁵ *Garretson v. Pacific Crude Oil Co.*, 146 Cal. 184, 79 Pac. 838.

⁸⁶ *Turner v. Fidelity Loan Concern*, 2 Cal. App. 122, 83 Pac. 62, 70.

⁸⁷ *Smith v. Smith, Sturgeon & Co.*, 125 Mich. 234, 84 N. W. 144.

⁸⁸ *Smith v. Martin*, 135 Cal. 247, 67 Pac. 779.

Certain promoters owned all the stock of a corporation organized to consolidate certain business interests. They purchased all of the stock authorized to be issued by the amendment to the corporate articles. They

in exchange for stock, that the property possessed inadequate value does not permit action for return of the stock without offer to return the property.⁸⁹

§ 3589. Rights of creditors as to water or overvaluation.—In general. It was formerly held in England that, where stock was issued by a corporation as full paid upon payment of less than par value, and the corporation afterwards became insolvent, and was wound up, the court could not compel the holders of the stock to pay up, for the benefit of creditors of the corporation, the difference between the par value of the stock and the amount actually paid in.⁹⁰ These decisions proceeded upon the ground that, if the transaction was invalid, because *ultra vires* or in fraud of subsequent creditors, it was invalid in toto; that the court could set it aside altogether, requiring the stock to be returned to the corporation, and what was paid therefor, if anything, returned to the stockholders; but that it could not alter the agreement between the corporation and the stockholders, and substitute or create an agreement to pay the full par value of the shares. In other words, it was held that “the transaction might be undone but could not be modelled.”⁹¹ In the later cases, however, the courts have repudiated this doctrine, and it has been held by the House of Lords, as well as by the lower courts, that where a corporation illegally issues its stock for less than par, the stockholders, upon the insolvency and winding up of the company, may be compelled to pay the full par value, if necessary for the payment of creditors.⁹²

had previously purchased all of the property intended to be conveyed to the new company and transferred this in payment for said additional stock. Held the transaction was not invalid. *Tompkins v. Sperry, Jones & Co.*, 96 Md. 560, 54 Atl. 254.

⁸⁹ *Insurance Press v. Montauk Fire Detecting Wire Co.*, 103 N. Y. App. Div. 472, 93 N. Y. Supp. 134; *Peter v. Union Mfg. Co.*, 56 Ohio St. 181, 46 N. E. 894.

⁹⁰ *In re Ince Hall Rolling Mills Co.*, 23 Ch. Div. 545, note; *In re Dronfield Silkstone Coal Co.*, 17 Ch. Div. 76; *In re Ambrose Lake Tin & Copper Min. Co.*, 14 Ch. Div. 390; *In re Wedgwood Coal & Iron Co.*, 7 Ch. Div. 94; *In re British Provident Life*

& Guarantee Ass'n, 5 Ch. Div. 306; *In re Great Northern & M. Coal Co.*, 3 De Gex, J. & S. 367.

⁹¹ *In re Great Northern & M. Coal Co.*, 3 De Gex, J. & S. 367, where shares were issued for property and services.

⁹² *Ooregum Gold Min. Co. v. Roper*, [1892] App. Cas. 125, 66 L. T. 427; *In re Railway Time Tables Pub. Co.*, [1895] 1 Ch. 255, aff'd *Welton v. Saffery*, [1897] App. Cas. 299; *In re New Eberhardt Co.*, 43 Ch. Div. 118; *In re London Celluloid Co.*, 39 Ch. Div. 190, 59 L. T. 109; *In re Almada Tirito Co.*, 38 Ch. Div. 415; *In re Addlestone Linoleum Co.*, 37 Ch. Div. 191, 58 L. T. 428.

In this country it is well settled that a court of equity, and in some jurisdictions, under the statutes, a court of law, may compel full payment for stock, contrary to the actual agreement between the stockholders and the corporation, when such payment is necessary to prevent a fraud upon the creditors of the corporation. Since the capital stock of a corporation constitutes the basis of its credit, persons dealing with a corporation have a right to assume, unless there is something to show the contrary, that the full amount of its issued capital stock has been actually paid in or secured to be paid in, either in money or its equivalent, so that it may be reached, if necessary, for the satisfaction of corporate debts. As a general rule, therefore, any agreement between a corporation and its stockholders, under which its capital stock is issued and falsely held out to the public as full paid, when it is not paid for at all, or is paid for in part only, either in money or in property, labor or services, while it may be binding as between the corporation and the persons to whom the stock is issued, or their transferees,⁹³ and as against other stockholders who participate, consent or acquiesce,⁹⁴ and as against creditors who have not dealt with the corporation on the faith of such stock being full paid,⁹⁵ is invalid as against creditors who have dealt with the corporation on the faith of the stock being full paid; and the agreement will be set aside or disregarded in equity, or, by statute in some jurisdictions, even at law, and full payment for the stock enforced, at the instance of creditors, or of a receiver or other person representing them, if such payment is necessary for the satisfaction of their claims. This doctrine has been applied, not only when there have been express charter, statutory or constitutional provisions requiring stock to be full paid, but also, on the ground of fraud, in the absence of express provisions to this effect.⁹⁶

⁹³ See §§ 3583, 3584, 3587, *supra*.

⁹⁴ § 3586, *supra*.

⁹⁵ See § 3595, *infra*.

⁹⁶ **United States.** *Lloyd v. Preston*, 146 U. S. 630, 36 L. Ed. 1111; *Camden v. Stuart*, 144 U. S. 104, 36 L. Ed. 363; *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227; *Fogg v. Blair*, 139 U. S. 118, 35 L. Ed. 104; *Richardson v. Green*, 133 U. S. 30, 33 L. Ed. 516; *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Hawley v. Upton*, 102 U. S. 314, 26 L. Ed. 179; *Webster v. Upton*, 91 U. S. 65, 23 L. Ed. 384; *Upton v. Tribilcock*, 91 U. S. 45, 23 L. Ed. 203; *Sawyer v. Hoag*, 17 Wall.

610, 21 L. Ed. 731; *Ogilvie v. Knox Ins. Co.*, 22 How. 380, 16 L. Ed. 349; *Addison v. Pacific Coast Milling Co.*, 79 Fed. 459; *Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co.*, 75 Fed. 554; *Grant v. East & W. R. Co.*, 54 Fed. 569; *In re Glen Iron Works*, 17 Fed. 324; *Marsh v. Burroughs*, 1 Woods 463, Fed. Cas. No. 9,112.

Alabama. *Roman v. Dimmick*, 115 Ala. 233, 22 So. 109; *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*, 92 Ala. 407, 12 L. R. A. 307, 25 Am. St. Rep. 65, 9 So. 129.

California. *Walter v. Merced Acad-*

And in a late Minnesota case it was said: "A certificate for paid up shares in a corporation is simply a written statement in the name of the corporation that the holder thereof is a stockholder, and that the full par value of his shares has been paid to the corporation. If

emy Ass'n, 126 Cal. 582, 59 Pac. 136.

Connecticut. New Haven Trust Co. v. Gaffney, 73 Conn. 480, 47 Atl. 760.

Illinois. Sprague v. National Bank of America, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, aff'g 66 Ill. App. 320; World's Fair Excursion & Transportation Boat Co. v. Gasch, 162 Ill. 402, 44 N. E. 724; Coleman v. Howe, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725, aff'g 53 Ill. App. 82; Bates v. Great Western Tel. Co., 134 Ill. 536, 25 N. E. 521, aff'g 35 Ill. App. 254; Alling v. Wenzel, 133 Ill. 264, 24 N. E. 551, aff'g 27 Ill. App. 511; Great Western Tel. Co. v. Gray, 122 Ill. 630, 14 N. E. 214, rev'g 23 Ill. App. 72; Hieckling v. Wilson, 104 Ill. 54; Union Mut. Life Ins. Co. v. Frear Stone Mfg. Co., 97 Ill. 537, 37 Am. Rep. 129; National Bank of America v. Pacific R. Co., 66 Ill. App. 320, aff'd 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, 172 Ill. 270, 50 N. E. 1123.

Indiana. See Bent v. Underdown, 156 Ind. 516, 60 N. E. 307; Clow v. Brown, 150 Ind. 185, 49 N. E. 1057, 48 N. E. 1034. But as to payment in property, see *infra*, this section.

Iowa. Stout v. Hubbell, 104 Iowa 499, 73 N. W. 1060; Wishard v. Hansen, 99 Iowa 307, 61 Am. St. Rep. 238, 68 N. W. 691; Tuthill Spring Co. v. Smith, 90 Iowa 331, 57 N. W. 853; Boulton Carbon Co. v. Mills, 78 Iowa 460, 5 L. R. A. 649, 43 N. W. 290; Jackson v. Traer, 64 Iowa 469, 52 Am. Rep. 449, 20 N. W. 764; Osgood v. King, 42 Iowa 478.

Kentucky. Haldeman v. Ainslie, 82 Ky. 395.

Louisiana. Belknap v. Adams, 49 La. Ann. 1350, 22 So. 382.

Maine. Barron v. Burrill, 86 Me.

66, 29 Atl. 939; Libby v. Tobey, 82 Me. 397, 19 Atl. 904.

Maryland. Crawford v. Rohrer, 59 Md. 599; Brant v. Ehlen, 59 Md. 1.

Michigan. Peninsular Sav. Bank of Detroit v. Black Flag Stove Polish Co., 105 Mich. 535, 63 N. W. 514.

Minnesota. Wallace v. Carpenter Elec. Heating Mfg. Co., 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189; Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28, 67 N. W. 652; Hospes v. Northwestern Manufacturing & Car Co., 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117; First Nat. Bank of Deadwood v. Gustin Minerva Consol. Min. Co., 42 Minn. 327, 6 L. R. A. 676, 18 Am. St. Rep. 510, 44 N. W. 198.

Missouri. Van Cleve v. Berkey, 143 Mo. 109, 42 L. R. A. 593, 44 S. W. 743; Guernsey v. Moore, 131 Mo. 650, 32 S. W. 1132; Hill v. Atoka Coal & Mining Co., 124 Mo. 153, 32 S. W. 111, 25 S. W. 926.

Montana. Kelly v. Clark, 21 Mont. 291, 42 L. R. A. 621, 69 Am. St. Rep. 668, 53 Pac. 959.

Nebraska. Gilkie & Anson Co. v. Dawson Town & Gas Co., 46 Neb. 333, 64 N. W. 978, 1097.

New Jersey. See v. Heppenheimer, 55 N. J. Eq. 240, 36 Atl. 966; Hebbard v. Southwestern Land & Cattle Co., 55 N. J. Eq. 18, 36 Atl. 122; Wetherbee v. Baker, 35 N. J. Eq. 501.

New York. See White, Corbin & Co. v. Jones, 167 N. Y. 158, 60 N. E. 422; Montgomery v. Brush Elec. Illuminating Co., 48 App. Div. 12, 62 N. Y. Supp. 606, aff'd 168 N. Y. 657, 61 N. E. 1131 (mem. dec.); Herbert v. Uhl, 66 Hun 626, 20 N. Y. Supp. 743; Sagory v. Dubois, 3 Sandf. Ch. 466.

the shares in fact have not been so paid for, the certificate that they have been is a false representation that the assets of the corporation have been increased to the amount of the par value of the stock so issued. And when a corporation represents that it has a paid up cap-

North Carolina. Clayton v. Ore Knob Co., 109 N. C. 385, 14 S. E. 36.

Ohio. Security Trust Co. v. Ford, 75 Ohio St. 322, 8 L. R. A. (N. S.) 263, 79 N. E. 474; Gates v. Tippecanoe Stone Co., 57 Ohio St. 60, 63 Am. St. Rep. 705, 48 N. E. 285.

Pennsylvania. Freeman v. Stine, 15 Phila. 37.

Tennessee. Kelley v. Fletcher, 94 Tenn. 1, 28 S. W. 1099.

Texas. Nenny v. Waddill, 6 Tex. Civ. App. 244, 25 S. W. 308; Mathis v. Pridham, 1 Tex. Civ. App. 58, 20 S. W. 1015.

Utah. Salt Lake Hardware Co. v. Tintie Milling Co., 13 Utah 423, 45 Pac. 200; Henderson v. Turngren, 9 Utah 432, 35 Pac. 495.

Virginia. Martin v. South Salem Land Co., 94 Va. 28, 26 S. E. 591.

Washington. Dunlap v. Rauch, 24 Wash. 620, 64 Pac. 807; Adamant Mfg. Co. of America v. Wallace, 16 Wash. 614, 48 Pac. 415; Manhattan Trust Co. of New York v. Seattle Coal & Iron Co., 16 Wash. 499, 48 Pac. 333, 737; Barto v. Nix, 15 Wash. 563, 46 Pac. 1033.

Wisconsin. Shaw v. Gilbert, 111 Wis. 165, 86 N. W. 188; National Bank of Merrill v. Illinois & W. Lumber Co., 101 Wis. 247, 77 N. W. 185; Gogebie Inv. Co. v. Iron Chief Min. Co., 78 Wis. 427, 23 Am. St. Rep. 417, 47 N. W. 726.

It has been held that the stockholders are also liable for interest from the time when the subscriptions should have been paid. Shaw v. Gilbert, 111 Wis. 165, 86 N. W. 188.

It is no defense as against the claim of creditors for full payment that the stock was not in fact worth more than was paid for it. Martin v. South

Salem Land Co., 94 Va. 28, 26 S. E. 591; Adamant Mfg. Co. of America v. Wallace, 16 Wash. 614, 48 Pac. 415, and other cases above cited.

The capital stock of a corporation is the fund forming the basis of its business transactions, and it is, generally speaking, upon such fund that credit is extended to it. It is, therefore, the established rule that the transfer by a subscriber to the corporation of property which is clearly inferior in value to the par value of the stock will not release him from liability to creditors in the event of corporate insolvency.

United States. In re Remington Automobile & Motor Co., 139 Fed. 766; McBride v. Farrington, 131 Fed. 797.

Arkansas. Lester v. Bemis Lumber Co., 71 Ark. 379, 74 S. W. 518.

Illinois. Parmelee v. Price, 208 Ill. 544, 70 N. E. 725.

Indiana. Bent v. Underdown, 156 Ind. 516, 60 N. E. 307.

Missouri. Berry v. Rood, 168 Mo. 316, 67 S. W. 644.

New Jersey. Coler v. Tacoma Railroad & Power Co., 64 N. J. Eq. 117, 53 Atl. 680.

Under this doctrine where a party arranged to take over the business of a firm whose assets were less than \$1,000 in value as the assets of a corporation which he had capitalized at \$100,000, and issued stock to dummy directors who did his bidding, the said directors exchanging the entire capital stock for the assets of the firm, and thereafter the directors paid to the firm the actual value of its said assets, leaving the corporation with nothing beyond the good-will taken over from the firm, the stockholders were liable to creditors for

ital of a given amount, it represents to the business world that at the time it issued the stock it received money or property to the full par value of its stock. The issuing of the stock of a corporation as paid up when it is not so in fact is a public and a private wrong—a cheat and a fraud—which enables the corporation to obtain credit and property by false pretenses.”⁹⁷ It is not essential that the stock shall have been formally issued to make the holder liable. Acceptance suffices.⁹⁸

the full par value of stock issued to them. *Hobgood v. Ehlen*, 141 N. C. 344, 53 S. C. 857.

A bank had a nominal capital stock of \$25,000. Its indebtedness amounted to approximately \$14,000. Its assets possessed a value approximately of \$21,000. In this condition of affairs the bank issued certificates of deposit to its stockholders to the amount of one-half of its capital stock and issued new capital stock to the amount of one-half of its former capital stock to take up such former capital stock. The court held that, as against a receiver and creditors of the bank, the certificates of deposit were without consideration. *State v. Bank of Ogalalla*, 65 Neb. 20, 91 N. W. 497, 90 N. W. 961.

Under the code of West Virginia it is competent for a mining corporation to purchase real and personal property for the legitimate purposes of the corporation at such price and upon such conditions as may be agreed upon between the owner of the property and the directors, and such property may be paid for in stock at par value, not in excess of the authorized corporate capital. And in order that one who has turned in property in exchange for stock may be held as on an unpaid subscription on the ground that the value of the property was less than the par value of the stock, it is necessary that the transaction shall have been impeached for fraud practiced upon the corporation. *Merchants' & Mechanics' Sav. Bank v. Belington Coal & Coke Co.*,

51 W. Va. 60, 41 S. E. 390.

A corporation cannot limit the liability of subscribers to its stock to pay the unpaid portions of the subscription price of their shares, as against creditors then existing, by the passage of a resolution limiting the liability. *Williams v. Taylor*, 99 Md. 306, 57 Atl. 641.

As to liability of stockholders of foreign corporations, see subds. xxxiii and xxxiv, *infra*, this chapter, and chapter on Foreign Corporations, *infra*.

⁹⁷ *Wallace v. Carpenter Elec. Heating Mfg. Co.*, 70 Minn. 321, 329, 68 Am. St. Rep. 530, 73 N. W. 189.

⁹⁸ See subds. xxxiii and xxxiv, *infra*, this chapter, and § 3478, *supra*.

Acceptance is equivalent to subscription. *Bernard v. Carr*, 167 N. C. 481, 83 S. E. 816. And see *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972.

Liability to creditors accrues when the stock, certified as paid up, is received by the holder. *Stock Corp. Law*, § 54. *Stevens v. Episcopal Church History Co.*, 140 N. Y. App. Div. 570, 125 N. Y. Supp. 573.

Stocks delivered in exchange for patents at a valuation are “issued.” In re *Monarch Corporation*, 203 Fed. 664, *rev'g order* 196 Fed. 252.

Takers of bonus stock or of bonds to which it pertains are subscribers, whether they accepted or attempted to reject the tendered certificate. *Union City Lumber Co. v. Traverse City, L. & M. R. Co.*, 170 Mich. 205, 136 N. W. 463.

Bondholders,⁹⁹ holders of mortgage security,¹ holders of judgments for torts² or stockholders who themselves have participated in the overvaluation, and to whom the corporation is indebted³ are creditors entitled to this recourse. The laws of the domicile are a part of the liability *ex contractu*.⁴ The federal courts will follow the settled law and decisions of the state courts on the liability resulting from underpaid stock or overvalued consideration for it,⁵ and since that also determines the nature of the liability it will be followed in determining whether it is of a kind to be enforced by a trustee in bankruptcy.⁶

§ 3590. — Fraud doctrine and the trust-fund doctrine. Some of the courts, including the Supreme Court of the United States, in its earlier opinions, have based this doctrine upon the ground that the subscribed capital stock of a corporation is in equity a trust fund for the payment of its debts, and that no agreement between a corporation and its stockholders can affect the right of creditors to so treat it,⁷ and the rule is still adhered to in some of the states, late applications of it to liability on watered or underpaid stock being cited below.⁸ It is now practically settled, however, that this is not the basis of the

⁹⁹ Bondholder held a creditor. *Fox v. Produce Cold Storage Exch.*, 192 Ill. App. 301.

¹ If the creditor holds a mortgage on the corporation's land, it must be resorted to before the stockholder, but it is no defense that the creditor made money by purchasing its lands at execution sale. *Vaughn v. Alabama Nat. Bank*, 143 Ala. 572, 5 L. R. A. 665, 42 So. 64.

² Tort judgments as well as contract judgments are among the debts protected by the statute. (Rev. St. 1909, §§ 3004, 3006.) *Rogers v. Stag Min. Co.*, 185 Mo. App. 659, 171 S. W. 676.

³ See § 3586, *supra*.

⁴ The laws of the domicile state are a part of the contractual liability of subscribers. *Rogers v. Stag Min. Co.*, 185 Mo. App. 659, 171 S. W. 676.

The law of the corporate domicile governs liability of stockholders. *Horton v. Sherrill-Russell Lumber Co.*, 147 Ky. 226, 143 S. W. 1053.

⁵ *Babbitt v. Read*, 215 Fed. 395; *In re Charles Town Light & Power Co.*, 199 Fed. 846.

⁶ Liability of incorporating partners under Ohio law is that of an original subscriber credited for the actual value of his share of interest turned in. *Kiskadden v. Steinle*, 203 Fed. 375.

⁷ In *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968, it was said: "The reason is, that the stock subscribed is considered in equity as a trust fund for the payment of creditors. * * * It is so held out to the public, who have no means of knowing the private contracts made between the corporation and its stockholders. The creditor has, therefore, the right to presume that the stock subscribed has been or will be paid up, and if it is not, a court of equity will at his instance require it to be paid."

⁸ *Maryland Rail Co. v. Taylor*, 231 Fed. 119; *Bernard v. Carr*, 167 N. C. 481, 83 S. E. 816; *Whitlock v. Alex-*

doctrine, for neither the unpaid subscriptions of a corporation nor its other assets are in any proper sense a trust fund for creditors.⁹ The true and only ground of the doctrine is fraud.¹⁰ Any arrangement between the stockholders of a corporation and the corporation, by which the former are to pay nothing at all, or less than par, either in money or property, for shares of stock which are issued and represented to the public as being full paid, is clearly a fraud upon persons who deal with the corporation on the faith of such representation, and it requires the application of no new principle to enable a court of equity to prevent creditors from being defrauded by compelling the stockholders to make their representation good. Creditors not defrauded cannot complain.¹¹

This doctrine was explained in a Minnesota case which is a leading authority. Judge Mitchell said: "It is difficult, if not impossible, to explain or reconcile these cases upon the 'trust-fund' doctrine, or, in the light of them, to predicate the liability of the stockholder upon that doctrine. But by putting it upon the ground of fraud, and applying the old and familiar rules of law on that subject to the peculiar

ander, 160 N. C. 465, 76 S. E. 538; Witt v. Nelson, — Tex. Civ. App. —, 169 S. W. 381.

The trust fund doctrine is adhered to, and if the property was not adequate the holders must respond. Lantz v. Moeller, 76 Wash. 429, 50 L. R. A. (N. S.) 68, 136 Pac. 687.

The trust fund doctrine did not affect with fraud or invalidity a valid contract to subscribe for stock below par. The trust is in the corporate funds and assets and not in the excess of nominal value over subscription price of the shares. Southworth v. Morgan, 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490, rev'g 143 N. Y. App. Div. 648, 128 N. Y. Supp. 196, 71 N. Y. Misc. 214, 128 N. Y. Supp. 598.

⁹ See the chapter on Insolvency, *infra*.

¹⁰ Hollins v. Brierfield Coal & Iron Co., 150 U. S. 371, 37 L. Ed. 1113; Handley v. Stutz, 139 U. S. 417, 35 L. Ed. 227; Lea v. Iron Belt Mercantile Co., 147 Ala. 421, 8 L. R. A. (N. S.) 279, 119 Am. St. Rep. 93, 42

So. 415; Vaughn v. Alabama Nat. Bank, 143 Ala. 572, 5 Ann. Cas. 665, 42 So. 64; O'Bear Jewelry Co. v. S. Volfer & Co., 106 Ala. 205, 28 L. R. A. 707, 54 Am. St. Rep. 31, 17 So. 525; Coleman v. Howe, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725; Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28, 67 N. W. 652; Hospes v. Northwestern Manufacturing & Car Co., 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117; First Nat. Bank of Deadwood v. Gustin Minerva Consol. Min. Co., 42 Minn. 327, 6 L. R. A. 676, 18 Am. St. Rep. 510, 44 N. W. 198.

Any grossly excessive valuation is a fraud on creditors. Bellview Cemetery Co. v. Faulks, — Ala. —, 73 So. 927; Vaughn v. Alabama Nat. Bank, 143 Ala. 572, 5 Ann. Cas. 665, 42 So. 64; Elyton Land Co. v. Birmingham Warehouse & Elevator Co., 92 Ala. 407, 12 L. R. A. 307, 25 Am. St. Rep. 65, 9 So. 129.

¹¹ See the cases above cited. And see § 3595, *infra*.

nature of a corporation and the relation which its stockholders bear to it and to the public, we have at once rational and logical ground on which to stand. The capital of a corporation is the basis of its credit. It is a substitute for the individual liability of those who own its stock. People deal with it and give it credit on the faith of it. They have a right to assume that it has paid in capital to the amount which it represents itself as having; and if they give it credit on the faith of that representation, and if the representation is false, it is a fraud upon them; and in case the corporation becomes insolvent, the law, upon the plainest principles of common justice, says to the delinquent stockholder, 'Make that representation good by paying for your stock.' It certainly cannot require the invention of any new doctrine in order to enforce so familiar a rule of equity. It is the misrepresentation of fact in stating the amount of capital to be greater than it really is that is the true basis of the liability of the stockholder in such cases; and it follows that it is only those creditors who have relied, or who can fairly be presumed to have relied, upon the professed amount of capital, in whose favor the law will recognize and enforce an equity against the holders of 'bonus' stock. This furnishes a rational and uniform rule, to which familiar principles are easily applied, and which frees the subject from many of the difficulties and apparent inconsistencies in which the 'trust-fund' doctrine has involved it; and we think that even when the trust-fund doctrine has been invoked, the decision in almost every well-considered case is readily referable to such a rule."¹² Express fraud is the basis of common-law liability as recognized in Kentucky.¹³ The federal court has said that the Connecticut rule is based neither on the fraud doctrine nor the trust-

¹² *Hospes v. Northwestern Manufacturing & Car Co.*, 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117.

Fraud in law or constructive fraud is basis. *Randall Printing Co. v. Sanitas Mineral Water Co.*, 120 Minn. 268, 43 L. R. A. (N. S.) 706, 139 N. W. 606.

Stock was issued to stockholders by a corporation, the stockholders afterwards transferring the stock as a bonus to parties who purchased an issue of bonds by the corporation, the stockholders receiving a portion of the proceeds of the stock and bonds, and also some new stock based on profits

turned back into improvements. The transaction was held not to be fraudulent as against creditors. *Great Western Min. & Mfg. Co. v. Harris*, 128 Fed. 321.

¹³ The common-law rule as recognized in Kentucky is that if the value was fairly agreed though excessive, the full paid stockholder is not liable to creditors as for underpaid stock, while if it was fraudulent the contract of subscription cannot be rescinded in part, and again he is not liable for the balance. *Horton v. Sherrill-Russell Lumber Co.*, 147 Ky. 226, 143 S. W. 1053.

fund doctrine, but on a doctrine of legal liability to pay par value;¹⁴ and in New Jersey, a former adherent of the trust-fund doctrine, the same theory of a legal liability is now asserted.¹⁵

§ 3591. — Issue at discount, or for inadequate value, or as bonus.

The doctrine that the issue of watered or fictitiously paid up stock is a fraud upon persons who become creditors of the corporation in reliance upon its capital stock clearly applies when the original stock of a corporation is issued for cash as paid up, under an agreement that payment in full shall not be required. Even in the absence of express statutory or constitutional provisions, as well as where there are such provisions, a court of equity, or other court having jurisdiction of winding-up proceedings, will disregard the agreement and enforce full payment for the stock so far as may be necessary to satisfy the claims of the creditors of the corporation who have dealt with it in reliance on the stock being full paid; and by statute in some jurisdictions a creditor may proceed at law.¹⁶

¹⁴ *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972.

¹⁵ Trust fund theory is settled in New Jersey, but the liability to creditors is now held to be statutory. *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069.

Stock issued for property without regular and valid action of the board is validated by acceptance so far as to make each holder a subscriber liable to creditors. This is on the theory that acceptance forms a contract and not on the theory of ratification. *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069.

Under Gen. Corp. Act of 1875 as it stood in 1886 (Gen. St. p. 907), the liability is not restricted to those creditors who dealt on the faith of the "held out" capital; but, as the duty was absolute to render an equivalent value for the stock, there is a contractual acceptance of that obligation. *Easton Nat. Bank v. American Brick & Tile Co.*, 70 N. J. Eq. 732, 8 L. R. A. (N. S.) 271, 10 Ann. Cas.

84, 64 Atl. 917, with discussion of the "trust fund doctrine."

¹⁶ **United States.** *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968; *Flinn v. Bagley*, 7 Fed. 785.

California. *Walter v. Merced Academy Ass'n*, 126 Cal. 582, 59 Pac. 136.

Connecticut. *New Haven Trust Co. v. Gaffney*, 73 Conn. 480, 47 Atl. 760.

Illinois. *Bates v. Great Western Tel. Co.*, 134 Ill. 536, 25 N. E. 521, aff'g 35 Ill. App. 254; *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551, aff'g 27 Ill. App. 511; *Great Western Tel. Co. v. Gray*, 122 Ill. 630, 14 N. E. 214, rev'g 23 Ill. App. 72; *Union Mut. Life Ins. Co. v. Frear Stone Mfg. Co.*, 97 Ill. 537, 37 Am. Rep. 129.

Indiana. *Bent v. Underdown*, 156 Ind. 516, 60 N. E. 307.

Missouri. *Guerney v. Moore*, 131 Mo. 650, 32 S. W. 1132.

New York. *Sagory v. Dubois*, 3 Sandf. Ch. 466.

Texas. *Nenny v. Waddill*, 6 Tex. Civ. App. 244, 25 S. W. 308.

England. *Welton v. Saffery*, [1897] App. Cas. 299; *Ooregum Gold Min. Co.*

When stock is issued to subscribers for less than its par value in cash, the right of creditors to compel full payment cannot be defeated by showing that there was no actual fraudulent intent in the transaction.¹⁷

The principles of valuation of property have been considered at length in a former section.¹⁸ In order that creditors may hold stockholders liable who have paid for their stock in property, on the ground that the property was overvalued, the overvaluation must have been fraudulent, or at least intentional. In some states it must have been fraudulent in fact.¹⁹ If the valuation was made in good faith, and the overvaluation was due to mistake or error of judgment, there is no liability even to creditors.²⁰

Whatever may be its internal rights²¹ if a corporation issues its stock as full paid for property, labor or services taken at an intentional overvaluation, the real value being less than the par value of the stock, the issue is just as truly an issue of the stock for less than its par value as if it were issued for cash at a discount, and in so far as the par value of the stock exceeds the value of the property, it is not in fact fully paid. The courts, however, have not agreed as to the right of creditors to compel the holders of such stock to pay the full par value.

In England, as was stated at the beginning of this section, it was held in the earlier cases that when stock is issued for property, labor or services, taken at an overvaluation, so that the stock is not in fact fully paid for, the courts, while they may set the transaction aside, and place the parties in statu quo, cannot substitute a different agreement, and compel the stockholders, even for the purpose of paying the debts of the corporation, to pay the difference between the par value of the stock and the actual value of the property, labor or serv-

v. Roper, [1892] App. Cas. 125, 66 L. T. 427; In re London Celluloid Co., 39 Ch. Div. 190, 59 L. T. 109; In re Addlestone Linoleum Co., 37 Ch. Div. 191, 58 L. T. 428.

See also other cases, § 3589, *supra*.

Holders who bought direct from the corporation at a price below par, are nevertheless "subscribers" and as such are liable to creditors for the unpaid balance unless it was issued as full paid. *McAllister v. American Hospital Ass'n*, 62 Ore. 530, 125 Pac. 286.

¹⁷ *Flinn v. Bagley*, 7 Fed. 785.

¹⁸ § 3576 et seq., *supra*.

¹⁹ See § 3576, *supra*.

²⁰ *Bank of Ft. Madison v. Alden*, 129 U. S. 372, 32 L. Ed. 725; *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 30 L. Ed. 420; *Woolfolk v. January*, 131 Mo. 620, 33 S. W. 432; *Bickley v. Schlag*, 46 N. J. Eq. 533, 20 Atl. 250.

Especially those who did not rely thereon. *Coler v. Tacoma Railway & Power Co.*, 64 N. J. Eq. 117, 53 Atl. 680.

²¹ See §§ 3519, 3572 et seq., *supra*.

ices.²² In the later cases, however, under a statutory provision that every share in any company shall be deemed and taken to have been issued and to be held subject to the payment of the whole amount thereof in cash, unless the same shall have been otherwise determined by a contract duly made in writing, and registered, it has been held that; when shares have been issued for property or services at an intentional overvaluation, the stockholders, upon a winding up of the corporation, may be compelled to pay, for the benefit of creditors, the difference between the par value of the stock and the actual value of the property or services.²³

In this country, although there are a few decisions apparently to the contrary,²⁴ it is settled in most jurisdictions that, if a corporation has issued its original stock as full paid, taking in payment property, labor or services at a fraudulent overvaluation, or in most states at an intentional overvaluation, whether there is an actual fraudulent intent or not, there is as clearly a fraud upon persons who have subsequently become creditors of the corporation in reliance upon the stock being fully paid for as if it had been issued for less than par in cash; and if the corporation is insolvent, the stockholders may, at the instance of such creditors, be compelled to pay the difference between the par value of the stock and the true value of the property or services. This doctrine has not only been applied under statutory or constitutional provisions regulating the issue of stock, but it has frequently been applied independently of any such provision.²⁵ The

²² *Anderson's Case*, 7 Ch. Div. 75; *In re Great Northern & M. Coal Co.*, 3 De Gex, J. & S. 367.

²³ *In re Eddystone Marine Ins. Co.*, 68 L. T. 408, 69 L. T. 363.

²⁴ See *Phelan v. Hazard*, 5 Dill. 45, Fed. Cas. No. 11,068; *Van Cott v. Van Brunt*, 82 N. Y. 535. As to these cases, see *infra*, this section.

²⁵ *United States*. *Camden v. Stuart*, 144 U. S. 104, 36 L. Ed. 363; *Northwestern Mut. Life Ins. Co. v. Cotton Exch. Real Estate Co.*, 70 Fed. 155, 46 Fed. 22.

In absence of fraud stockholder is not liable because of overvaluation. *Maryland Rail Co. v. Taylor*, 231 Fed. 119.

Alabama. *Elyton Land Co. v. Birmingham Warehouse & Elevator Co.*,

92 Ala. 407, 12 L. R. A. 307, 25 Am. St. Rep. 65, 9 So. 129.

California. A knowing overvaluation is not binding against creditors. *R. H. Herron Co. v. Shaw*, 165 Cal. 668, Ann. Cas. 1915 A 1265, 133 Pac. 488.

Illinois. *Sprague v. National Bank of America*, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, aff'g 66 Ill. App. 320; *World's Fair Excursion & Transportation Boat Co. v. Gasch*, 162 Ill. 402, 44 N. E. 724, rev'g 59 Ill. App. 391; *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725, aff'g 53 Ill. App. 82. A creditor who took stock at ten per cent. of par for his debt is liable for the balance and cannot be reinstated as a creditor by agreement so

following cases may be noted as seemingly to the contrary of this rule. In a federal case decided by Judges Dillon and Treat in 1878, suit was brought by a creditor of a corporation to charge a transferee of stock, who had purchased the same in good faith and for value as full paid, on the ground that it was paid for in property at an overvaluation. It was held, principally on the authority of the earlier English cases, that no liability could be established against the defendant by showing that the property conveyed to the corporation in payment for

as to evade liability to other creditors. *Moore v. United States One Stave Barrel Co.*, 238 Ill. 544, 128 Am. St. Rep. 153, 87 N. E. 536, aff'g 141 Ill. App. 104.

Indiana. *Clow v. Brown*, 150 Ind. 185, 49 N. E. 1057, 48 N. E. 1034; *Bruner v. Brown*, 139 Ind. 600, 38 N. E. 318; *Coffin v. Ransdell*, 110 Ind. 417, 11 N. E. 20. *Coffin v. Ransdell*, supra, has sometimes been cited as contrary to this doctrine, but it is not so. It was merely held in that case that an action at law could not be maintained by a receiver of a corporation to collect as unpaid subscriptions the difference between the actual value of the property given by subscribers in payment for their stock and the par value of their stock, where there was no fraud. It was said that the transaction might be impeached in equity for fraud.

Missouri. *Van Cleve v. Berkey*, 143 Mo. 109, 42 L. R. A. 593, 44 S. W. 743; *Shickle v. Watts*, 94 Mo. 410, 7 S. W. 274, qualified to some extent in *Woolfolk v. January*, 131 Mo. 620, 33 S. W. 432.

Montana. *Kelly v. Clark*, 21 Mont. 291, 42 L. R. A. 621, 69 Am. St. Rep. 668, 53 Pac. 959.

Nebraska. *Gilkie & Anson Co. v. Dawson Town & Gas Co.*, 46 Neb. 333, 64 N. W. 978, 1097.

New Jersey. See *v. Heppenheimer*, 55 N. J. Eq. 240, 36 Atl. 966; *Hebberd v. Southwestern Land & Cattle Co.*, 55 N. J. Eq. 18, 36 Atl. 122; *Wetherbee v. Baker*, 35 N. J. Eq. 501.

North Carolina. *Clayton v. Ore Knob Co.*, 109 N. C. 385, 14 S. E. 36.

Ohio. *Gates v. Tippecanoe Stone Co.*, 57 Ohio St. 60, 63 Am. St. Rep. 705, 48 N. E. 285.

Tennessee. *Kelley v. Fletcher*, 94 Tenn. 1, 6, 28 S. W. 1099.

Utah. *Salt Lake Hardware Co. v. Tintie Milling Co.*, 13 Utah 423, 45 Pac. 200; *Henderson v. Turngren*, 9 Utah 432, 35 Pac. 495.

Virginia. *Martin v. South Salem Land Co.*, 94 Va. 28, 26 S. E. 591.

Washington. *Dunlap v. Rauch*, 24 Wash. 620, 64 Pac. 807; *Kroenert v. Johnston*, 19 Wash. 96, 52 Pac. 605; *Adamant Mfg. Co. of America v. Wallace*, 16 Wash. 614, 48 Pac. 415; *Manhattan Trust Co. of New York v. Seattle Coal & Iron Co.*, 16 Wash. 499, 48 Pac. 333, 737. Takers of common stock as a bonus with preferred have notice that it is not paid and impliedly promise to pay the subscription par of it for satisfaction of creditors; and it is no defense that they were misled. *Gordon v. Cummings*, 78 Wash. 515, 139 Pac. 489.

West Virginia. Statute prevents holders from making their stock full paid at 50 cents on the dollar merely by inserting in the articles that it shall be so. *Security Trust Co. v. Ford*, 75 Ohio St. 322, 8 L. R. A. (N. S.) 263, 79 N. E. 474.

Wisconsin. *National Bank of Merrill v. Illinois & W. Lumber Co.*, 101 Wis. 247, 77 N. W. 185; *Gogebic Inv. Co. v. Iron Chief Min. Co.*, 78 Wis. 427, 23 Am. St. Rep. 417, 47 N. W. 726.

the stock was not worth the amount of the stock, or that it was not worth anything over and above mortgages which covered it at the time of the transfer. The decision was put upon the ground that the agreement under which the property was received in payment for the stock was conclusive upon the corporation and its creditors, unless impeached and rescinded in a direct attack on the ground of fraud, and it was said that "the courts, even where the rights of creditors are involved, will treat that as a payment which the parties have agreed should be payment."²⁶ In a New York case it appeared that defendant, the president and a director of a railroad company, as such entered into a contract with a third person, by which the latter agreed to build and equip a portion of the road, for a certain sum in stock of the company, and for a certain sum in its bonds; and immediately afterwards, in accordance with a previous agreement, the contract was assigned to the defendant, who, with others associated with him, performed the contract at an expense less than the par of the stock and bonds agreed to be paid therefor, and which the defendant and his associates received. It appeared, however, that the contract was entered into and assignment made in good faith, after full deliberation and consultation, with the knowledge and consent of all the directors and stockholders of the company, as the only means to insure the construction of the road, and that the amount expended in the performance of the contract exceeded the actual value of the stock and bonds delivered in payment. Under these circumstances, it was held that the defendant was not liable, at the suit of a receiver of the company, for the difference between the par value of the stock received by him and the cost of his performance of the contract.²⁷ It does not appear from the report of this case whether the creditors for whom it was sought to compel payment became so after the stock was issued, or before, or whether they were in any way deceived by the issue of the stock for less than its par value. If they were existing creditors at the time the stock was issued, or if, though they became so afterwards, they knew of the circumstances, they were not in any way injured, and the decision was right, for only those creditors who have dealt with the corporation after the issue of fictitiously paid up stock, and upon the faith of its being paid up, can complain.²⁸ If the court meant to hold, as the dicta of the court would seem to imply, that persons who take original capital stock of a corporation at less than its par value, either in

²⁶ *Phelan v. Hazard*, 5 Dill. 45, Fed.

²⁸ See § 3595, *infra*.

Cas. No. 11,068.

²⁷ *Van Cott v. Van Brunt*, 82 N. Y.

535.

money, or in property intentionally overvalued, are not liable to subsequent creditors who deal with the corporation on the faith of its capital stock, the decision is opposed to the overwhelming weight of authority.²⁹

The general power to issue bonus stock, and its effect within the corporation, has already been discussed.³⁰ In a New York case, where a corporation had issued paid up stock as a gratuity, it was held that a judgment creditor of the corporation, on its becoming insolvent, could not maintain a suit in equity to compel the stockholder to pay for the stock contrary to his agreement with the corporation. "The liability of a shareholder to pay for his stock," said the court, "does not arise out of his relation, but depends upon his contract, express or implied, or upon some statute, and in the absence of either of these grounds of liability, we do not perceive how a person to whom shares have been issued as a gratuity has, by accepting them, committed any wrong upon creditors, or made himself liable to pay the nominal face of the shares as upon a subscription or contract."³¹ It does not appear, from the report of this case, whether the creditor was such when the stock was issued, or became such after it was issued, and in reliance on its being in fact full paid. If the former, then the decision is clearly a sound one,³² but if the latter, it is contrary to the prevailing rule.

As we have seen, it is on the ground of fraud, and not on the ground of contract, that persons to whom stock has been issued as full paid, when it is not so in fact, are held liable to creditors, and the reason for the doctrine, therefore, applies as well where stock is issued as a gratuity as where it is issued for cash at a discount. In the former case, the holder does not agree to pay anything; in the latter, he does not agree to pay anything further than what he has paid. It has repeatedly been held, therefore, that if a corporation issues its stock as full paid without receiving any consideration, and particularly when it does so in violation of an express charter, statutory or constitutional provision, and the stock is falsely held out to the public as being full paid, the transaction, even when binding upon the corporation and consenting stockholders, operates as a fraud upon persons who subsequently deal with the corporation and become creditors on the

²⁹ See 2 Morawetz on Corporations, § 826; Taylor on Corporations, § 522 (c), p. 524, note; Elyton Land Co. v. Birmingham Warehouse & Elevator Co., 92 Ala. 407, 12 L. R. A. 307, 25 Am. St. Rep. 65, 9 S. 129.

³⁰ See §§ 3520, 3579 et seq., *supra*.

³¹ Christensen v. Eno, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648. See also Christensen v. Quintard, 55 Hun (N. Y.) 608, 8 N. Y. Supp. 400.

³² See § 3595, *infra*.

faith of its capital stock being full paid, and a court of equity, or, in some jurisdictions by statute, a court of law, will compel full payment for the stock, if necessary for the satisfaction of their claims.³³

In California it is held that where a certificate of stock is issued without any consideration, in violation of the statutory provision of that state that no corporation shall issue stock except for money, labor or property actually received, and all fictitious increase of stock shall be void, the certificate is absolutely void for all purposes, and that the holder is not liable to creditors as for an unpaid subscription.³⁴ In some of the other states it is held otherwise.³⁵

§ 3592. — Fictions to cover underpayment; loans, pledges, etc. "Any arrangement," said the Court of Appeals of Maryland, "among the stockholders, or those in charge of the affairs of the corporation, by which the stock is but nominally paid for, whether in money or property, the corporation not in fact getting the benefit of the price in good faith, will be regarded as a sham and not as a valid payment, as against the creditors of the corporation, however it may be regarded as between the corporation and the subscriber."³⁶

In a case in the Supreme Court of the United States it was said: "It is the settled doctrine of this court that the trust arising in favor

33 United States. *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227, 41 Fed. 531; *Richardson v. Green*, 133 U. S. 30, 33 L. Ed. 516; *Allen v. Fairbanks*, 45 Fed. 445.

Illinois. *Hickling v. Wilson*, 104 Ill. 54.

Iowa. *Tuthill Spring Co. v. Smith*, 90 Iowa 331, 57 N. W. 853.

Kentucky. *Haldeman v. Ainslie*, 82 Ky. 395.

Louisiana. *Belknap v. Adams*, 49 La. Ann. 1350, 22 So. 382.

Michigan. *Peninsular Sav. Bank of Detroit v. Black Flag Stove Polish Co.*, 105 Mich. 535, 63 N. W. 514.

Minnesota. *Hospes v. Northwestern Manufacturing & Car Co.*, 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117.

Missouri. *Skrainka v. Allen*, 76 Mo. 384, 7 Mo. App. 434.

New Jersey. *Hebberd v. Southwestern Land & Cattle Co.*, 55 N. J. Eq. 18, 36 Atl. 122.

Washington. *Barto v. Nix*, 15 Wash. 563, 46 Pac. 1033.

England. *In re Railway Time Tables Pub. Co.*, 68 L. T. 649.

As to bonus stock issued to purchasers of bonds compare § 3593, *infra*.

³⁴ *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377.

³⁵ *Haldeman v. Ainslie*, 82 Ky. 395; *Belknap v. Adams*, 49 La. Ann. 1350, 22 So. 382; *Skrainka v. Allen*, 7 Mo. App. 434, 76 Mo. 384.

³⁶ *Crawford v. Rohrer*, 59 Md. 599. To same effect, *Fox v. Produce Cold Storage Exchange*, 192 Ill. App. 301.

Leaving certificates in the stock book as treasury stock does not prevent its being considered as "issued." *In re Grand Rapids Furniture Agency*, 209 Fed. 483.

Organizing new company to float stock of old at inflated value. *State v. Citizens' Light & Power Co.*, 172 Ala. 232, 55 So. 193.

of creditors by subscriptions to the stock of a corporation cannot be defeated by a simulated payment of such subscription, nor by any device short of an actual payment in good faith. And while any settlement or satisfaction of such subscription may be good as between the corporation and the stockholders, it is unavailing as against the claims of the creditors."³⁷ Although a corporation may contract with its stockholders, and lend them money if it acts in good faith and without prejudice to the rights of creditors, it cannot resort to any such a device for the purpose of relieving them from payment for their shares, to the injury of creditors. It was held, therefore, in a leading case in the Supreme Court of the United States, that an arrangement by which the stock of a corporation was nominally paid for by the subscribers, and the money was immediately repaid as a loan to them, was a mere device to change the subscribers' indebtedness from a stock debt to a loan, and was not a valid payment, as against creditors of the corporation.³⁸ According to these authorities a simulated performance of an agreement to turn over property³⁹ or the crediting of fictitious payments in property⁴⁰ or a sham pur-

³⁷ Mr. Justice Brown, in *Camden v. Stuart*, 144 U. S. 104, 113, 36 L. Ed. 363. It was further said in this case: "Nothing that was said in the recent cases of *Clark v. Bever*, 139 U. S. 96; *Fogg v. Blair*, 139 U. S. 118; or *Handley v. Stutz*, 139 U. S. 417, was intended to overrule or qualify in any way the wholesome principle adopted by this court in the earlier cases, especially as applied to the original subscribers to stock. The later cases were only intended to draw a line beyond which the court was unwilling to go in fixing a liability upon those who had purchased stock of the corporation, or had taken it in good faith in satisfaction of their demands."

³⁸ *Sawyer v. Hoag*, 17 Wall. (U. S.) 610, 21 L. Ed. 731.

³⁹ Agreement to pay in patents is not performed by giving a part paid option to purchase one of them with a license to operate under it for a two-year period, it having nine years yet to run. In *re Monarch Corporation*, 203 Fed. 664, *rev'g* 196 Fed. 252.

⁴⁰ Where increased stock of a corpo-

ration is required by the terms of the authority for the increase to be sold at par, and the corporation buys from a subscriber for the increased stock a patent of no value, for the purpose of allowing him to get his stock below par, by crediting the purchase price on his subscription, and afterwards resells the patent to him for a nominal sum, the transaction, being a mere evasion of the requirements of the statute, does not entitle the subscriber to any credit on his subscription as against creditors, or a receiver suing on their behalf. *Peck v. Elliott*, 79 Fed. 10, 38 L. R. A. 616.

A selling agent for patents who had only a prospective commission on the sale and no interest in them could not be credited for payment for stock as on a sale of them to the corporation where the price was paid by it to the owner. Hence the stock should be regarded as paid only to the amount of cash paid in. *Moore v. United States One Stave Barrel Co.*, 238 Ill. 544, 128 Am. St. Rep. 153, 87 N. E. 536, *aff'g* 141 Ill. App. 104.

chase to avoid appearance of a subscription ⁴¹ will be treated for what they really are.

§ 3593. — As to watered or underpaid increased issues. The doctrine under which stockholders of a corporation are held liable to pay the full amount of their stock for the benefit of creditors, notwithstanding an agreement to the contrary with the corporation, is not limited to original capital stock, but applies also, subject to some limitations, to new stock issued by a corporation upon increasing its capital stock. If a corporation increases its capital stock for the mere purpose of adding to the original capital stock, and enabling it to do a larger and more profitable business, a subscriber for the new stock is in substantially the same position as a subscriber for the original stock, in so far as payment therefor is concerned. If the stock is issued as full paid, upon payment or agreement to pay in part only, or gratuitously, and the corporation becomes insolvent, subsequent bona fide creditors may compel him to pay the balance, if necessary for the satisfaction of their claims, as shown in the preceding paragraphs.⁴² By the weight of authority, however, there is no such liability, in the absence of a statute, where an active corporation becomes embarrassed and issues an increase of its capital stock in good faith at the best price that can be obtained, although it may be less than the

⁴¹ When stock is issued to a subscriber for property taken at an overvaluation, the fact that the subscription is cancelled, and the stock issued in form as upon a purchase of the property, does not prevent the court from holding the subscriber liable for the difference between the par value of the stock and the actual value of the property. *Hebberd v. Southwestern Land & Cattle Co.*, 55 N. J. Eq. 18, 36 Atl. 122.

A sham subscription never carried out by delivery of certificates and followed by direct subscriptions or sales to others does not protect them as takers of ostensible full paid stock. *Gordon v. Cummings*, 78 Wash. 515, 139 Pac. 489.

Issuance of stock nominally for mineral licenses and immediate return of it into treasury, it being already covered by contract for sale at half par

to a bank, and no consideration having moved to licensor, is no protection. *Enright v. Heckscher*, 240 Fed. 863.

⁴² *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227, 41 Fed. 531; *Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co.*, 75 Fed. 554; *Flinn v. Bagley*, 7 Fed. 785.

Creditors of a corporation are presumed to have trusted it on the faith of an increase in the capital stock from the time it was voted, and the fact that subscribers therefor did not receive it until after the debts were contracted will not relieve them from liability in case the stock is not in fact full paid. *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227.

Actual fraud in valuing assets to make a stock dividend must be shown to charge holders. *Whitlock v. Alexander*, 160 N. C. 465, 76 S. E. 538.

par value, either in the payment of debts, or to raise money for the successful continuance of its business;⁴³ or where it issues such stock in good faith as a bonus in order to induce persons to purchase its bonds at their par value,⁴⁴ and there is no presumption that the stock had a value with the bonds exceeding the debt paid thereby.⁴⁵ The transaction must be in good faith, and not a mere device for recklessly or fraudulently disposing of the stock to the prejudice of stockholders or creditors.⁴⁶

In a case in the Supreme Court of the United States, a railroad company, being indebted to a construction company in the sum of \$70,000, which it was unable to pay in money, had a settlement with the construction company, whereby the debt was paid in shares of the stock of the railroad company of the par value of \$350,000, the stock being taken at twenty cents on the dollar, but not being worth at the time anything at all on the market. It was held that the issue of the stock was not a fraud upon subsequent creditors, nor ultra vires, so as to render the members of the construction company, among whom it was distributed, liable upon the same as unpaid stock, and that they could not be held liable under a statute merely imposing liability to the amount of unpaid instalments on stock.⁴⁷

In another leading case in the Supreme Court of the United States, a corporation issued new stock as a bonus to purchasers of its bonds in order to dispose of the bonds, and the transaction was upheld as

⁴³ **United States.** *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227; *Fogg v. Blair*, 139 U. S. 118, 35 L. Ed. 104; *Clark v. Bever*, 139 U. S. 96, 35 L. Ed. 88.

California. *Kellerman v. Maier*, 116 Cal. 416, 48 Pac. 377; *Stein v. Howard*, 65 Cal. 616, 4 Pac. 662.

Colorado. *Speer v. Bordelean*, 20 Colo. App. 413, 79 Pac. 332.

Michigan. *Dummer v. Smedley*, 110 Mich. 466, 38 L. R. A. 490, 68 N. W. 260.

Texas. *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

Contra, *Jackson v. Traer*, 64 Iowa 469, 52 Am. Rep. 449, 20 N. W. 764.

⁴⁴ *Dummer v. Smedley*, 110 Mich. 466, 38 L. R. A. 490, 68 N. W. 260; *Handley v. Stutz*, 139 U. S. 417, 35 L. Ed. 227; *Fogg v. Blair*, 139 U. S. 118, 35 L. Ed. 104.

⁴⁵ Where suit was brought against contractors for the building of a railroad to hold them liable for the face value of stock received by them in payment for work done, and the bill alleged that they got \$12,000 in the company's first mortgage bonds for each mile of constructed road, and in addition \$850,000 in stock, and that the bonds were full and adequate compensation for the work, but which contained no allegation as to the real value of the stock, it was held that the bill was bad on demurrer, for not showing that the stock was of some value. *Fogg v. Blair*, 139 U. S. 118, 35 L. Ed. 104.

⁴⁶ *Fogg v. Blair*, 139 U. S. 118, 35 L. Ed. 104. See *New Castle & N. W. Ry. Co. v. Simpson*, 21 Fed. 533.

⁴⁷ *Clark v. Bever*, 139 U. S. 96, 35 L. Ed. 88.

against creditors. "To say," said Mr. Justice Brown, "that a corporation may not, under the circumstances above indicated, put its stock upon the market and sell it to the highest bidder, is practically to declare that a corporation can never increase its capital by a sale of shares, if the original stock has fallen below par. The wholesome doctrine, so many times enforced by this court, that the capital stock of an insolvent corporation is a trust fund for the payment of its debts, rests upon the idea that the creditors have a right to rely upon the fact that the subscribers to such stock have put into the treasury of the corporation, in some form, the amount represented by it; but it does not follow that every creditor has a right to trace each share of stock issued by such corporation, and inquire whether its holder, or the person of whom he purchased, has paid its par value for it. It frequently happens that corporations, as well as individuals, find it necessary to increase their capital in order to raise money to prosecute their business successfully, and one of the most frequent methods resorted to is that of issuing new shares of stock and putting them upon the market for the best price that can be obtained; and so long as the transaction is bona fide, and not a mere cover for 'watering' the stock, and the consideration obtained represents the actual value of such stock, the courts have shown no disposition to disturb it. Of course no one would take stock so issued at a greater price than the original stock could be purchased for, and hence the ability to negotiate the stock and to raise the money must depend upon the fact whether the purchaser shall or shall not be called upon to respond for its par value. While, as before observed, the precise question has never been raised in this court, there are numerous decisions to the effect that the general rule that holders of stock, in favor of creditors, must respond for its par value, is subject to exceptions where the transaction is not a mere cover for an illegal increase. * * * The liability of a subscriber for the par value of increased stock taken by him may depend somewhat upon the circumstances under which, and the purposes for which, such increase was made. If it be merely for the purpose of adding to the original capital stock of the corporation, and enabling it to do a larger and more profitable business, such subscriber would stand practically upon the same basis as a subscriber to the original capital. But we think that an active corporation may, for the purpose of paying its debts, and obtaining money for the successful prosecution of its business, issue its stock and dispose of it for the best price that can be obtained."⁴⁸ A stock dividend made without sufficient assets

⁴⁸ *Handley v. Stutz*, 139 U. S. 417, *Smedley*, 110 Mich. 466, 38 L. R. A. 35 L. Ed. 227, followed in *Dummer v.* 490, 68 N. W. 260.

cannot be returned to the corporation and the liability thus avoided.⁴⁹

§ 3594. — As to treasury stock and stock bought in or forfeited. It is too clear to admit of question, that, when stock has been once issued and fully paid for, there is nothing to prevent the stockholders from returning the whole or a part thereof to the corporation, or to a trustee for its sale, to be disposed of for its benefit; and in such a case the corporation or trustee may dispose of the stock at less than its par value without violating statutory or constitutional provisions regulating the issue of stock, and without rendering purchasers thereof liable to creditors beyond the price which they agree to pay.⁵⁰

When stock which has been subscribed, paid for in full, and issued, is by the holders thereof placed in the hands of a trustee to be paid over to subscribers for bonds of the corporation, when their subscriptions to such bonds are paid in full, such stock may lawfully be transferred by the trustee to the subscribers for bonds, upon payment of their subscriptions, without violating the constitutional or statutory provision that stock or bonds shall not be issued except for money paid, labor done or property actually received, and that all fictitious increase of stock or indebtedness shall be void. And the failure to pay their subscriptions for bonds does not make such subscribers liable upon the stock agreed to be delivered, as upon unpaid subscriptions for stock.⁵¹ The same is true of stock which has been lawfully issued by a corporation, and afterwards reacquired by it by forfeiture for nonpayment of assessments thereon, or by a valid purchase. It holds

⁴⁹ First Nat. Bank v. Patton Co., 32 Ohio Cir. Ct. 627.

⁵⁰ Davis v. Montgomery Furnace & Chemical Co., 101 Ala. 127, 8 So. 496; Lake Superior Iron Co. v. Drexel, 90 N. Y. 87. Compare Alling v. Wenzel, 133 Ill. 264, 24 N. E. 551, aff'g 27 Ill. App. 511.

Stock once issued and afterwards reacquired by the corporation may be sold by it at the best price obtainable, even below par. Mosher v. Sinnott, 20 Colo. App. 454, 79 Pac. 742; Crosby v. Stratton, 17 Colo. App. 212, 68 Pac. 130.

Purchaser of full paid stock from corporation is not liable though he paid less than par. Henry v. Semonian, 27 Colo. App. 487, 150 Pac. 818.

See also § 3522, supra.

The following case does not reveal how the stock passed from the corporation to the holder, who bought \$1,000 of stock for \$250. It was "sold" to him by the corporation, but how the corporation held it does not appear. If it was treasury stock, rather than unissued stock, the decision seems clearly erroneous.

It was therein held that, even if stock was sold by corporation to holder at one-fourth its face, a creditor may recover the balance as unpaid subscription. (This was decided under the trust fund theory.) Merchants' Mut. Adjusting Agency v. Davidson, 23 Cal. App. 274, 137 Pac. 1091.

⁵¹ Davis v. Montgomery Furnace & Chemical Co., 101 Ala. 127, 8 So. 496.

such stock as it holds other assets, and may lawfully sell the same at its market price, although it may be less than the par value, without rendering the purchasers liable to creditors.⁵²

This exception to the general doctrine does not apply where the transaction under which the corporation reacquires the shares is not in good faith, but a mere device on the part of the stockholders to avoid payment in full. Stockholders cannot escape liability to creditors by subscribing for stock, and then surrendering it to the corporation before payment therefor, and afterwards taking the same from the corporation, controlled by them, at a reduced value,⁵³ or by electing to treat it as a loan to the corporation.⁵⁴

§ 3595. — Antecedent creditors and creditors with notice or assenting. As we have seen, the doctrine that persons who receive stock of a corporation under an agreement by which they are to pay nothing therefor, or to pay less than its par value, may be compelled to pay in full for the benefit of creditors of the corporation, is based upon the ground of fraud.⁵⁵ It can be invoked, therefore, in favor of such creditors only as have dealt with the corporation on the faith of the stock being fully paid. Those who have not done so are not defrauded, and cannot complain. "The whole doctrine that the capital stock of corporations is a trust fund for the payment of creditors," said the Minnesota court, "rests upon the equitable consideration that the distribution of the capital among stockholders without making adequate provision for the payment of debts, or the issue of fictitiously paid up stock, is a fraud upon creditors who contract with the corporation in reliance upon its capital remaining intact, or in reliance upon the professed capital having been in fact paid up in full. But when the reason for the rule does not exist the rule itself ceases to apply. This trust does not arise absolutely in every case, in favor of every and any creditor. It is not true, and no case can be found which holds, that it is in the power of a creditor in every and all cases, as a matter of right, to institute an inquiry as to the value or amount of the consideration given for stock issued as fully paid up, any more than that

⁵² *Chillicothe Branch of State Bank of Ohio v. Fox*, 3 Blatchf. 431, Fed. Cas. No. 2,683; *Pullman v. Railway Equipment Co.*, 73 Ill. App. 313; *Otter v. Brevoort Petroleum Co.*, 50 Barb. (N. Y.) 427; *Ramwell's Case*, 50 L. J. Ch. 827.

⁵³ *Alling v. Wenzel*, 133 Ill. 264, 24 N. E. 551, aff'g 27 Ill. App. 511. See

also *Belknap v. Adams*, 49 La. Ann. 1350, 22 So. 382.

⁵⁴ A sale of stock to raise capital with an option to the purchaser to treat it as a loan, cannot be so treated as against creditors; but credit may be allowed for payments made. *Du-*

grand v. Brown, 236 Fed. 609.

⁵⁵ § 3590, supra.

it would be his right, in any and every case, to inquire into the distribution of the capital among the shareholders. It is only those creditors who can fairly allege that they have relied, or whom the law presumes to have relied, upon the amount of capital stock of the company, who have a right to make such inquiry, or in whose favor equity will impress a trust upon the subscription to the stock, and set aside a fictitious arrangement for its payment."⁵⁶ It follows that an issue of watered or fictitiously paid up stock by a corporation cannot be attacked, nor the holders thereof be compelled to pay its full par value, by or for the benefit of persons who dealt with the corporation and became creditors before the stock was issued.⁵⁷ The same is true of a creditor who participated in the issue of the stock, or consented thereto, whether he participated as a stockholder or officer of the corporation, or as its attorney, or otherwise.⁵⁸ And it is equally true

⁵⁶First Nat. Bank of Deadwood v. Gustin Minerya Consol. Min. Co., 42 Minn. 327, 6 L. R. A. 676, 18 Am. St. Rep. 510, 44 N. W. 198.

It is not necessary to have relied specifically on subscriptions or to have known that the stock was unpaid. Union City Lumber Co. v. Traverse City, L. & M. R. Co., 170 Mich. 205, 136 N. W. 463.

Iowa. Stout v. Hubbell, 104 Iowa 499, 73 N. W. 1060; Wishard v. Hansen, 99 Iowa 307, 61 Am. St. Rep. 238, 68 N. W. 691; Boulton Carbon Co. v. Mills, 78 Iowa 460, 5 L. R. A. 649, 43 N. W. 290; Chisholm v. Forny, 65 Iowa 333, 21 N. W. 664; Jackson v. Traer, 64 Iowa 469, 52 Am. Rep. 449, 20 N. W. 764; Osgood v. King, 42 Iowa 478.

Maine. Libby v. Tobey, 82 Me. 397, 19 Atl. 904.

Maryland. Crawford v. Rohrer, 59 Md. 599; Brant v. Ehlen, 59 Md. 1.

Michigan. Peninsular Sav. Bank of Detroit v. Black Flag Stove Polish Co., 105 Mich. 535, 63 N. W. 514.

Minnesota. Wallace v. Carpenter Elec. Heating Mfg. Co., 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189; Hastings Malting Co. v. Iron Range Brewing Co., 65 Minn. 28, 67 N. W. 652. It is voidable as to creditors so far as the agreement that it is full

paid goes. They may sue for the balance. Shaw v. Staight, 107 Minn. 152, 20 L. R. A. (N. S.) 1077, 119 N. W. 951.

⁵⁷Handley v. Stutz, 139 U. S. 417, 35 L. Ed. 227, aff'g 41 Fed. 531; Coit v. Gold Amalgamating Co., 119 U. S. 343, 30 L. Ed. 420, 14 Fed. 12; Continental Trust Co. v. Toledo, St. L. & K. C. R. Co., 82 Fed. 642; Hospes v. Northwestern Manufacturing & Car Co., 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117; First Nat. Bank of Deadwood v. Gustin Minerva Consol. Min. Co., 42 Minn. 327, 6 L. R. A. 676, 18 Am. St. Rep. 510, 44 N. W. 198. See also Graham v. La Crosse & M. R. Co., 102 U. S. 148, 26 L. Ed. 106.

Under a statute in Tennessee, all unpaid stock, whenever subscribed, is a trust fund for the payment of all corporate debts, whether created before or subsequent to the subscriptions. Shields v. Clifton Hill Land Co., 94 Tenn. 123, 26 L. R. A. 509, 45 Am. St. Rep. 700, 28 S. W. 668.

⁵⁸United States. Bank of Fort Madison v. Alden, 129 U. S. 372, 32 L. Ed. 725; Coit v. Gold Amalgamating Co., 119 U. S. 343, 30 L. Ed. 420; Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co., 75 Fed. 554.

of a creditor who dealt with the corporation with actual or constructive notice of the circumstances under which the stock was issued.⁵⁹ Of

Alabama. *Nierosi v. Calera Land Co.*, 115 Ala. 429, 22 So. 147.

District of Columbia. *Ambler v. Archer*, 1 App. Cas. 94.

Iowa. *Callanan v. Windsor*, 78 Iowa 193, 42 N. W. 652.

Michigan. *Ten Eyck v. Pontiac, O. & P. A. R. Co.*, 114 Mich. 494, 72 N. W. 362.

New Jersey. *Knoop v. Bohmrich*, 49 N. J. Eq. 82, 23 Atl. 118.

Where certain persons purchased land to be conveyed to a corporation to be afterwards formed, and which was to issue them stock at the rate of five dollars of stock for every dollar paid to the fund for purchasing the land, which was done, it was held that one of such persons, who became a director of the corporation, and afterwards sold his stock and became a creditor, could not, on its becoming insolvent, maintain a bill to compel the other subscribers to pay the difference between the face value of their stock and the value of the property conveyed. *Nierosi v. Calera Land Co.*, 115 Ala. 429, 22 So. 147.

In a Texas case it was held that creditors who were stockholders, and had notice of an agreement for the issue of stock at less than par, could not demand from the subscribers that they pay the difference between what they agreed to pay and the face of the stock, and that they had no right to participate in the fund contributed by the subscribers to pay creditors not having such notice. *Mathis v. Pridham*, 1 Tex. Civ. App. 58, 20 S. W. 1015.

Where a creditor otherwise has a right to enforce stockholders' liability for the unpaid balances due on shares issued for less than par, he is not precluded by the fact that he is also a stockholder, unless he was a party to

the agreement under which the stock was issued. *Richardson v. Chicago Packing & Provision Co.*, 131 Cal. xviii, 63 Pac. 74.

But if he was a party to the agreement, it is otherwise. *Id.*

One who has taken an assignment of a claim against a corporation, after it has issued stock for less than its par value, is not precluded from enforcing the liability of stockholders for the balance on the stock by the fact that his assignor was a stockholder. *Montgomery v. Brush Elec. Illuminating Co. of New York*, 48 N. Y. App. Div. 12, 62 N. Y. Supp. 606, aff'd 168 N. Y. 657, 61 N. E. 1131 (mem. dec.).

59 United States. *Coit v. Gold Amalgamating Co.*, 119 U. S. 343, 30 L. Ed. 420; *McBride v. Farrington*, 131 Fed. 797; *Rickerson Roller-Mill Co. v. Farrell Foundry & Machine Co.*, 75 Fed. 554; *Northwestern Mut. Life Ins. Co. v. Cotton Exch. Real Estate Co.*, 70 Fed. 155; *Kenton Furnace R. R. & Mfg. Co. v. McAlpin*, 5 Fed. 737.

Indiana. *Bent v. Underdown*, 156 Ind. 516, 60 N. E. 307.

Iowa. *Callanan v. Windsor*, 78 Iowa 193, 42 N. W. 652.

Kansas. *Walburn v. Chenault*, 43 Kan. 352, 23 Pac. 657.

Kentucky. *Miller v. Higginbotham's Adm'r*, 29 Ky. L. Rep. 547, 107 Am. St. Rep. 335, 87 S. W. 933.

Minnesota. *Hospes v. Northwestern Manufacturing & Car Co.*, 48 Minn. 174, 15 L. R. A. 470, 31 Am. St. Rep. 637, 50 N. W. 1117; *First Nat. Bank of Deadwood v. Gustin Minerva Consol. Min. Co.*, 42 Minn. 327, 6 L. R. A. 676, 18 Am. St. Rep. 510, 44 N. W. 198.

Missouri. *Colonial Trust Co. v. McMillan*, 188 Mo. 547, 107 Am. St. Rep. 335, 87 S. W. 933; *Woolfolk v. January*, 131 Mo. 620, 33 S. W. 432.

Oregon. *McAllister v. American*

course it must be antecedent notice.⁶⁰ In view of the numerous statutory requirements of statements to be recorded either in the corporate books or in some public office, the question arises whether notice is imparted by them. The recorded articles do not impart notice of the overvaluation ordinarily⁶¹ unless they exhibit the very facts⁶² or per-

Hospital Ass'n, 62 Ore. 530, 125 Pac. 286.

Washington. *Davies v. Ball*, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833; *Adamant Mfg. Co. v. Wallace*, 16 Wash. 614, 48 Pac. 415.

Wisconsin. *Whitehill v. Jacobs*, 75 Wis. 474, 44 N. W. 630.

Wyoming. *Tuttle v. Rohrer*, 23 Wyo. 305, 149 Pac. 857, rehearing denied 153 Pac. 27.

An agreement that payment in full of par value shall not be required is a fraud on subsequent creditors in good faith, but not on those who deal with notice of the facts. *Dickinson v. Kline*, 96 Neb. 435, 148 N. W. 141.

Evidence held to show that creditors had notice, especially one who was attorney for the company at the time of issuance. *Dickinson v. Kline*, 96 Neb. 435, 148 N. W. 141.

A "no recourse" clause in a mortgage, made by reference a part of the bonds, absolves stockholders from liability to mortgage bondholders for a deficiency. *Babbitt v. Read*, 215 Fed. 395.

Knowledge that a mining corporation had sold full paid stock below par defeats recovery. *Reel v. Brammer*, 56 Ind. App. 180, 101 N. E. 1043.

⁶⁰ Subsequent notice is no defense. *Gordon v. Cummings*, 78 Wash. 515, 139 Pac. 489.

⁶¹ The record of incorporation proceedings is not constructive notice to subsequent creditors of the real value of property received in payment of subscriptions to stock, or that it was grossly overvalued. *Lea v. Iron Belt Mercantile Co.*, 119 Ala. 271, 24 So. 28.

Where the promoters of a corporation agreed to purchase land at a

grossly excessive valuation, and issue the stock of the corporation in payment, and the articles of incorporation recited the contract, and that the directors should pay for the land by issuing stock at par for the agreed valuation, and that the stock, when so issued, should be held and regarded as fully paid for by the conveyance of the land to the corporation, it was held that the articles were not notice to subsequent creditors that the land had been overvalued. *Stout v. Hubbell*, 104 Iowa 499, 73 N. W. 1060.

Entries contained in the private books of a corporation are not notice to persons becoming creditors of the corporation as to the way in which stockholders have paid for their shares. *Gilkie & Anson Co. v. Dawson Town & Gas Co.*, 46 Neb. 333, 64 N. W. 978, 1097.

The filing and recording of articles reciting full payment in property (*R. S.* 1909, §§ 2975, 3340) do not impart notice that the property is fictitiously valued; creditors are not bound by such recitals. *Rogers v. Stag Min. Co.*, 185 Mo. App. 659, 171 S. W. 676.

⁶² Where the recorded articles of a corporation expressly provide that only a certain per cent. of the par value of the stock shall be collected except by unanimous consent of the stockholders, and show the amount subscribed by each stockholder, and the cash paid, the unpaid portion of the subscriptions is not an asset for the benefit of creditors of the corporation on its becoming insolvent, since the articles give notice of the liability of the stockholders. *Bent v. Underdown*, 156 Ind. 516, 60 N. E. 307.

haps where they are aided by a recorded mortgage,⁶³ but the filing of the approved statement required by the Virginia law (a blue sky law) is held to be notice.⁶⁴ Where the creditor is a corporation, the knowledge of its officer suffices to charge it;⁶⁵ and a parent corporation and its assignee were held chargeable with knowledge of overvaluation in the stock issue of a subsidiary one.⁶⁶

These are defenses only to an equitable liability and not to one that is legal and positive to pay par value.⁶⁷ Thus in Illinois a statute provides that "each stockholder shall be liable for the debts of the corporation to the extent of the amount that may be unpaid upon the stock held by him," and it has been held that the right of a creditor to compel a stockholder to pay the difference between the par value of his stock and what he has paid in money or property under his agreement with the company is not in any way affected by the fact that he knew, or did not know, when he extended credit to the company, that the stock was in part unpaid.⁶⁸ Neither is such a defense

⁶³ Evidence held to show that subsequent creditors did not extend credit on the belief that certain stock was full paid, the corporate records having been such as to impart notice and there being a prior mortgage on file. *Durand v. Brown*, 236 Fed. 609.

⁶⁴ The policy of such laws, says the Virginia court, is to make persons dealing with corporations "look to the records of the State Corporation Commission for information there to be found, or suggested, as to the character, location and value of the assets of the corporation, and if they fail * * * they shall have no remedy." *Monk v. Barnett*, 113 Va. 635, 75 S. E. 185.

⁶⁵ Knowledge of its officer may be imputed to a corporation becoming a creditor of another inflated one. *Lea v. Iron Belt Mercantile Co.*, 147 Ala. 421, 8 L. R. A. (N. S.) 279, 119 Am. St. Rep. 93, 42 So. 415.

⁶⁶ Contract for selling the parent's products, which contract was turned over for stock in the subsidiary. *Farrell v. Davis*, — Ore. —, 161 Pac. 94.

⁶⁷ In Connecticut where the basis of liability is a legal obligation to pay

par value, notice and subsequence in time are not defenses. *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972.

⁶⁸ *Sprague v. National Bank of America*, 172 Ill. 149, 168, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, aff'g 66 Ill. App. 320: "The liability of the stockholder," said the court in this case, "is established by the statute for the purpose of securing to the creditor the benefit of the entire fund which, in the contemplation of the statute, will be created by subscriptions to the capital stock of the corporation. The right of a creditor to avail himself of this liability of a stockholder arises out of the fact the stockholder has not, as the statute requires, paid the full amount of his subscription to the capital stock of the corporation, and the right is in no wise impaired by the fact that the creditor knew, or did not know, the stockholder was in default." But see *Higgins v. Lansingh*, 154 Ill. 301, 40 N. E. 362.

As to unpaid balances covered by fictitious entries the creditor may recover without regard to when the debt accrued. (*Hurd's Rev. St.* 1908,

relevant if there is no allegation or issue that the stock was put out as full paid.⁶⁹

A creditor cannot enforce further payment by stockholders who have received watered or fictitiously paid up stock, if he has waived the right to do so by a special contract.⁷⁰

§ 3596. Measure and extent of liability to creditors—In general.

The holders of watered or fictitiously paid up stock are liable, for the benefit of creditors of the corporation, to such an extent only as may be necessary for the satisfaction of their claims.⁷¹ When the assets of a corporation are abundantly sufficient for the payment of the debts of the corporation, and have, either by law or by act of the corporation, been set apart and secured primarily for that purpose, stockholders cannot be required to pay up anything due on their subscriptions.⁷² Credit should be allowed for whatever was realized or paid in as corporate assets⁷³ and a set-off of advances may be allowed⁷⁴ or stated in another form, "if there is overvaluation of the property taken by the corporation for the stock, the stockholder is liable for the difference between the actual value and the accepted value of such property, and consequently his stock is regarded as unpaid stock to the extent of that difference."⁷⁵

c. 32, § 8, p. 526.) *Moore v. United States One Stave Barrel Co.*, 238 Ill. 544, 128 Am. St. Rep. 153, 87 N. E. 536, aff'g 141 Ill. App. 104.

⁶⁹ Unless there is issue and proof that stock was issued and held as full paid, this defense is irrelevant. *McAllister v. American Hospital Ass'n*, 62 Ore. 530, 125 Pac. 286.

⁷⁰ *Bush v. Robinson*, 95 Ky. 492, 26 S. W. 178. And see *infra*, this chapter.

⁷¹ See *Scoville v. Thayer*, 105 U. S. 143, 26 L. Ed. 968.

⁷² *Albitztigui v. Guadalupe y Caloo Min. Co.*, 92 Tenn. 598, 22 S. W. 739. See *infra*, this chapter, subd. xxxiii.

⁷³ Subscribers should be credited for whatever has been paid on the shares turned into the treasury to be sold with credit to them on sales. In *re Grand Rapids Furniture Agency*, 209 Fed. 483.

Money paid
capital should
Brown, 236 Fed.

sold to raise
J. Durand v.

Actual value should be credited. *Enright v. Heckscher*, 240 Fed. 863.

Just value will be credited. *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069.

Reasonable value may be credited. *Bellview Cemetery Co. v. Faulks*, — Ala. —, 73 So. 927.

Under Comp. Laws 1907, § 316, payments are not declared void if overvalued; and such payments may be credited at actual value, neither does allowance of such credits offend. Const. art. XII, § 5, forbidding issue except to bona fide subscribers, and for money or property received, etc. *Union Pac. R. Co. v. Blair*, — Utah —, 156 Pac. 948.

⁷⁴ A set-off for money advanced to the corporation. *Witt v. Nelson*, — Tex. Civ. App. —, 169 S. W. 381.

⁷⁵ *United States*. *Babbitt v. Read*, 215 Fed. 395.

California. *Harrison v. Armour*, 169 Cal. 787, 147 Pac. 1166.

Where stock is issued for property of equal value, and it is afterwards ascertained that the vendor had no title to a fractional part of the property, and the corporation purchases it from the true owner, the vendor is liable, not for the amount so paid by the corporation, but for the difference between the value of the property to which he had title and the face value of the stock at the time the stock was issued to him.⁷⁶ Interest should be added to the amount regarded as unpaid from the time when it should have been paid.⁷⁷ The liability is pro rata among the stockholders⁷⁸ to the extent of the stock legally

Illinois. *Coleman v. Howe*, 154 Ill. 458, 471, 45 Am. St. Rep. 133, 39 N. E. 725, aff'g 53 Ill. App. 82; *Fox v. Produce Cold Storage Exchange*, 192 Ill. App. 301; *De Shelter v. American Spring Water Supply Co.*, 182 Ill. App. 403; *Cohen v. Toy Gun Mfg. Co.*, 172 Ill. App. 330.

Kansas. *First Nat. Bank v. Northup*, 82 Kan. 638, 136 Am. St. Rep. 119, 109 Pac. 672.

Louisiana. *Webre v. Christ*, 130 La. 450, 58 So. 145.

Montana. *Kelly v. Clark*, 21 Mont. 291, 42 L. R. A. 621, 69 Am. St. Rep. 668, 53 Pac. 959.

Gross overvaluation, \$79,400 capital against \$15,000 of property and \$600 against \$300 in money. *Schneider v. Johnson*, 161 Mo. App. 375, 143 S. W. 78.

In a leading New Jersey case, five persons entered into a contract for the purchase of a tract of land for \$50,000, and organized a corporation to take the same. In the certificate of incorporation the capital stock was fixed at \$100,000, and these persons subscribed for the whole of it, and became the directors. The deed for the land was made directly to the corporation, and it gave its obligations for the whole purchase money. The directors then appraised the land at \$100,000, although it was not worth more than the purchase price of \$50,000, and credited \$50,000 of the valuation as a payment on the sub-

scriptions to the capital stock. In a suit by a creditor of the corporation it was held that, as against creditors, the allowance of the credit on subscriptions was invalid, and the stockholders were required to pay the subscriptions in full. *Wetherbee v. Baker*, 35 N. J. Eq. 501.

Difference between agreed price of the property and the par of the stock, where it was issued full paid for property agreed to be worth a sum below par. *First Nat. Bank v. Northup*, 82 Kan. 638, 136 Am. St. Rep. 119, 109 Pac. 672.

⁷⁶ *Jenkins v. Bradley*, 104 Wis. 540, 80 N. W. 1025.

⁷⁷ Interest should be included on the unpaid amount from date of action begun constituting a demand (dictum per Frick, J., not necessary because majority found nothing unpaid). *Union Pac. R. Co. v. Blair*, — Utah —, 156 Pac. 948.

In New Jersey the purchaser is liable for the full unpaid balance even if stock was issued as full paid to increase capital. *Enright v. Heckscher*, 240 Fed. 863. And for interest thereon from the time payment was due, to wit, in this case from time of receipt of the stock. *Id.*

⁷⁸ Where nothing was paid the holders are liable for their pro rata portion of the debts. *Rowan v. Texas Orchard Development Co.*, — Tex. Civ. App. —, 181 S. W. 871.

owned by them.⁷⁹ An assignee of a creditor may recover the face of the claim and not only the lesser amount which he paid for it.⁸⁰

§ 3597. — Effect of transfer on liability to creditors. The holder of watered or fictitiously paid up stock cannot escape liability to creditors by transferring the same to an irresponsible person or to a bona fide purchaser, and in some states he remains liable under all circumstances;⁸¹ and a person cannot be regarded as a transferee if in fact he took direct from the corporation after a colorable issue and surrender of the stock into the treasury,⁸² or by some other fiction.⁸³

Whether there is any liability on the part of the transferee depends upon whether he was a bona fide purchaser. If he purchased with notice, actual or constructive, that the stock was not in fact fully paid up, he is subject to the same liability as his transferrer; but he is not liable at all if he purchased without such notice.⁸⁴

⁷⁹ One who holds as legal owner and also some as equitable owner is liable only for what is unpaid on the former. *McAllister v. American Hospital Ass'n*, 62 Ore. 530, 125 Pac. 286.

⁸⁰ Assignees of creditors will not be scaled down to what they paid for their claims. *Gordon v. Cummings*, 78 Wash. 515, 139 Pac. 489.

⁸¹ *Sprague v. National Bank of America*, 172 Ill. 149, 42 L. R. A. 606, 64 Am. St. Rep. 17, 50 N. E. 19, aff'g 66 Ill. App. 320; *White v. Greene* (Iowa), 70 N. W. 182; *Wishard v. Hansen*, 99 Iowa 307, 61 Am. St. Rep. 238, 68 N. W. 691. And see *infra*, this chapter, subd. xxxiii.

⁸² Persons who took common stock as a bonus direct from the company without any intervening certificate cannot claim as transferees of promoters, who in fact turned it back into the treasury to be used as a bonus. *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618; aff'd 82 N. J. Eq. 364, 91 Atl. 1069.

Turning fraudulently void stock back into the treasury and thence selling it as full paid does not relieve the purchaser with notice. *Enright v. Heckscher*, 240 Fed. 863. Evidence

held to show that a director had notice. *Id.*

⁸³ The president became a subscriber where in the name of a fictitious person he gave forged bonds for stock and then transferred the stock in the fictitious name to himself. *Houston Fire & Marine Ins. Co. v. Swain*, — Tex. Civ. App. —, 114 S. W. 149.

⁸⁴ **United States.** *Steady v. Little Rock & Ft. S. R. Co.*, 5 Dill. 348, Fed. Cas. No. 13,329.

Illinois. *Coleman v. Howe*, 154 Ill. 458, 45 Am. St. Rep. 133, 39 N. E. 725, aff'g 53 Ill. App. 82.

Iowa. *Wishard v. Hansen*, 99 Iowa 307, 61 Am. St. Rep. 238, 68 N. W. 691.

Maryland. *Brant v. Ehlen*, 59 Md. 1.

Michigan. *Young v. Erie Iron Co.*, 65 Mich. 111, 31 N. W. 814.

Minnesota. *Wallace v. Carpenter Elec. Heating Mfg. Co.*, 70 Minn. 321, 68 Am. St. Rep. 530, 73 N. W. 189.

Tennessee. *West Nashville Planing-Mill Co. v. Nashville Sav. Bank*, 86 Tenn. 252, 6 Am. St. Rep. 835, 6 S. W. 340.

Washington. See *Davies v. Ball*, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

§ 3598. Remedies and procedure. The remedies applicable to obtain redress where stock is watered or underpaid are the ordinary remedies available to the corporation, its members or its creditors, and other appropriate chapters of this work dealing with such remedies in their general aspects should be consulted.⁸⁵ In the absence of a statute, the remedy of creditors of a corporation to compel payment by holders of watered or fictitiously paid up stock is in equity, and he cannot, nor can a receiver, maintain an action at law directly against the stockholders.⁸⁶ In some jurisdictions, however, there are statutes which allow a creditor in such a case to maintain an action at law against a stockholder, or to levy an execution under a judgment against the corporation.⁸⁷ Underpaid subscriptions may be recovered in an

And see *infra*, this chapter, subd. XXXIII.

A purchaser in the open market is not liable. *Bonet Const. Co. v. Central Amusement Co.*, 153 Mo. App. 185, 132 S. W. 270.

Overvaluation is not imported by the mere fact that stock was treasury stock. Evidence held not to show notice to transferee of overvaluation though he was a director with access to books. *Davies v. Ball*, 64 Wash. 292, Ann. Cas. 1914 B 750, 116 Pac. 833.

Where the certificates bought from a broker did not recite full payment or nonassessability but did disclose that three shares of common was a bonus for each one of preferred, the taker had notice. *Gordon v. Cummings*, 78 Wash. 515, 139 Pac. 489.

Holders of underpaid stock who knew that the subscriber took it at a fraudulent overvaluation, all being incorporators, are liable to creditors on what they took from such subscriber. *Schneider v. Johnson*, 161 Mo. App. 375, 143 S. W. 78.

Payments by transferees before actual delivery of stock and bonds does not impute notice to the purchaser beyond the fact that they are not yet ready for delivery. Creditors cannot look to such holders for underpayment. *Babbitt v. Read*, 215 Fed. 395.

Under a statute requiring the corporation upon organization to file a certificate that its stock has been fully paid in, and providing that stockholders shall be liable individually in an amount equal to the amount of stock held by them until the entire capital stock has been paid in, it has been held that a purchaser of the stock before the certificate has been filed may be held liable where the stock was issued in exchange for property at an overvaluation, although the purchaser took the stock without knowledge of such fact. *White, Corbin & Co. v. Jones*, 167 N. Y. 158, 60 N. E. 422.

⁸⁵ As to remedies of creditors in general, see *infra*, this chapter, subd. XXXIII.

As to remedies founded on the contract of subscription, or for breach thereof, see Chap. 17, *supra*.

As to remedies of stockholders, individually or in the corporate right, see other portions of this chapter, and Chaps. 42 and 43, *supra*.

⁸⁶ *First Nat. Bank of Sioux City v. Peavey*, 69 Fed. 455; *Thomson-Houston Elec. Co. v. Dallas Consol. Traction Ry. Co.*, 54 Fed. 1001; *Coffin v. Ransdell*, 110 Ind. 417, 11 N. E. 20.

⁸⁷ *National Park Bank v. Peavey*, 64 Fed. 912 (under the Iowa statute); *Chisholm Bros. v. Forny*, 65 Iowa 333,

action *ex contractu*⁸⁸ and where it is *ex contractu*, and therefore a part of the corporate assets, a trustee in bankruptcy of the corporation⁸⁹ may maintain an action to recover the balance, but if it stands as full paid towards the corporation, which therefore cannot sue, then the action, if any, must be brought by the creditor himself,⁹⁰ or a receiver may sue under a statutory right.⁹¹ Under the New Jersey law a receiver may sue for the unpaid sum without annulment of a full paid certificate,⁹² but the suit cannot be at law until chancery has ascertained the amount due.⁹³ The action may be brought in a foreign state, applying the procedural law of the forum and the substantive law of the domicile⁹⁴ if the liability is not exclusively by a statutory remedy.⁹⁵ The creditors' remedy accrues and limitations run from

21 N. W. 664; *Barron v. Burrill*, 86 Me. 66, 29 Atl. 939; *Libby v. Tobey*, 82 Me. 397, 19 Atl. 904. See *infra*, this chapter, subd. XXXIII.

⁸⁸ The action against a stockholder by or in right of the corporation for the amount underpaid sounds in contract. *Lamphere v. Lang*, 213 N. Y. 585, 108 N. E. 82, rev'g 157 N. Y. App. Div. 306, 141 N. Y. Supp. 967; *Southworth v. Morgan*, 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490; *Christensen v. Colby*, 110 N. Y. 660, 18 N. E. 480; *Christensen v. Eno*, 106 N. Y. 97, 60 Am. Rep. 429, 12 N. E. 648.

⁸⁹ *Babbitt v. Read*, 215 Fed. 395; *Bernard v. Carr*, 167 N. C. 481, 83 S. E. 816; *Southworth v. Morgan*, 143 N. Y. App. Div. 648, 128 N. Y. Supp. 196, aff'g 71 N. Y. Misc. 214, 128 N. Y. Supp. 598, and rev'd 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490.

The trustee can enforce only what the bankrupt could. *Sternbergh v. Duryea Power Co.*, 161 Fed. 540.

One who took under a contract for fraudulent valuation is liable to trustee in bankruptcy. *Enright v. Heckscher*, 240 Fed. 863.

⁹⁰ When stock stands as full paid the receiver cannot sue and creditors, if they wish to enforce liability must themselves sue stockholders. *Reel v. Brammer*, 56 Ind. App. 180, 101 N. E. 1043.

⁹¹ *Gilson v. Appleby*, 82 N. J. L. 400, 81 Atl. 724, aff'g order 80 N. J. L. 542, 77 Atl. 1084.

See New Jersey statute explained in *Manufacturers' Commercial Co. v. Heckscher*, 144 N. Y. App. Div. 601, 129 N. Y. Supp. 566.

⁹² The receiver may sue for the underpaid amount without annulment of the certificate, for its acceptance when issued as full paid is a contract for full payment. *Gilson v. Appleby*, 82 N. J. L. 400, 81 Atl. 724, aff'g order 80 N. J. L. 542, 77 Atl. 1084.

⁹³ A receiver cannot sue at law by attachment as on a debt until the amount due is ascertained by chancery on the underpaid stock. *Gilson v. Appleby*, 80 N. J. L. 542, 77 Atl. 1084, aff'd 82 N. J. L. 400, 81 Atl. 724.

⁹⁴ A contractual liability can be enforced in another state by its remedies. *McDermott v. Woodhouse* (N. J. Ch.), 99 Atl. 103.

The law of the domicile fixes liability to be enforced by the law of the forum. *Johnson v. Tennessee Oil, etc., Co.*, 74 N. J. Eq. 32, 69 Atl. 788.

⁹⁵ Where the remedy by statute of the domicile is not exclusive, a common-law action in another state will lie on the contract of subscription. *Southworth v. Morgan*, 71 N. Y. Misc. 214, 128 N. Y. Supp. 598, aff'd 143 N. Y. App. Div. 648, 128 N. Y. Supp.

insolvency⁹⁶ and that of the trustee in bankruptcy from demand by him.⁹⁷ In the case of a gratuitous issue to a director either action for conversion or on implied contract for the value will lie.⁹⁸ The complaint should plainly aver that full value was not received if a payment in property is impeached.⁹⁹ It is a variance to sue on the subscription alleging nothing paid, and to prove a wrongful taking of the stock without payment.¹ Invalidity is a legal defense in an action on the subscription.² A suit in chancery may be put over to take proofs as to who are stockholders and what credits should be allowed.³ No inquiry as to value paid is necessary under the Connecticut statute, if in fact it appears that nothing was paid.⁴

The remedy by cancellation is available to the corporation or stockholders suing in its right.⁵ The stockholder's remedy should be by in-

196, and rev'd 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490.

Under the New Jersey law, unlike the New York law (New Jersey Revision of 1896, tit. Corporations, § 21 et seq., N. Y. Stock Corp. Law, §§ 55, 56, 59) the corporation or its trustee in bankruptcy has the right to recover the underpaid portion, and creditors cannot sue. Hence the New York courts will not sustain a suit by a creditor. *Manufacturers' Commercial Co. v. Heckscher*, 144 N. Y. App. Div. 601, 129 N. Y. Supp. 566.

⁹⁶ *Vaughn v. Alabama Nat. Bank*, 143 Ala. 572, 5 Ann. Cas. 665, 42 So. 64.

⁹⁷ *Southworth v. Morgan*, 143 N. Y. App. Div. 648, 128 N. Y. Supp. 196, aff'g 71 N. Y. Misc. 214, 128 N. Y. Supp. 598, rev'd 205 N. Y. 293, 51 L. R. A. (N. S.) 56, 98 N. E. 490.

⁹⁸ *Lamphere v. Lang*, 157 N. Y. App. Div. 306, 141 N. Y. Supp. 967.

⁹⁹ To impeach a payment of stock for construction work or property, there must be an unequivocal allegation that it was not so issued in payment, or else some fact from which it may be inferred that full value was not received. *Bostwick v. Young*, 118 N. Y. App. Div. 490, 103 N. Y. Supp. 607, aff'd 194 N. Y. 516, 87 N. E. 1115.

¹ Allegations of fraud in issuing the

stock are surplusage in such an action and will not sustain such proof. *Lamphere v. Lang*, 213 N. Y. 585, 108 N. E. 82, rev'g 157 N. Y. App. Div. 306, 141 N. Y. Supp. 967.

² The defense of invalidity by a stockholder sued by the corporation for subscription is good at law. *Trent Import Co. v. Wheelwright*, 118 Md. 249, 84 Atl. 543.

³ On a receiver's suit. *Holcombe v. Trenton White City Co.*, 80 N. J. Eq. 122, 82 Atl. 618, aff'd 82 N. J. Eq. 364, 91 Atl. 1069.

⁴ When the statutory statement by the directors descriptive of property and valuations is not spread on the record book (Connecticut P. A. 1903, c. 194, § 12), and the records show that nothing was delivered, it is not material to inquire whether any part was unpaid, all being in fact unpaid. *Rosoff v. Gilbert Transp. Co.*, 221 Fed. 972.

⁵ Action to cancel stock issued for fraudulently overvalued property, the corporation being defrauded, is in it; or if it refuses to sue, in a stockholder suing for it. *Howard v. National Tel. Co.*, 182 Fed. 215; *Brahm v. M. C. Gehl Co.*, 132 Wis. 674, 112 N. W. 1097.

A receiver may be appointed if necessary to preserve the property against the illegal holders. *Ellis v.*

junction to prevent rather than by suit to cancel an issue.⁶ An injunction bill by the attorney general will lie if the performance of public duties is jeopardized by an inflated issue⁷ or quo warranto may lie.⁸ An issue may be cancelled, though it is part of a transaction in which another but separable issue was put out.⁹ In the case of actual fraud a cancellation suit as well as an action for the fraud may lie.¹⁰ Invalidity of the stock must be alleged in such a suit.¹¹ A cancellation decree should not essay the disposal of secret formulae, when there is no issue as to ownership or need to decide that question.¹²

In an action against the corporation for refusal to issue stock for services, it must be alleged that they were for the corporation.¹³ The defense of illegality in such an action may be invoked by the court though not pleaded.¹⁴

Penn Beef Co., 9 Del. Ch. 213, 80 Atl. 666.

⁶ The stockholders' remedy is to enjoin issuance for an unlawful purpose rather than by suit to cancel on that ground, although it was alleged also, untenably, that there was a fraudulent overvaluation. *Southwestern Portland Cement Co. v. Latta & Happer*, — Tex. Civ. App. —, 193 S. W. 1115.

⁷ An information in equity by the attorney general will lie to enjoin issues by public utility companies contrary to law and on an overvaluation which may impede them in discharge of their public duties (sufficiency of pleadings examined). *McCarter v. Pitman, Glassboro & Clayton Gas Co.*, 74 N. J. Eq. 255, 69 Atl. 211.

⁸ Quo warranto lies where a corporation was formed merely to take over another's stock and put out its own at a fictitious value. *State v. Citizens Light & Power Co.*, 172 Ala. 232, 55 So. 193.

⁹ *Tooker v. National Sugar Refining Co. of New Jersey*, 80 N. J. Eq. 305, 84 Atl. 10.

¹⁰ Where there were false representations as to the existence or value of property for which stock was issued, there may be a cause of action for fraud in addition to one for cancella-

tion of nonpaid stock. *Shaw v. Staight*, 107 Minn. 152, 20 L. R. A. (N. S.) 1077, 119 N. W. 951.

¹¹ Complaint in stockholders' suit to cancel fictitious stock obnoxious to Const. § 234, held sufficient to allege fictitiousness. *Crow v. Florence Ice & Coal Co.*, 143 Ala. 541, 39 So. 401.

¹² On cancelling stock by requiring its surrender, a further direction to deliver up secret formulae for which it was issued is improper where no issue as to ownership of them is made and defendant having voluntarily surrendered the stock claims them. *Brewster v. F. G. Brewster Co.*, 145 N. Y. App. Div. 812, 130 N. Y. Supp. 654, modified 204 N. Y. 687, 98 N. E. 1099.

¹³ A contract with the corporation to issue stock for labor to be done in future must be alleged to sustain recovery for refusal to issue such stock. It cannot lie against the corporation on such a contract with promoters, it being unlawful. *Morgan v. Bon Bon Co.*, 165 N. Y. App. Div. 89, 150 N. Y. Supp. 668.

¹⁴ In an action for failure to issue stock which would have been illegal the court should refuse to enforce the contract even though the corporation did not plead illegality. *Rogers v. Gladiator Gold Mining & Milling Co.*, 21 S. D. 412, 113 N. W. 86.

XIII. LIEN OF CORPORATION ON SHARES

§ 3599. **In the absence of express provisions or agreement.** It is well settled that, in the absence of an express charter or statutory provision, or a valid by-law, or an agreement, a corporation has no lien upon the shares of its stock for debts which may be due to it from the stockholders; and a bona fide transfer of shares is therefore valid as against the corporation, where there is no provision or agreement for a lien, notwithstanding any claim it may have against the transferrer, whether the claim is for a balance due on the stock, or for a loan or other indebtedness.¹⁵ This is true even when the transfer is to an

15 United States. *Case v. Citizens' Bank of Louisiana*, 100 U. S. 446, 25 L. Ed. 695; *First Nat. Bank of South Bend v. Lanier*, 11 Wall. 369, 20 L. Ed. 172; *In re W. W. Mills Co.*, 162 Fed. 42; *New Orleans Nat. Banking Ass'n v. P. S. Wiltz & Co.*, 10 Fed. 330; *Neale v. Janney*, 2 Cranch C. C. 188, Fed. Cas. No. 10,069.

Alabama. *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 So. 228; *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558; *Spence v. Whitaker*, 3 Port. 297.

Arkansas. *Bankers' Trust Co. of St. Louis v. McCloy*, 109 Ark. 160, 47 L. R. A. (N. S.) 333, 159 S. W. 205.

California. *Lankershin Ranch Land & Water Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134; *People v. Crockett*, 9 Cal. 112.

Colorado. *Central Sav. Bank v. Smith*, 43 Colo. 90, 95 Pac. 307.

Connecticut. *Vansands v. Middlesex County Bank*, 26 Conn. 144.

Iowa. *Jewell v. Nuhn*, 138 N. W. 457; *Dempster Mfg. Co. v. Downs*, 126 Iowa 80, 106 Am. St. Rep. 340, 3 Ann. Cas. 187, 101 N. W. 735; *Farmers' & Merchants' Bank v. Wasson*, 48 Iowa 336, 30 Am. Rep. 398.

Kentucky. *Dana v. Brown*, 1 J. J. Marsh. (Ky.) 304; *Fitzhugh v. Bank of Shepherdsville*, 3 T. B. Mon. (Ky.) 126, 16 Am. Dec. 90.

Louisiana. *Bryon v. Carter*, 22 La. Ann. 98; *New Orleans Nat. Banking*

Ass'n v. P. S. Wiltz & Co., 10 Fed. 330.

Maine. See *Hagar v. Union Nat. Bank*, 63 Me. 509.

Maryland. *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032.

Massachusetts. *Massachusetts Iron Co. v. Hooper*, 7 Cush. 183; *Sargent v. Franklin Ins. Co.*, 8 Pick. 90, 19 Am. Dec. 306.

Mississippi. *Bank of Holly Springs v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330.

Missouri. *Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co.*, 118 Mo. 447, 24 S. W. 129; *Bank of Atchison County v. Durfee*, 118 Mo. 431, 40 Am. St. Rep. 396, 24 S. W. 133; *Carroll v. Mullanphy Sav. Bank*, 8 Mo. App. 249.

Nebraska. *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685; *Williams v. Lowe*, 4 Neb. 382.

New York. *Driscoll v. West, Bradley & Cary Mfg. Co.*, 59 N. Y. 96; *Bank of Attica v. Manufacturers' & Traders' Bank*, 20 N. Y. 501; *Union Bank of Brooklyn v. United States Exch. Bank*, 143 App. Div. 128, 127 N. Y. Supp. 661; *Bates v. New York Ins. Co.*, 3 Johns. Cas. 238; *Godfrey v. Pell*, 49 N. Y. Super. Ct. 226.

North Carolina. *Boyd v. Redd*, 120 N. C. 335, 58 Am. St. Rep. 792, 27 S.

officer of the corporation, if it is made in good faith, and the officer is guilty of no breach of trust.¹⁶

§ 3600. Liens under charter or statutory provisions. Corporate charters and general statutes frequently give corporations a lien on their shares for debts due them from their stockholders, either in express terms or by necessary implication.¹⁷ And a lien may also be

E. 35; *Heart v. State Bank*, 17 N. C. 111.

Pennsylvania. *Merchants' Bank v. Shouse*, 102 Pa. St. 488; *Steamship Dock Co. v. Heron's Adm'r*, 52 Pa. St. 280.

Texas. *First State Bank of Montgomery v. First Nat. Bank of Navasota*, — Tex. Civ. App. —, 145 S. W. 691.

Washington. *Dearborn v. Washington Sav. Bank*, 18 Wash. 8, 50 Pac. 575.

"The mere fact that the owner of the stock is indebted to the corporation does not prohibit the sale of the stock, because the corporation has no lien upon its shares which it can assert against its stockholder restraining a free alienation of them." *Central Sav. Bank v. Smith*, 43 Colo. 90, 95 Pac. 307.

"When the rights of third persons, accruing by purchase from the shareholder intervened, the recognition of such a lien, or equity, would have offended the rigid rules of the common law guarding against secret trusts." *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558.

¹⁶ In an Iowa case, the president of a bank, who was surety on a note of an insolvent stockholder to a third person, took a transfer of his stock as indemnity, the stockholder being also indebted to the bank. It was held that, in the absence of fraud or concealment, the transfer was valid, and that the bank had no equitable lien on the stock. *Farmers' & Merchants' Bank v. Wasson*, 48 Iowa 336, 30 Am. Rep. 398.

¹⁷ **Alabama.** *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 So. 228; *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558.

Arkansas. *Bank of Searcy v. Merchants' Grocer Co.*, 123 Ark. 403, 185 S. W. 806; *Red Bud Realty Co. v. South*, 96 Ark. 281, 131 S. W. 340; *Springfield Wagon Co. v. Bank of Batesville*, 68 Ark. 234, 57 S. W. 257; *McIlroy Banking Co. v. Dickson*, 66 Ark. 327, 50 S. W. 868; *Curtice v. Crawford County Bank*, 118 Fed. 390, modifying judgment 110 Fed. 830.

Georgia. *People's Bank of Talbotton v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269.

Kentucky. *Bank of Kentucky v. Bonnie*, 102 Ky. 343, 43 S. W. 407.

Minnesota. *Dorr v. Life Ins. Clearing Co.*, 71 Minn. 38, 70 Am. St. Rep. 309, 73 N. W. 635; *Prince Inv. Co. v. St. Paul & S. C. L. Co.*, 68 Minn. 121, 70 N. W. 1079.

Oklahoma. *Farmers' & Merchants' Bank of Kiel v. Cherokee Trust Co.*, 32 Okla. 700, 123 Pac. 153; *Ardmore State Bank v. Mason*, 30 Okla. 568, 39 L. R. A. (N. S.) 292, 120 Pac. 1080; *Eubank v. Bryan County State Bank of Caddo, Oklahoma*, 216 Fed. 833.

Rhode Island. *Cross v. Phenix Bank*, 1 R. I. 39.

Texas. *First State Bank of Montgomery v. First Nat. Bank of Navasota*, — Tex. Civ. App. —, 145 S. W. 691.

Virginia. *Bohmer & Osterloh v. City Bank*, 77 Va. 445.

In Pennsylvania prior to 1895 corporations were given a lien; but the

given by a provision in the articles of association, if such a provision is not contrary to the charter of general law.¹⁸

Whether a lien is given by a particular provision is, of course, a question of construction. Where the stock is transferable only upon the books of the company, it is generally held that a lien is given by a provision that all debts due to the corporation must be satisfied or paid before a transfer is registered;¹⁹ although there is some authority

Act of June 24, 1895, P. L. 258, gives an absolute right of sale to stockholders of corporations which is inconsistent with any right of corporations subject to its provisions to refuse a transfer or retain the stock of a stockholder indebted to it.

The provision of Act of May 13, 1876, P. L. 161, § 21, giving a lien to state banks is repealed by Act of June 24, 1895, P. L. 258. *Bank of Millvale v. Ohio Valley Bank*, 234 Pa. 1, 82 Atl. 1115.

The act operates to repeal a previous statute giving a lien as respects future transactions, but has no retroactive effect, so as to deprive a corporation of its lien for a debt contracted prior to its passage. *Sproul v. Standard Plate Glass Co.*, 201 Pa. 103, 50 Atl. 1003.

In Louisiana a corporation formed under a general law containing no provision for a lien cannot be given a lien by its charter. *New Orleans Nat. Banking Ass'n v. P. S. Wiltz & Co.*, 10 Fed. 330.

In *Pitot v. Johnson*, 33 La. Ann. 1286, it is held that a pledge of stock may be perfected by a simple delivery of the certificate without notice to the corporation, the lien of a pledgee is superior to the lien of a corporation under its charter for an indebtedness arising after the date of the pledge but before the corporation had notice of it.

In *Stafford v. Produce Exch. Banking Co.*, 61 Ohio St. 160, 76 Am. St. Rep. 371, 55 N. E. 162, it is said with respect to *Pitot v. Johnson* that there

is in that case "no such statement of the facts as will disclose the precise point decided,—that the conclusion depended upon provisions of the civil code, and that the court felt constrained to follow former decisions whose correctness it more than doubted."

A lien on its shares given by the charter of a corporation or a general law is valid and enforceable in other states as against residents thereof who purchase shares. *Hammond v. Hastings*, 134 U. S. 401, 33 L. Ed. 960; *Bishop v. Globe Co.*, 135 Mass. 132.

A lien given by a bank charter is not intended for the security of indorsers. *Cross v. Phenix Bank*, 1 R. I. 39.

See also the statutes of the various states and the cases cited in the following notes.

18 United States. *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, 194 Fed. 947.

Iowa. *Jewell v. Nuhn*, 138 N. W. 457.

New York. *Leggett v. Bank of Sing Sing*, 24 N. Y. 283; *Gibbs v. Long Island Bank*, 83 Hun 92, 31 N. Y. Supp. 406; *Mohawk Nat. Bank of Schenectady v. Schenectady Bank*, 78 Hun 90, 28 N. Y. Supp. 1100; *Arnold v. Suffolk Bank*, 27 Barb. 424.

Virginia. *United Cigarette Mach. Co. v. Brown*, 119 Va. 813, L. R. A. 1917 F 1100, 89 S. E. 850.

England. See *In re National Bank of Wales*, [1899] 2 Ch. 629.

19 United States. *Brent v. Bank of Washington*, 10 Pet. 596, 9 L. Ed. 547;

to the contrary.²⁰ It has been held that such a provision gives a lien when taken with a further provision giving the corporation authority to sell the stock and apply the proceeds to the payment of the indebtedness.²¹ A provision that the board of directors may at its option

Union Bank of Georgetown v. Laird, 2 Wheat. 390, 4 L. Ed. 269.

Kansas. *Madison Bank v. Price*, 79 Kan. 289, 100 Pac. 280; *Faulkner v. Bank of Topeka*, 77 Kan. 385, 94 Pac. 153; *Battley v. Eureka Bank*, 62 Kan. 384, 63 Pac. 437.

Kentucky. *Kenton Ins. Co. v. Bowman*, 84 Ky. 430, 1 S. W. 717.

Maryland. *Reese v. Bank of Commerce*, 14 Md. 271, 74 Am. Dec. 536; *In re Farmers' Bank of Maryland*, 2 Bland 394; *Farmers' Bank v. Iglehart*, 6 Gill 50.

Michigan. *Brinen v. Muskegon Sav. Bank*, 174 Mich. 414, 140 N. W. 529; *Oakland County Sav. Bank v. State Bank of Carson City*, 113 Mich. 284, 67 Am. St. Rep. 463, 71 N. W. 453; *Citizens' State Bank of Monroe v. Kalamazoo County Bank*, 111 Mich. 313, 69 N. W. 663; *Michigan Trust Co. v. State Bank of Michigan*, 111 Mich. 306, 69 N. W. 645.

Minnesota. *United States & C. Land Co. v. Sullivan*, 113 Minn. 27, Ann. Cas. 1912 A 51, 128 N. W. 1112.

New York. *Bank of Utica v. Smalley & Barnard*, 2 Cow. 770, 14 Am. Dec. 526, aff'd 8 Cow. 398.

Ohio. *Conant, Ellis & Co. v. Reed*, 1 Ohio St. 298.

Oklahoma. *Farmers' & Merchants' Bank of Kiel v. Cherokee Trust Co.*, 32 Okla. 700, 123 Pac. 153.

Pennsylvania. *National Bank of Republic of New York v. Rochester Tumbler Co.*, 172 Pa. St. 614, 33 Atl. 748; *Mount Holly Paper Co.'s Appeal*, 99 Pa. St. 513; *Klopp & Stump v. Lebanon Bank*, 46 Pa. St. 88; *Pittsburgh & C. R. Co. v. Clarke & Thaw*, 29 Pa. St. 146; *Sewall v. Lancaster Bank*, 17 Serg. & R. 285; *Grant v. Mechanics' Bank of Philadelphia*, 15 Serg. & R. 140.

A provision of the articles of incorporation that "no shares shall be transferable on which any calls for installment of capital, or any interest on such installment, shall remain unpaid, or in which any shareholder is indebted to the bank, either as drawer or endorser, or as security for any payment due the bank, unless the majority of the board of directors consent thereto," gives the bank a lien on the stock in the cases named. *Lyman v. State Bank of Randolph*, 81 N. Y. App. Div. 367, 80 N. Y. Supp. 901, aff'd 179 N. Y. 577, 72 N. E. 1145.

A provision that certificates of stock shall not be transferred while the owner thereof is indebted to the corporation unless the directors consent thereto gives what is practically equivalent to a lien in the negative power to refuse a transfer. *Sproul v. Standard Plate Glass Co.*, 201 Pa. 103, 50 Atl. 1003.

²⁰ A provision that if a stockholder shall be indebted to the corporation the directors may refuse to consent to a transfer of his stock until such indebtedness is paid provided a copy of the statute is written or printed upon the certificate of stock, does not give or purport to give a lien on the stock of the indebted stockholder, but is merely a provision for the coercion of the payment of such an indebtedness as a condition of being able to effect a sale of the stock which will be recognized by the corporation and transferred on its books. *Strahmann v. Yorkville Bank*, 148 N. Y. App. Div. 8, 132 N. Y. Supp. 130, aff'd 210 N. Y. 536, 103 N. E. 1133.

²¹ *Arnold v. Suffolk Bank*, 27 Barb. (N. Y.) 424.

retain the dividends and prohibit the transfer of the stock belonging to any stockholder who may be indebted to the company does not itself create a lien, but merely gives the option to create one, and until that option is exercised no lien is created.²² It has been held that a statute authorizing a corporation to sell a stockholder's shares in case of nonpayment of assessments gives the corporation a lien on the shares for unpaid assessments,²³ but there are decisions to the contrary.²⁴

A provision that shares shall be transferable only on the books of the corporation does not give it a lien;²⁵ nor does a provision that "except as against the claims of the corporation" a transfer of stock does not require a transfer on the books of the company.²⁶ Nor is a lien for unpaid assessments created by charter provisions that the amount due by subscribers for unpaid stock shall be a fund for the payment of corporate debts, that the transfer of stock by a subscriber shall not relieve him from payment, and that, on failure of a subscriber to pay for stock when payment is due, the corporation may maintain an action against him.²⁷

Statutes giving liens have been held not to apply to corporations created before their enactment.²⁸ And it has been held that such a statute is invalid in so far as it applies to a corporation previously

²² *Perrine v. Fireman's Ins. Co.*, 22 Ala. 575.

²³ *Ripley v. Sampson*, 10 Pick. (Mass.) 371.

Although a statute providing for assessment of the stockholders of banks to make up impaired capital does not in terms give the corporation a lien for the amount of the assessment, a lien follows as a necessary incident of the statutory right to make the assessment and to enforce it by a sale of the stock. *Corbin Banking Co. v. Mitchell*, 141 Ky. 172, 31 L. R. A. (N. S.) 446, 132 S. W. 426.

²⁴ *Dearborn v. Washington Sav. Bank*, 18 Wash. 8, 50 Pac. 575.

²⁵ *First State Bank of Montgomery v. First Nat. Bank of Navasota*, — Tex. Civ. App. —, 145 S. W. 691.

²⁶ *Buena Vista Loan & Savings Bank v. Grier*, 114 Ga. 398, 40 S. E. 284.

²⁷ *Ingles Land Co. v. Knoxville Fire*

Ins. Co. (Tenn.), 53 S. W. 1111.

²⁸ In the Georgia Act of October 21, 1891, § 1, providing that all banking companies hereafter chartered shall have the powers hereinafter specified, the word "hereafter" is not to be construed as rendering the fourth section, as amended December 20, 1893, whereby liens are created in favor of banking companies for debts of stockholders on stock held by them, operative as to stock issued by a banking company chartered under the Act of 1891 prior to the said amendment. *Southern Banking & Trust Co. v. Fidelity Banking & Trust Co.*, 105 Ga. 487, 33 S. E. 639.

In *In re W. W. Mills Co.*, 162 Fed. 42, a general law of North Carolina giving a lien to corporations was held not to apply to a trust company chartered by a private act before its enactment.

chartered under a private act imposing no restrictions on the right of its stockholders to dispose of their shares, since it interferes with the right of disposition which is inherent in the right of ownership, and which is secured to every stockholder by his contract of subscription, and hence impairs a contract obligation.²⁹

Where a lien is given by the charter or a statute,³⁰ or by a valid

²⁹ *In re W. W. Mills Co.*, 162 Fed. 42, 54.

³⁰ **United States.** *Hammond v. Hastings*, 134 U. S. 401, 33 L. Ed. 960; *Brent v. Bank of Washington*, 10 Pet. 596, 9 L. Ed. 547; *Union Bank of Georgetown v. Laird*, 2 Wheat. 390, 4 L. Ed. 269; *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, 194 Fed. 947; *Bank of Commerce v. Bank of Newport*, 63 Fed. 898.

Alabama. *Birmingham Trust & Savings Co. v. East Lake Land Co.*, 101 Ala. 304, 13 So. 72; *Mobile Mut. Ins. Co. v. Cullom*, 49 Ala. 558.

Arkansas. *Bank of Searcy v. Merchants' Grocer Co.*, 123 Ark. 403, 185 S. W. 806; *Bankers' Trust Co. of St. Louis v. McCloy*, 109 Ark. 160, 47 L. R. A. (N. S.) 333, 159 S. W. 205; *Springfield Wagon Co. v. Bank of Batesville*, 68 Ark. 234, 57 S. W. 257; *Oliphint v. Bank of Commerce*, 60 Ark. 198, 29 S. W. 460.

Connecticut. *First Nat. Bank of Hartford v. Hartford Life & Annuity Ins. Co.*, 45 Conn. 22.

Iowa. See *Dempster Mfg. Co. v. Downs*, 126 Iowa 80, 106 Am. St. Rep. 340, 3 Ann. Cas. 187, 101 N. W. 735.

Kentucky. *Corbin Banking Co. v. Mitchell*, 141 Ky. 172, 31 L. R. A. (N. S.) 446, 132 S. W. 426; *Kenton Ins. Co. v. Bowman*, 84 Ky. 430, 1 S. W. 717; *German Nat. Bank v. Kentucky Trust Co. of Louisville*, 19 Ky. L. Rep. 361, 40 S. W. 458; *German Security Bank v. Jefferson*, 10 Bush 326.

Maryland. *Reese v. Bank of Commerce*, 14 Md. 271, 74 Am. Dec. 536;

Farmers' Bank v. Iglehart, 6 Gill 50. **Massachusetts.** *Bishop v. Globe Co.*, 135 Mass. 132.

Michigan. *Russel Wheel & Foundry Co. v. Hammond, Standish & Co.*, 130 Mich. 7, 89 N. W. 590; *Oakland County Sav. Bank v. State Bank of Carson City*, 113 Mich. 284, 67 Am. St. Rep. 463, 71 N. W. 453; *Citizens' State Bank of Monroe v. Kalamazoo County Bank*, 111 Mich. 313, 69 N. W. 663; *Michigan Trust Co. v. State Bank of Michigan*, 111 Mich. 306, 69 N. W. 645.

Minnesota. *Dorr v. Life Insurance Clearing Co.*, 71 Minn. 38, 70 Am. St. Rep. 309, 73 N. W. 635; *Schmidt v. Hennepin County Barrel Co.*, 35 Minn. 511, 29 N. W. 200.

Ohio. *Conant, Ellis & Co. v. Reed*, 1 Ohio St. 298.

Pennsylvania. *National Bank of Republic of New York v. Rochester Tumbler Co.*, 172 Pa. St. 614, 33 Atl. 748; *Mount Holly Paper Co.'s Appeal*, 99 Pa. St. 513; *Pittsburgh & C. R. Co. v. Clarke & Thaw*, 29 Pa. St. 146.

South Carolina. *Hampton & B. Railroad & Lumber Co. v. Bank of Charleston*, 48 S. C. 120, 26 S. E. 238.

Virginia. *Bohmer & Osterloh v. City Bank*, 77 Va. 445.

Wisconsin. *H. W. Wright Lumber Co. v. Hixon*, 105 Wis. 153, 80 N. W. 110, 1135.

"The assignee, or whoever succeeds to the rights of the shareholder, takes the stock subject to the lien of the corporation. * * * The assignee stands in the relation of one acquiring a thing not negotiable, and his right is subject to the prior right of the

provision in the articles of incorporation,³¹ all persons who purchase shares in the corporation are chargeable with notice of the provision, and the corporation has a lien, not only as against the stockholders and transferees with notice, but also as against bona fide purchasers or pledgees without actual notice, unless it waives the lien, or is estopped by its conduct from asserting the same.³²

In the absence of a waiver or estoppel, the corporation may assert its lien as against a purchaser of the stock at an execution sale under a judgment against the stockholder.³³

When a lien upon shares is given to a corporation by statute, no notice of the lien need be given in the certificate of stock, unless this is required by the statute.³⁴ But of course a statutory provision requiring such a notice must be complied with.³⁵

corporation to charge the stock with the debts due or contracted by the assignee, before notice of the assignment." *Mobile Mut. Ins. Co. v. Cul- lom*, 49 Ala. 558.

³¹ *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, 194 Fed. 947; *Dempster Mfg. Co. v. Downs*, 126 Iowa 80, 106 Am. St. Rep. 340, 3 Ann. Cas. 187, 101 N. W. 735. See also *United Cigarette Mach. Co. v. Brown*, 119 Va. 813, L. R. A. 1917 F 1100, 89 S. E. 850.

"The corporation is created by the adoption of the articles. These form the very basis of its existence. Everyone who deals with it or its stock is charged with knowledge of their contents." *Dempster Mfg. Co. v. Downs*, 126 Iowa 80, 106 Am. St. Rep. 340, 3 Ann. Cas. 187, 101 N. W. 735.

³² See § 3620, *infra*.

³³ *Springfield Wagon Co. v. Bank of Batesville*, 68 Ark. 234, 57 S. W. 257; *Oliphint v. Bank of Commerce*, 60 Ark. 198, 29 S. W. 460; *Newberry v. Detroit & L. S. Iron Mfg. Co.*, 17 Mich. 141; *Schmidt v. Hennepin County Barrel Co.*, 35 Minn. 511, 29 N. W. 200.

A provision that statutory provisions for the enforcement of a bank's lien shall not affect "any lien or right of any other party by virtue

of any attachment or levy of execution upon the stock of any stockholder in any such corporation" merely means that the bank's lien shall not affect prior liens upon the stock, and does not give execution creditors priority in all cases. *Springfield Wagon Co. v. Bank of Batesville*, 68 Ark. 234, 57 S. W. 257.

Under a statute providing that stock in a corporation may be sold under execution against the holder, subject to any debt due to the corporation, the title of a purchaser of stock at a sale under an execution against the holder is divested by a subsequent sale of the stock to satisfy a debt due to the corporation from the original holder. *West Branch Bank v. Armstrong*, 40 Pa. St. 278.

The purchaser takes the stock subject to the lien under such a statute. *Sewall v. Lancaster Bank*, 17 Serg. & R. (Pa.) 285.

³⁴ *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, 194 Fed. 947; *First Nat. Bank v. Hartford Life & Annuity Ins. Co.*, 45 Conn. 22; *McCready v. Rumsey*, 6 Duer (N. Y.) 574; *National Bank of Republic of New York v. Rochester Tumbler Co.*, 172 Pa. St. 614, 33 Atl. 748.

³⁵ Where the right to refuse to transfer the stock is given only when

Recording of the lien is necessary in order to give it validity as against third persons when required by the constitution or statutes.³⁶

§ 3601. Liens under by-laws. The validity and effect of by-laws creating liens has been fully considered in a previous section.³⁷

§ 3602. Liens by contract with stockholders. In the absence of a charter or statutory prohibition, a corporation may acquire a lien

the provisions of the statute are written or printed upon the certificate, the corporation has no lien unless such provisions are so written or printed upon the certificate. *Rochester & K. F. Land Co. v. Raymond*, 158 N. Y. 576, 47 L. R. A. 246, 53 N. E. 507, aff'g 4 N. Y. App. Div. 600, 39 N. Y. Supp. 145; *Union Bank of Brooklyn v. United States Exch. Bank*, 143 N. Y. App. Div. 128, 127 N. Y. Supp. 661.

The purpose of such a provision is to give notice to the purchaser of stock that the directors may refuse to consent to a transfer of the stock until the indebtedness of the stockholder to the corporation is paid. *Strahmann v. Yorkville Bank*, 148 N. Y. App. Div. 8, 132 N. Y. Supp. 130, aff'd 210 N. Y. 536, 103 N. E. 1133.

Where the certificate in no way indicates the existence of a corporate provision giving the corporation a lien on stock, and a pledgee is unaware of such provision in fact, it has been held that the pledgee has a lien superior to that of the corporation irrespective of the fact that the articles of the corporation provide a lien on stock and that the pledgee is a stockholder. *Lyman v. State Bank of Randolph*, 81 N. Y. App. Div. 367, 80 N. Y. Supp. 901, aff'd 179 N. Y. 577, 72 N. E. 1145. In this case the court points out that the apparent holdings to the contrary in *Mohawk Nat. Bank of Schenectady v. Schenectady Bank*, 78 Hun (N. Y.) 90, 28 N. Y. Supp. 1100, aff'd 151 N. Y. 665, 46 N. E.

1149, and in *Gibbs v. Long Island Bank*, 83 Hun (N. Y.) 92, 31 N. Y. Supp. 406, aff'd 151 N. Y. 657, 46 N. E. 1147, are mere dicta, since in neither of those cases was the assignee a bona fide holder for value without notice.

A provision that the directors may refuse to consent to a transfer until the indebtedness of the stockholder is paid "provided a copy of this section is written or printed upon the certificate of stock" is sufficiently complied with by a statement in the certificate to the effect that if the stockholder is indebted to the corporation the directors may refuse to consent to a transfer until his indebtedness is paid, and that so long as he is so indebted the stock shall not be transferable, although a copy of the section is not written or printed on the certificate. *Strahmann v. Yorkville Bank*, 148 N. Y. App. Div. 8, 132 N. Y. Supp. 130, aff'd 210 N. Y. 536, 103 N. E. 1133.

The Uniform Stock Transfer Act, § 15, provides: "There shall be no lien in favor of a corporation upon the shares represented by a certificate issued by such corporation, and there shall be no restriction upon the transfer of shares so represented by virtue of any by-law of such corporation, or otherwise, unless the right of the corporation to such lien or the restriction is stated upon the certificate."

³⁶ *New Orleans Nat. Banking Ass'n v. P. S. Wiltz & Co.*, 10 Fed. 330,

³⁷ See § 515, *supra*.

upon its shares, under its general power to contract, by virtue of a special agreement with the stockholder; and in such a case, the lien is enforceable, not only as against the stockholder, but also as against transferees with notice.³⁸ Such an agreement, however, cannot give a lien as against bona fide transferees without notice. A bona fide purchaser or pledgee of shares is not affected by any secret lien reserved by the corporation.³⁹

§ 3603. Provisions in certificates of stock. If a corporation is given authority to regulate transfers of its stock, or even without ex-

38 California. *Jennings v. Bank of California*, 79 Cal. 323, 5 L. R. A. 233, 12 Am. St. Rep. 145, 21 Pac. 852.

Connecticut. *Vansands v. Middlesex County Bank*, 26 Conn. 144, 5 L. R. A. 233.

Nebraska. *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685.

New Hampshire. *Blue Mountain Forest Ass'n v. Borrowe*, 71 N. H. 69, 51 Atl. 670; *Costello v. Portsmouth Brewing Co.*, 69 N. H. 405, 43 Atl. 640.

New York. *Gibbs v. Long Island Bank*, 83 Hun 92, 31 N. Y. Supp. 406; *Buckmaster v. Consumers' Ice Co.*, 5 Daly 313.

Ohio. *Stafford v. Produce Exch. Banking Co.*, 61 Ohio St. 160, 76 Am. St. Rep. 371, 55 N. E. 162.

Pennsylvania. *Reading Trust Co. v. Reading Iron-Works*, 137 Pa. St. 282, 21 Atl. 169, 170.

Tennessee. *Wilkinson v. Home Bank*, 137 Tenn. 198, 192 S. W. 920.

Where, on reorganization of a corporation, the stockholders of the old company passed a resolution that the new shares should be issued to the stockholders in proportion to their holdings in the old company, but that no new shares should be issued to a person indebted to the company until payment of the debt, and that the corporation might apply the new shares in payment of the debt, it was

held that the resolution created a lien. *Reading Trust Co. v. Reading Iron-Works*, 137 Pa. St. 282, 21 Atl. 169, 170.

That such a contract is void when in conflict with the provisions of a statute, see § 3605.

As to the effect of provisions in the certificates as a contract, see § 3603.

As to what amounts to a contract of pledge, see subd. xxvi, *infra*, this chapter.

39 Illinois. *Douglas v. Aurora Daily News Co.*, 160 Ill. App. 506.

Kentucky. *Fitzhugh v. Bank of Shepherdsville*, 3 T. B. Mon. 126, 16 Am. Dec. 90.

Mississippi. *Bank of Holly Springs v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330.

Missouri. *Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co.*, 118 Mo. 447, 24 S. W. 129; *Bank of Atchison County v. Durfee*, 118 Mo. 431, 40 Am. St. Rep. 396, 24 S. W. 133.

Nebraska. *Herrick v. Humphrey Hardware Co.*, 73 Neb. 809, 119 Am. St. Rep. 917, 11 Ann. Cas. 201, 103 N. W. 685.

New York. *Driscoll v. West Bradley & C. Mfg. Co.*, 59 N. Y. 96; *Bank of Attica v. Manufacturers' & Traders' Bank*, 20 N. Y. 501.

A subsequent agreement for a lien for a debt not yet due cannot be maintained as against one to whom the stock has been pledged without notice of the agreement. *Just v. State Sav. Bank*, 132 Mich. 600, 94 N. W. 200.

press authority, it may, under its general power to contract, reserve a lien on its shares for debts due from its stockholders by inserting a provision to such effect in the certificates of stock. In such a case, the stockholder's acceptance of the certificate containing the reservation of a lien is an acceptance of that condition, and the lien exists, therefore, by force of a contract between him and the corporation. And since the condition appears upon the certificate, it is sufficient to put a purchaser upon inquiry, and make it his duty to ascertain whether the shares are subject to a lien.⁴⁰ A lien is thus given by a provision in a certificate of stock that "no transfer of the stock described in this certificate will be made upon the books of the corporation until after the payment of all indebtedness due the corporation by the person in whose name the stock stands," etc., and it makes no difference that there is no by-law of the corporation, nor resolution of the directors authorizing the insertion of such a condition.⁴¹ A lien is also

40 California. *Jennings v. Bank of California*, 79 Cal. 323, 5 L. R. A. 233, 12 Am. St. Rep. 145, 21 Pac. 852.

Connecticut. *Vansands v. Middlesex County Bank*, 26 Conn. 144.

Iowa. *Des Moines Nat. Bank v. Warren County Bank*, 97 Iowa 204, 66 N. W. 154; *Farmers' & Traders' Bank v. Haney*, 87 Iowa 101, 54 N. W. 61.

Kentucky. See *German Nat. Bank v. Kentucky Trust Co. of Louisville*, 19 Ky. L. Rep. 361, 40 S. W. 458.

Missouri. *Morrison-Wentworth Bank v. Kerdolff*, 75 Mo. App. 297; *State Sav. Ass'n v. Nixon-Jones Printing Co.*, 25 Mo. App. 642.

New Hampshire. *Blue Mountain Forest Ass'n v. Borrowe*, 71 N. H. 69, 51 Atl. 670. See also *Hill v. Pine River Bank*, 45 N. H. 300.

New York. *Reynolds v. Bank of Mt. Vernon*, 6 App. Div. 62, 39 N. Y. Supp. 623; *Buffalo German Ins. Co. v. Third Nat. Bank of Buffalo*, 19 Misc. 564, 43 N. Y. Supp. 550.

Ohio. *Stafford v. Produce Exch. Banking Co.*, 61 Ohio St. 160, 76 Am. St. Rep. 371, 55 N. E. 172.

Tennessee. *Wilkinson v. Home Bank*, 137 Tenn. 198, 192 S. W. 920.

The unauthorized act of the direc-

tors of a corporation in inserting in the certificates of stock a provision that the stock shall not be transferred without the consent of the directors by any stockholder who is indebted to the corporation is ratified by a stockholder who, at various times for a period of several years, purchases stock and receives such certificates without objection. *Reynolds v. Bank of Mt. Vernon*, 158 N. Y. 740, 53 N. E. 1131, aff'g 6 N. Y. App. Div. 62, 39 N. Y. Supp. 623.

A provision in certificates of stock that the stock shall not be transferred without the consent of the directors by any stockholder who shall be indebted to the corporation is not injurious to the corporation, and a stockholder, therefore, cannot sue on behalf of himself and the other stockholders to compel the corporation to strike the provision from the certificates. *Reynolds v. Bank of Mt. Vernon*, 6 N. Y. App. Div. 62, 39 N. Y. Supp. 623, 158 N. Y. 740, 53 N. E. 1131.

⁴¹ *Jennings v. Bank of California*, 79 Cal. 323, 5 L. R. A. 233, 12 Am. St. Rep. 145, 21 Pac. 852. And see the other cases in the note preceding.

given by a provision that "no shareholder shall sell his stock while owing the bank either direct or indirect. Anyone trading for same will be governed accordingly."⁴² But the mere fact that the certificate recites that the same is "transferable in person or by attorney only on the books of the company on surrender of this certificate" does not ipso facto give a lien.⁴³

A provision of the by-laws giving a lien which is referred to in a stock certificate will bind the stockholder as a contractual obligation though it is not in terms set out.⁴⁴ And if notice of a by-law lien is given on the face of the certificate, a transferee takes subject to any debt due by the stockholder to the corporation at the time of the transfer, or which may arise before the corporation has notice of the transfer.⁴⁵ But a recital in a certificate of stock that the shares are "transferable at the office of the corporation, in person or by attorney,"⁴⁶ or that they are "transferable only on the books of the corporation, in person or by attorney, on surrender of the certificate,"⁴⁷ or that they are "transferable only upon the books of the company in person or by attorney, in accordance with the by-laws, upon surrender of the certificate,"⁴⁸ does not constitute constructive notice to a transferee of a by-law giving the corporation a lien. On the contrary, such a statement justifies him in assuming that there are no further restrictions on the right of a stockholder to transfer his shares,⁴⁹ and instead of operating only as a warning of the company's rules, is also a promise that the corporation will not make a transfer to any one who does not produce and surrender the certificate itself.⁵⁰

⁴² *Wilkinson v. Home Bank*, 137 Tenn. 198, 192 S. W. 920.

⁴³ *Buena Vista Loan & Savings Bank v. Grier*, 114 Ga. 398, 40 S. E. 284; *Hardy v. Boyer*, 7 Ga. App. 472, 67 S. E. 205; *First State Bank of Montgomery v. First Nat. Bank of Nava-sota*, — Tex. Civ. App. —, 145 S. W. 691.

⁴⁴ *Blue Mountain Forest Ass'n v. Borrowe*, 71 N. H. 69, 51 Atl. 670.

⁴⁵ *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226; *Wilkinson v. Home Bank*, 137 Tenn. 198, 192 S. W. 920.

A transferee has notice of a lien given by the charter and by-laws where the certificate recites that the corporation has a lien on the stock to secure any indebtedness of the stockholder. *German Nat. Bank v. Ken-*

tucky Trust Co. of Louisville, 19 Ky. L. Rep. 361, 40 S. W. 458.

⁴⁶ *Bank of Holly Springs v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330.

⁴⁷ Such a provision does not charge the transferee with notice of what is on the books of the company, or of the existence of a by-law lien, or of the fact of the stockholder's indebtedness to the company. *Bank of Culloden v. Bank of Forsyth*, 120 Ga. 575, 102 Am. St. Rep. 115, 48 S. E. 226.

⁴⁸ *Chandler v. Blanke Tea & Coffee Co.*, 183 Mo. App. 91, 165 S. W. 819.

⁴⁹ He has a right to repose confidence in the terms of the certificate and is not bound to inquire further. *Bank of Holly Springs v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330.

⁵⁰ See subd. xxi, *infra*, this chapter.

Of course the recital in the certificate of a by-law giving a lien, which is void because in conflict with the statute, cannot operate as notice to a transferee so as to give the corporation a lien as against him.⁵¹

The necessity for inserting a notice of the lien in the certificate is considered in another section.⁵²

§ 3604. Liens by custom or usage. As against stockholders with notice and transferees not occupying the position of bona fide purchasers, a corporation may acquire a lien on its shares for a debt due from its stockholders by virtue of a general usage or course of business. If a stockholder borrows money from the corporation or otherwise deals with it and becomes indebted, knowing that, by the general usage and course of business of the corporation, it reserves a lien on shares for any indebtedness due from its stockholders, he impliedly assents to such usage or course of business, and a lien exists by implied contract.⁵³ But a lien cannot be thus acquired as against bona fide purchasers without notice.⁵⁴

§ 3605. Effect of charter or statutory prohibition. Of course, a corporation cannot create a lien upon its shares of stock by adopting a by-law to such effect, even as against its stockholders and transferees with notice, if it is expressly or impliedly prohibited by its charter or the general law from acquiring a lien on the shares of its own stock, for by-laws which are inconsistent with the charter of a corporation or a general law are absolutely void. Nor can a lien be acquired in such a case by usage or by express agreement with stockholders.⁵⁵

A national bank is prohibited by the National Banking Act from making loans or discounts on the security of shares of its own capital stock,⁵⁶ and it cannot acquire a lien on its shares for loans made to its stockholders by virtue of a by-law or agreement.⁵⁷

⁵¹ Third Nat. Bank v. Buffalo German Ins. Co., 193 U. S. 581, 48 L. Ed. 801.

⁵² See § 3600, *supra*.

⁵³ Morgan v. Bank of North America, 8 Serg. & R. (Pa.) 73, 11 Am. Dec. 575. See also Bankers' Trust Co. of St. Louis v. McCloy, 109 Ark. 160, 47 L. R. A. (N. S.) 333, 159 S. W. 205.

⁵⁴ See Bankers' Trust Co. of St. Louis v. McCloy, 109 Ark. 160, 47 L. R. A. (N. S.) 333, 159 S. W. 205; Fitzhugh v. Bank of Shepherdsville, 3 T.

B. Mon. (Ky.) 126, 16 Am. Dec. 90.

⁵⁵ See Hill v. Pine River Bank, 45 N. H. 300, quoting a statute of Maine, providing that the free sale of stock by the owners thereof should not be in any manner restricted by the by-laws of the corporation, and that any such by-laws should be void. It was held in this case, however, that the validity of a by-law creating a lien was not involved.

⁵⁶ See § 1142, *supra*.

⁵⁷ United States. Third Nat. Bank

A like construction has been placed by some courts upon state statutes prohibiting any banking corporation from making loans or discounts upon the security of shares of its own capital stock.⁵⁸ And it has been held that a lien cannot be acquired for a loan made after the enactment of such a statute under a by-law adopted before its enactment, for it is within the power of the legislature to declare such prohibition as to future transactions, notwithstanding any regulation or by-law of the corporation to the contrary.⁵⁹ But such a statute will not be given a retrospective effect so as to invalidate a lien given by a valid by-law enacted before the passage of the act for an indebtedness contracted before its passage, at least where the statute does not contain terms clearly importing such an intention.⁶⁰

In some states it has been held that such statutes will not deprive a bank of its right to a statutory lien for debts of its stockholders contracted in good faith and not on the security of their stock.⁶¹

v. Buffalo German Ins. Co., 193 U. S. 581, 48 L. Ed. 801; **Bullard v. National Eagle Bank**, 18 Wall. 589, 21 L. Ed. 923; **First Nat. Bank of South Bend v. Lanier**, 11 Wall. 369, 20 L. Ed. 172; **Evansville Nat. Bank v. Metropolitan Nat. Bank**, 2 Biss. 527, Fed. Cas. No. 4573.

Maine. **Hagar v. Union Nat. Bank**, 63 Me. 509.

New Jersey. **Delaware, L. & W. R. Co. v. Oxford Iron Co.**, 38 N. J. Eq. 340.

New York. **Bridges v. National Bank of Troy**, 185 N. Y. 146, 7 Ann. Cas. 285, 77 N. E. 1005, aff'g 106 App. Div. 616, 94 N. Y. Supp. 1140; **Buffalo German Ins. Co. v. Third Nat. Bank**, 162 N. Y. 163, 48 L. R. A. 107, 56 N. E. 521, 171 N. Y. 670, 64 N. E. 1119, aff'd 193 U. S. 581, 48 L. Ed. 801; **Conklin v. Second Nat. Bank**, 45 N. Y. 655; **Rosenback v. Salt Springs Nat. Bank**, 53 Barb. 495.

Virginia. **Feckheimer v. National Exch. Bank**, 79 Va. 80.

The power on the part of a national bank to withhold a transfer of the stock of one of its shareholders indebted to it, granted by section 36 of the National Banking Act of 1863, was

taken away by the National Banking Act of 1864, and the right no longer exists. That there is a provision for the exercise of this right in the charter and by-laws of the national bank and provision for its exercise is stated in the certificate of the stock does no result in creating the power in favor of the bank. **Third Nat. Bank v. Buffalo German Ins. Co.**, 193 U. S. 581, 48 L. Ed. 801.

Such a by-law cannot be enforced as an agreement between the stockholder and the corporation, since such an agreement would also be void. **Feckheimer v. National Exch. Bank**, 79 Va. 80.

⁵⁸ **Corydon Deposit Bank v. McClure** 141 Ky. 481, 133 S. W. 201; **Nicolle Nat. Bank v. City Bank**, 38 Minn. 85, 8 Am. St. Rep. 643, 35 N. W. 577.

⁵⁹ **Nicollet Nat. Bank v. City Bank** 38 Minn. 85, 8 Am. St. Rep. 643, 35 N. W. 577. See also **Hill v. Pine River Bank**, 45 N. H. 300.

⁶⁰ **Morris v. Westerman**, — W. Va. —, 92 S. E. 567.

⁶¹ A statute prohibiting the officer of a bank from making loans or discounts to stockholders on the security of their stock and prohibiting the bank

§ 3606. Extent and effect of lien. The extent of a lien on shares given a corporation by its charter or by the general law depends, of course, upon the terms of the statute. Since the common law gives a corporation no lien on its shares for debts due from its stockholders, it has been held that statutes and clauses of charters creating such a lien, being in derogation of the common law, must be strictly construed.⁶²

The lien attaches the moment the stockholder becomes indebted to the corporation.⁶³

The lien "extends not only to stock of which the stockholder may have the legal title, but to all of which he is the real, beneficial owner, though the legal title may reside in another."⁶⁴ So it extends to all stock actually owned by persons indebted to the corporation, whether standing in their own names or in the names of other persons as their trustees,⁶⁵ or in the names of fictitious persons.⁶⁶ But a lien will not

from thereafter becoming the purchaser or holder of loans on such stock, unless it shall become necessary to prevent loss on a debt previously contracted in good faith, does not deprive a bank of its right to a lien for the debt of a stockholder contracted in good faith and not on the security of his stock, especially where the same act gives the bank a lien on its stock for debts due from its stockholders. *Faulkner v. Bank of Topeka*, 77 Kan. 385, 94 Pac. 153; *Batley v. Eureka Bank*, 62 Kan. 384, 63 Pac. 437.

A provision that no bank shall make any loan or discount on the security of the shares of its own capital, does not apply to a discount or loan made to a stockholder not on the security of his stock, and in respect to such a loan is not in conflict with the provision of the stock corporation law permitting directors to refuse to consent to a transfer of stock by a stockholder indebted to the company until such indebtedness is paid, and hence under such circumstances a bank may claim the benefit of the latter provision. *Strahmann v. Yorkville Bank*, 148 N. Y. App. Div. 8, 132 N. Y. Supp. 130, aff'd 210 N. Y. 536, 103 N. E. 1133.

In *Corydon Deposit Bank v. Me-*

Clure, 141 Ky. 481, 133 S. W. 201, it is said: "In *Bank of Kentucky v. Bonnie Bros.*, 102 Ky. 343, under the charter of the bank enacted by the Legislature, it was given a lien on the stock to secure any debt of the stockholder; but there is a difference between a charter provision to this effect and a by-law; the bank can pass no by-law inconsistent with the statute."

⁶² *Boyd v. Redd*, 120 N. C. 335, 58 Am. St. Rep. 792, 27 S. E. 35.

⁶³ *Owens v. Atlanta Trust & Banking Co.*, 122 Ga. 521, 50 S. E. 379.

⁶⁴ *Planters' & Merchants' Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585.

In the above case it was held that where one member of a firm, which owned bank stock, retired and sold out his interest to the others, who assumed all the partnership debts and continued the business under a new name, the new firm became the equitable owner of the stock and that the bank was entitled to a lien for an indebtedness incurred by it although the stock had never been transferred to the new firm on the corporate books.

⁶⁵ *Stebbins v. Phenix Fire Ins. Co.*, 3 Paige (N. Y.) 350.

⁶⁶ *Stebbins v. Phenix Fire Ins. Co.*, 3 Paige (N. Y.) 350.

attach to stock held in trust for debts of the trustee, where the corporation has knowledge that it is so held.⁶⁷

Where a transfer on the corporate books is necessary to constitute a transferee a stockholder, the corporation has no lien as against an intermediate unrecorded owner of the stock.⁶⁸ But it may have such a lien as against an intermediate transferee although he has never surrendered the old certificate and no new one has been issued in his name, where it has waived a strict compliance with its regulations in this regard and has admitted him to full membership in the corporation without such compliance.⁶⁹

It has been held that a provision in corporate by-laws reserving to the corporation the right to refuse to make transfer on the corporate books while the holder is indebted to the corporation, has no application where an executor seeks a transfer to himself as executor of stock belonging to his testator.⁷⁰

As a rule the lien extends to dividends declared on the stock to which it attaches,⁷¹ and it is sometimes expressly provided that it shall extend so.⁷² And it follows that the corporation may apply dividends declared to the payment of debts due it from its stockholders.⁷³

§ 3607. Debts for which lien attaches—In general. The lien may be given only for the indebtedness of a stockholder upon the subscription for his stock, or it may be given for any and all debts due from

⁶⁷ *Alexandria Mechanics' Bank v. Seton*, 1 Pet. (U. S.) 299, 7 L. Ed. 152; *Porter v. Marine Sav. Bank*, 186 Mich. 355, 153 N. W. 19.

⁶⁸ *Helm v. Swiggett*, 12 Ind. 194.

In *Planters' & Merchants' Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585, it was held that where one member of a firm, which owned bank stock, retired and sold out his interest to the others, who assumed all the partnership debts and continued the business under a new name, the new firm became the equitable owner of the stock, and that the bank was entitled to a lien for an indebtedness incurred by it as against an equitable assignee of the retiring member although the stock had never been transferred to the new firm on the corporate books.

⁶⁹ So it has a lien under such circumstances where it is notified of

the transfer, and notes it on the stock certificate book in which it keeps record of stock transfers. *Bank of Commerce v. Bank of Newport*, Fed. 898.

⁷⁰ *London, P. & A. Bank v. Arostegui*, 117 Fed. 601, certiorari denied 187 U. S. 641, 47 L. Ed. 345 (modified).

⁷¹ *Dempster Mfg. Co. v. Downs*, 1 Iowa 80, 106 Am. St. Rep. 340, Ann. Cas. 187, 101 N. W. 735; In *Farmers' Bank of Maryland*, 2 Blac. (Md.) 394.

⁷² *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, 194 Fed. 947; *United Cigarette Mach. Co. v. Brown*, 119 Va. 813, L. R. A. 1917 1100, 89 S. E. 850.

⁷³ See subd. xvi, *infra*, this chapter.

him to the corporation. A lien given in general terms for debts due from the stockholders is not limited to debts due on account of their stock, but extends to any other debt, unless there is something in the statute to show a different intention.⁷⁴ But a statute providing that, if calls on stock subscriptions are not paid as required by the directors, the stockholder's shares may be sold for the payment thereof, the surplus, if any, to be paid to the stockholder, gives the corporation no lien for any debts other than unpaid subscriptions.⁷⁵

A lien may be given only for debts which are due and payable at the time a transfer of stock is demanded,⁷⁶ and when such is the case a lien may be claimed for a debt due from a stockholder which has matured since a transfer of his shares but before the transferee has demanded a transfer to himself on the books.⁷⁷ Under such a statute the transferee at the time of the transfer gets an inchoate or contingent priority over any existing and unmatured corporate debt which he can fix and ripen into an absolute priority only by demanding a transfer or doing some equivalent thing before the indebtedness of the stock-

74 Alabama. Birmingham Trust & Savings Co. v. East Lake Land Co., 101 Ala. 304, 13 So. 72; Mobile Mut. Ins. Co. v. Cullom, 49 Ala. 558.

Arkansas. Red Bud Realty Co. v. South, 96 Ark. 281, 131 S. W. 340.

Kentucky. Kenton Ins. Co. v. Bowman, 84 Ky. 430, 1 S. W. 717.

Michigan. Citizens' State Bank of Monroeville v. Kalamazoo County Bank, 111 Mich. 313, 69 N. W. 663.

Pennsylvania. Sproul v. Standard Window Glass Co., 201 Pa. 103, 50 Atl. 1003; National Bank of Republic of New York v. Rochester Tumbler Co., 172 Pa. St. 614, 33 Atl. 748; Rogers v. Huntingdon Bank, 12 Serg. & R. 77.

The lien extends to an indebtedness for money of the corporation collected by a stockholder and not accounted for, and which he has used to pay his own debts. Red Bud Realty Co. v. South, 96 Ark. 281, 131 S. W. 340.

75 Shenandoah Valley R. Co. v. Griffith, 76 Va. 913; Petersburg Sav. & Ins. Co. v. Lumsden, 75 Va. 327.

76 Young Coal Co. v. Hill, 112 Ark. 180, 165 S. W. 292; Bankers' Trust Co. of St. Louis v. McCloy, 109 Ark.

160, 47 L. R. A. (N. S.) 333, 159 S. W. 205; Reese v. Bank of Commerce, 14 Md. 271, 74 Am. Dec. 536; Brinen v. Muskegon Sav. Bank, 174 Mich. 414, 140 N. W. 529; National City Bank v. Kalamazoo City Sav. Bank, 232 Fed. 669, construing the Michigan statute; Klopp & Stump v. Lebanon Bank, 46 Pa. St. 88.

Under the Michigan statute the pledgee or purchaser of bank stock has an absolute right to have the same transferred to him on the corporate books as against any claim by the bank against the registered holder, unless such claim is upon a debt which is "due" in the sense of being past due, or matured. National City Bank v. Kalamazoo City Sav. Bank, 232 Fed. 669.

A note becomes due and payable on the last day of grace, within the meaning of such a provision. Klopp & Stump v. Lebanon Bank, 46 Pa. St. 88.

77 Brinen v. Muskegon Sav. Bank, 174 Mich. 414, 140 N. W. 529; Michigan Trust Co. v. State Bank of Michigan, 111 Mich. 306, 69 N. W. 645.

holder to the corporation matures.⁷⁸ In other words the corporation is not required to transfer the stock on the books unless, before the maturity of the debt to the corporation, the transferee has demanded a transfer or has given a notice, which means that he has elected to claim his full rights, or unless the facts make that election so certain that formal notice is unnecessary.⁷⁹ And this is equally true although the corporation had knowledge of the transfer before the indebtedness to it matured.⁸⁰

On the other hand the lien may be given generally for any indebtedness, in which case, the lien exists whether the debt is due at the time a transfer is demanded or not.⁸¹ A conditional liability is not within a provision giving a lien for "debts due."⁸²

It has been held that a provision giving a corporation a lien for any indebtedness due from stockholders, or prohibiting a transfer of shares by a stockholder who is in any way indebted to it, does not give a lien or prevent a transfer because a stockholder has not paid the full amount payable on his shares, where the balance is payable only on call by the directors, and no calls have been made therefor,⁸³ but

⁷⁸ *National City Bank v. Kalamazoo City Sav. Bank*, 232 Fed. 669.

⁷⁹ *National City Bank v. Kalamazoo City Sav. Bank*, 232 Fed. 669.

⁸⁰ *National City Bank v. Kalamazoo City Sav. Bank*, 232 Fed. 669.

Just v. State Bank, 132 Mich. 600, 94 N. W. 200, holds that the right of a bank to a lien is inferior to the lien of a pledgee if it has "notice" of the pledge before the maturity of the debt to it although no demand for a transfer of the stock on its books is made before that time.

In *National City Bank v. Kalamazoo City Sav. Bank*, it is said that the word "notice" is not used in the Just Case in the sense of knowledge, but means such notice as is tantamount to a demand. It is further pointed out that in the Just Case, while the pledgee never made any formal demand for a transfer, or served written or other formal notice of his election to insist upon having the stock, the corporation knew of the existence of the pledge before the maturity of the debt, and that the

pledgor was dead, that his estate was insolvent, and that the bank knew that the pledgee was claiming the rightful title to the stock, and that either the pledgee or the bank must suffer loss, and hence knew that the pledgee would insist upon a formal transfer just as well as if it had been formally notified to that effect.

⁸¹ *Alabama*. *Cunningham v. Alabama Life Insurance & Trust Co.*, Ala. 652.

Missouri. *St. Louis Perpetual Insurance Co. v. Goodfellow*, 9 Mo. 149.

New York. *Leggett v. Bank of New York*, 24 N. Y. 283.

Ohio. *Downer's Adm'r v. Bank of Zanesville*, Wright 477.

Pennsylvania. *Pittsburgh & C. Co. v. Clarke*, 29 Pa. St. 146; *Sewal v. Lancaster Bank*, 17 Serg. & R. 281; *Grant v. Mechanics' Bank*, 15 Serg. & R. 140.

⁸² *Bankers' Trust Co. of St. Louis v. McCloy*, 109 Ark. 160, 47 L. R. (N. S.) 333, 159 S. W. 205.

⁸³ *Hall v. United States Ins. Co.*, Baltimore, 5 Gill (Md.) 484; *Kahn*

there is authority to the contrary.⁸⁴ Where a lien is given upon shares for any calls due thereon, and not generally, the lien attaches to those shares only upon which calls are due, and only for the calls due thereon. The fact that calls are unpaid on certain shares does not make such calls a lien upon, or prevent the transfer of, other shares upon which all calls have been paid.⁸⁵

It has been held that a charter or statutory provision giving a corporation a lien on its shares for debts due from the stockholders applies only to debts arising out of transactions between the corporation and the stockholders, and that it does not apply to obligations given by a stockholder to a third person, and assigned by the latter to the corporation.⁸⁶ And especially is this true where the purpose of the assignment is to enable the corporation to enforce the payment of the claim by means of its lien for the benefit of the assignor.⁸⁷

The lien may be limited to an indebtedness of the stockholder to the corporation on account of his relations to it as such stockholder.⁸⁸

A lien given for "debts" has been held not to include a claim for unliquidated damages for a tort, such as the misappropriation of corporate funds by a stockholder in his capacity as a corporate officer.⁸⁹ But there is authority to the contrary where the claim is liquidated before demand is made for the transfer of the shares, on the theory that such a claim, though a tort, is based on a breach of the stockholder's contract as an officer.⁹⁰

Bank of St. Joseph, 70 Mo. 262.

⁸⁴ *Pittsburgh & C. R. Co. v. Clarke & Thaw*, 29 Pa. St. 146. And see *In re Bachman*, 2 Cent. Law J. 119, Fed. Cas. No. 707.

⁸⁵ *Shenandoah Valley R. Co. v. Griffith*, 76 Va. 913; *Hubbersty v. Manchester, S. & L. Ry. Co.*, L. R. 2 Q. B. 472.

⁸⁶ *Boyd v. Redd*, 120 N. C. 335, 58 Am. St. Rep. 792, 27 S. E. 35.

So it does not apply to notes given by a stockholder to a third person and by him assigned to the corporation as collateral security, although at the time of such assignment the maker of the notes is the president of the corporation. *Id.*

⁸⁷ *Bank of Kentucky v. Bonnie*, 102 Ky. 343, 43 S. W. 407; *White's Bank*

v. Toledo Fire & Marine Ins. Co., 12 Ohio St. 601.

⁸⁸ This was held to be true under a provision giving a corporation a lien for any sum due it from its shareholders, "either on account of the subscription to its stock, or for money loaned by the association to said shareholder, or for any other indebtedness due from the shareholder." *Jewell v. Nuhn* (Iowa), 138 N. W. 457.

⁸⁹ *Jewell v. Nuhn* (Iowa), 138 N. W. 457.

⁹⁰ *Sproul v. Standard Plate Glass Co.*, 201 Pa. 103, 50 Atl. 1003. In this case it was held that the corporation was entitled to a lien on an officer's stock for money embezzled.

A bank has a lien on the stock of

A lien for the "debts, liabilities and engagements" of stockholder to or with the corporation embraces a demand for damages for breach of contract.⁹¹ A provision giving a lien for any debt or any indebtedness from a stockholder to the corporation gives a lien to secure the collateral liability of a stockholder as a surety or indorser.⁹² And it has been held that the lien extends to a debt due from a firm of which the stockholder is a member.⁹³

Where stock is owned by a partnership and a member of the firm dies, and the business is carried on by his successor and the surviving partner, the corporation is not entitled to a lien for an indebtedness contracted by the new firm unless the title to the stock has been transferred to it, since without such a transfer it is not a stockholder.

A statute may give a lien for debts contracted prior to its enactment.⁹⁵ And the lien may attach for a debt contracted before acquiring the stock, as well as for debts afterwards contracted.⁹⁶

its cashier for the amount of a shortage in his accounts. *McIlroy Banking Co. v. Dickson*, 66 Ark. 327, 50 S. W. 868.

⁹¹ *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, 194 Fed. 947; *United Cigarette Mach. Co. v. Brown*, 119 Va. 813, L. R. A. 1917 F 1100, 89 S. E. 850.

⁹² *Union Bank of Georgetown v. Laird*, 2 Wheat. (U. S.) 390, 4 L. Ed. 269; *McLean v. Lafayette Bank*, 3 McLean 587, Fed. Cas. No. 8,888; *Bank of Kentucky v. Bonnie*, 102 Ky. 343, 43 S. W. 407; *St. Louis Perpetual Ins. Co. v. Goodfellow*, 9 Mo. 149; *Leggett v. Bank of Sing Sing*, 24 N. Y. 283.

A stockholder of a bank who has indorsed a note held by the bank, and on which it has not proceeded against the maker, is "indebted" to the bank, within the meaning of a charter provision giving it a lien on the shares of any stockholder "indebted" to it. *Bank of Kentucky v. Bonnie*, 102 Ky. 343, 43 S. W. 407.

⁹³ *Planters' & Merchants' Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585; *Citizens' State Bank v. Kalamazoo County Bank of Monroeville*, 111 Mich. 313, 69 N. W. 663; *Arnold v.*

Suffolk Bank, 27 Barb. (N. Y.) 42; *Mechanics' Bank v. Earp*, 4 Raw (Pa.) 384.

"The individual liability of a member of a copartnership for debts of the firm is primary, and not collateral." *Bank of Searcy v. Merchants' Grocer Co.*, 123 Ark. 403, 18 S. W. 806.

The corporation is not precluded from enforcing the lien in such a case by the fact that it has deposits in the firm. *Mechanics' Bank v. Earp*, 4 Rawle (Pa.) 384.

⁹⁴ *Dalton v. Humphreys*, 242 Fe 777.

⁹⁵ *Birmingham Trust & Savings Co. v. East Lake Land Co.*, 101 Ala. 30 13 So. 72; *First Nat. Bank of Hartford v. Hartford Life & Annuity Ins. Co.*, 45 Conn. 22.

This was held to be true of a statute in terms giving the corporation a lien "for any debt or liability incurred to it by a stockholder." *Birmingham Trust & Savings Co. v. East Lake Land Co.*, 101 Ala. 30 13 So. 72.

⁹⁶ *Schmidt v. Hennepin County Bank Co.*, 35 Minn. 511, 29 N. W. 200.

§ 3608. — **Debts contracted after transfer.** Generally, if stock is transferable only on the books of the corporation, as is elsewhere explained, a corporation may acquire a lien on shares by virtue of a charter or statutory provision, or by agreement, for a debt contracted by a person appearing on its books as the owner of shares after he has transferred the shares, but before notice of the transfer is given the corporation,⁹⁷ although the contrary has been held in Louisiana.⁹⁸ But the corporation cannot acquire a lien as against an unregistered transferee by allowing the transferrer to borrow money or otherwise contract a debt after it has notice of the transfer, even though the transferee, until the transfer is registered, acquires merely an equitable title.⁹⁹ Since a pledgee of stock acquires only a special property there-

97 United States. *Union Bank of Georgetown v. Laird*, 2 Wheat. 390, 4 L. Ed. 269.

California. *Jennings v. Bank of California*, 79 Cal. 323, 5 L. R. A. 233, 12 Am. St. Rep. 145, 21 Pac. 852.

Colorado. *Pueblo Sav. Bank v. Richardson*, 39 Colo. 319, 89 Pac. 799.

Connecticut. *Platt v. Birmingham Axle Co.*, 41 Conn. 255. And see *First Nat. Bank of Hartford v. Hartford Life & Annuity Ins. Co.*, 45 Conn. 22.

Georgia. *People's Bank of Talbotton v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269.

Kansas. *Faulkner v. Bank of Topeka*, 77 Kan. 385, 94 Pac. 153.

Maryland. *Gemmell v. Davis*, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032.

Ohio. *Stafford v. Produce Exch. Banking Co.*, 61 Ohio St. 160, 76 Am. St. Rep. 371, 55 N. E. 162.

Where a statute provided that shares of stock might be pledged by delivering a power of attorney for their transfer, with the certificate of stock, to the pledgee, but that no pledge, without an actual transfer of stock, should be effectual against any person but the pledgor and his executors and administrators until deposit of a copy of the power of attorney with the treasurer or secretary of

the corporation, and a later statute provided that corporations should at all times have a lien upon all the stock owned by any person therein for all debts due to them from such person, it was held that the latter act, immediately upon its going into effect, created a lien in favor of a corporation for an old indebtedness upon stock which had been pledged before the passage of the act, where the pledge was merely by delivery of the certificate of the stock and a power of attorney for its transfer, without the filing of a copy of the power of attorney or any other notice to the corporation. *First Nat. Bank v. Hartford Life & Annuity Ins. Co.*, 45 Conn. 22.

98 In *Pitot v. Johnson*, 33 La. Ann. 1286, it is held that a pledge of stock may be perfected by a simple delivery of the certificate without notice to the corporation, and hence that the lien of a pledgee is superior to the lien of a corporation under its charter for an indebtedness arising after the date of the pledge but before the corporation had notice of it.

99 United States. *Curtice v. Crawford County Bank*, 118 Fed. 390, modifying on other grounds 110 Fed. 830; *Hotchkiss & Upson Co. v. Union Nat. Bank*, 68 Fed. 76.

Alabama. *Bank of Florida v. Amer-*

in,¹ the corporation may have a lien on the general property in the stock remaining in the pledgor for a credit which is extended to the pledgee after it had received notice of the pledge,² although, as we have seen, such lien will be inferior to the lien of the pledgee. Under such circumstances, the statute of limitations will not run in favor of the corporation against the right of the pledgee to enforce the pledge. But the pledgee's right to relief in equity may be barred by laches.

Iowa. Nat. Bank, 75 So. 310; Birmingham Trust & Savings Co. v. Louisiana Nat. Bank, 99 Ala. 379, 20 L. R. A. 600, 13 So. 112.

District of Columbia. Bradford Banking Co. v. Briggs, 12 App. Cas. 29.

Georgia. People's Bank of Talbotton v. Exchange Bank, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269.

Kentucky. Bank of America v. McNeil, 10 Bush 54.

Massachusetts. Nesmith v. Washington Bank, 6 Pick. 324.

Minnesota. Prince Inv. Co. v. St. Paul & S. City Land Co., 68 Minn. 121, 70 N. W. 1079.

Ohio. Conant v. Reed, 1 Ohio St. 298.

Oklahoma. Farmers' & Merchants' Bank of Kiel v. Cherokee Trust Co., 32 Okla. 700, 123 Pac. 153; Ardmore State Bank v. Mason, 30 Okla. 568, 39 L. R. A. (N. S.) 292, 120 Pac. 1080.

Vermont. White River Sav. Bank v. Capital Sav. Bank & Trust Co., 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

"Whatever may be the English rule, we think it is settled that the courts of this country repudiate the idea that a bona fide purchaser or pledgee of stock takes it subject to claims that may subsequently arise in favor of the corporation, if it has notice of his purchase, and that notice of the purchaser's rights are sufficient to protect them, although a demand for a transfer of stock on the books of the corporation be not

made." Just v. State Sav. Bank, 1 Mich. 600, 94 N. W. 200, quoted with approval in Ardmore State Bank v. Mason, 30 Okla. 568, 39 L. R. A. (N. S.) 292, 120 Pac. 1080.

The statute providing for registration of stock transfers "contemplates only the protection of subsequent purchasers without notice of prior equities, and when such equities have been created by transfer, hypothecation, mortgage or lien, the corporation is bound to regard them from the time it receives notice of their existence. Bank of Florida v. American Nat. Bank, — Ala. —, 75 So. 310.

¹ See subd. xxvi, *infra*, this chapter.

² White River Sav. Bank v. Capital Sav. Bank & Trust Co., 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

³ White River Sav. Bank v. Capital Sav. Bank & Trust Co., 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

⁴ Certain corporate stock was pledged to secure an obligation. Thereafter the corporation itself acquired a lien on the stock, although not until within approximately three and one-half years after it had received notice of the pledge. No claim was made that the pledgee, having notice of the rights of the corporation, had at any time taken steps prejudicial to the corporation. Credit was extended to the owner of the stock with knowledge of the pledge. The court held that the original pledgee had not been guilty of laches and could enforce the pledge. White River Sav. Bank v. Capital Sav. Bank.

§ 3609. — What constitutes notice. The question whether the corporation had actual notice of the transfer before the indebtedness on which the lien is sought to be predicated was contracted is ordinarily one of fact.⁵ A corporation is bound by knowledge of a transfer acquired by one of its executive officers while he is engaged in the legitimate transaction of the company's business.⁶ But it is not bound by the private individual knowledge of its officer, acquired in the transaction of his own business, while dealing as if he had no official relation to the corporation.⁷ So it is not chargeable with notice of facts of which its president acquires knowledge while dealing in his private capacity and in his own behalf with third persons;⁸ nor is knowledge on his part thus acquired imputable to the corporation when, acting through another official, it deals with him at arm's length as with

& Trust Co., 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

⁵ Prince Inv. Co. v. St. Paul & S. C. Land Co., 68 Minn. 121, 70 N. W. 1079; Ardmore State Bank v. Mason, 30 Okla. 568, 39 L. R. A. (N. S.) 292, 120 Pac. 1080.

⁶ Bank of Florala v. American Nat. Bank, — Ala. —, 75 So. 310.

Where the pledgee of stock consults the president of the corporation to ascertain whether the certificate has been regularly issued, and informs him that the stock has been assigned to him as collateral security, the president acquires knowledge of the pledge while acting within the scope of his duty. Curtice v. Crawford County Bank, 118 Fed. 390, modifying 110 Fed. 830.

Knowledge of the secretary of the company, who has the custody of the stock and transfer books, and who is the proper officer to receive and act on notice of transfers of stock, is notice to the company. Prince Inv. Co. v. St. Paul & S. C. Land Co., 68 Minn. 121, 70 N. W. 1079.

Notice to the cashier of a bank is notice to the bank, where he produces the stock transfer book and the transfer is thereupon entered in it. Conant v. Reed, 1 Ohio St. 298.

A letter sent by the treasurer of the pledgor to the corporation, and received by the treasurer of the latter, notifying it of the pledge, is notice to the corporation. In giving and receiving such notice, the respective treasurers are in the performance of their respective duties. White River Sav. Bank v. Capital Sav. Bank & Trust Co., 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

See also § 2211 et seq., supra.

⁷ Curtice v. Crawford County Bank, 118 Fed. 390, modifying 110 Fed. 830; Bank of Florala v. American Nat. Bank, — Ala. —, 75 So. 310; Pueblo Sav. Bank v. Richardson, 39 Colo. 319, 89 Pac. 799.

Where an officer transfers his stock therein, acting in his private capacity, and not in the business of the corporation, without making a transfer on the books of the corporation, his knowledge of the transfer is not imputable to the corporation. Gemmell v. Davis, 75 Md. 546, 32 Am. St. Rep. 412, 23 Atl. 1032.

See also § 2211 et seq., supra.

⁸ People's Bank of Talbotton v. Exchange Bank, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269; Dorr v. Life Ins. Clearing Co., 71 Minn. 38, 70 Am. St. Rep. 309, 73 N. W. 635.

any other individual representing himself alone.⁹ And knowledge acquired by an officer while acting in his own interest and in fraud of the corporation is not constructive notice to it.¹⁰ But where a bank ratifies the act of its cashier in making loans to himself, without the approval of the directors, by seeking to enforce a lien therefor on his stock, he must be regarded as its agent in making such loans, and hence it is chargeable with his knowledge that he had pledged his stock as collateral security before such loans were made.¹¹

A written notice, though not in itself sufficiently full, may be sufficient to put the corporation on inquiry, in which event it will be chargeable with knowledge of the transfer if it would have acquired such knowledge by proper inquiry.¹²

If the corporation is once given notice that the stock has been pledged, the pledgee is under no obligation to give it additional notices from time to time that it has not been redeemed and that he still holds it, but on the contrary, it is the duty of the corporation to ascertain the facts in this regard before making loans to the pledgor in reliance on its lien.¹³

§ 3610. — Ultra vires transactions. A corporation cannot enforce a lien upon shares for an alleged indebtedness if its claim arises out of an ultra vires transaction, and is for that reason unenforceable under the law of the particular jurisdiction. Thus it has been held that a corporation cannot acquire a lien on shares for an indebtedness due from the stockholder to a third person by taking an assignment of the debt, where the taking of the assignment is not within the powers conferred upon it by its charter, as where it takes the assignment, not for a legitimate corporate purpose, but merely for the purpose of enforcing its lien for the benefit of the assignor.¹⁴ Nor is a bank, as against a pledgee in good faith, entitled to a lien on the stock of one of its directors for money loaned to him in violation of the express provisions of the statute.¹⁵ Similarly, a corporation is not entitled to

⁹ People's Bank of Talbotton v. Exchange Bank, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269.

¹⁰ Sproul v. Standard Plate Glass Co., 201 Pa. 103, 50 Atl. 1003.

¹¹ Bank of Florida v. American Nat. Bank, — Ala. —, 75 So. 310.

¹² White River Sav. Bank v. Capital Sav. Bank & Trust Co., 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

¹³ Curtice v. Crawford County Bank,

118 Fed. 390, modifying 110 Fed. 830.

¹⁴ Bank of Kentucky v. Bonnie, 102 Ky. 343, 43 S. W. 407; White's Bank of Buffalo v. Toledo Fire & Marine Ins. Co., 12 Ohio St. 601.

¹⁵ Eubank v. Bryan County State Bank, 216 Fed. 833; Bryan County State Bank v. American Nat. Bank of Ft. Worth, Texas, — Okla. —, 156 Pac. 352.

a lien where the claim arises out of a transaction with another corporation, which is void because beyond the powers of the latter. Thus it has been held that a corporation cannot enforce a lien for a debt alleged to be due it by another corporation on stock purchased by an officer in the latter corporation with the funds thereof, since a corporation, unless expressly authorized, cannot invest in the capital stock of another corporation.¹⁶

It has been held that the violation of a provision limiting the amount in which a corporation may permit any one person to become indebted to it at any one time for money borrowed will not deprive it of its lien to the extent that it might lawfully have made the loan, but that it is not entitled to a lien for an amount greater than that which it might lawfully have loaned.¹⁷

§ 3611. — **Debts barred by statute of limitations.** The fact that an action by a corporation to recover a debt due from a stockholder is barred by the statute of limitations does not extinguish the debt, but merely bars the remedy, and it does not preclude the corporation from asserting a lien upon the stock of the debtor, and refusing to transfer the stock to a purchaser without payment of the debt.¹⁸

Generally the lien may be enforced in equity although an action at law on the debt is barred.¹⁹ And notwithstanding the fact that the statute has run against the debt, a court of equity may require the stockholder to discharge it as a condition to granting him affirmative relief in respect to the stock, as, for example, in a suit brought by him to enjoin the corporation from refusing to transfer the stock and from withholding dividends from the complainant, or otherwise denying him the rights of a stockholder.²⁰

¹⁶ *Lanier Lumber Co. v. Rees*, 103 Ala. 622, 49 Am. St. Rep. 57, 16 So. 637.

¹⁷ *People's Bank of Talbotton v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269.

¹⁸ *Brent v. Bank of Washington*, 10 Pet. (U. S.) 596, 9 L. Ed. 547; *Farmers' Bank v. Iglehart*, 6 Gill (Md.) 50; *Sproul v. Standard Plate Glass Co.*, 201 Pa. 103, 50 Atl. 1003; *Reading Trust Co. v. Reading Iron-Works*, 137 Pa. St. 282, 21 Atl. 169, 170; *Geyer v. Western Ins. Co.*, 3 Pittsb. 41; *United Cigarette Mach. Co. v. Brown*, 119 Va.

813, L. R. A. 1917 F 1100, 89 S. E. 850.

The lien is in the nature of collateral security, and the enforcement of rights arising thereunder is without limit in time. *Sproul v. Standard Plate Glass Co.*, 201 Pa. 103, 50 Atl. 1003.

¹⁹ See *United Cigarette Mach. Co. v. Brown*, 119 Va. 813, L. R. A. 1917 F 1100, 89 S. E. 850.

²⁰ This is true regardless of whether the corporation could have enforced the lien in an independent suit brought for that purpose. *United Cigarette Mach. Co. v. Brown*, 119 Va. 813, L. R. A. 1917 F 1100, 89 S. E. 850.

§ 3612. Discharge of lien. To give the corporation a lien there must be an existing claim in favor of the corporation, and it follows that anything which operates to discharge the stockholder's indebtedness will necessarily extinguish the corporation's lien.²¹ So the lien is discharged by payment or satisfaction of the debt due the corporation.²² But when a corporation has a lien upon shares for an indebtedness due from a stockholder, and for which others are liable as sureties, the latter, upon paying the debt, are entitled, by subrogation, to enforce the lien of the corporation.²³

In an accounting to determine whether the indebtedness of the stockholder for which the lien is claimed has been fully paid off, the sole inquiry should be, whether or not the corporation has applied payments made by the stockholder as he directed, or, in the absence of any direction on his part, in the manner prescribed by law. An assignee of the stock has no right to insist that payments shall be applied otherwise than as the assignor directed, or that a credit voluntarily given him by the corporation to which he was not entitled shall go to the extinguishment of a debt arising before it received notice of the assignment, rather than to the discharge of an indebted

²¹ *Farmers' Bank v. Iglehart*, 6 Gill (Md.) 50.

²² *Ardmore State Bank v. Mason*, 30 Okla. 568, 39 L. R. A. (N. S.) 292, 120 Pac. 1080.

In *Murray W. Sales & Co. v. German-American Sav. Bank*, 192 Mich. 540, 159 N. W. 143, it was held that where a corporation accepted a new secured note from a stockholder in lieu of a past due note, and, after learning that the security was invalid, marked the old note "Paid," continued to carry the new note in its mortgage loan account, to which the loan had been transferred, and so reported it to the banking commissioner, and retained possession of the new note and mortgage, it could not claim a lien as for a past due indebtedness by virtue of the old note as against a pledgee of the stock.

In *Modern Laundry v. Hochbaum*, 89 Ark. 612, 117 S. W. 525, which was a suit to enjoin the sale of stock and to enforce a lien thereon in favor of the

corporation, the evidence was held to sustain a finding that the corporation was a party to an agreement for the sale of the stock whereby the purchaser agreed to pay the indebtedness of the seller to the corporation, which was determined to be a certain amount, and hence was not entitled to any relief.

²³ *Young v. Vough*, 23 N. J. Eq. 325; *Klopp v. Lebanon Bank*, 46 Pa. St. 88; *West Branch Bank v. Armstrong*, 41 Pa. St. 278.

Where the by-laws of a corporation required each stockholder to give his note, satisfactorily indorsed, for his unpaid stock, and a statute provided that the shares of each stockholder should be subject to a lien for the unpaid balance due thereon, it was held that indorsers of notes given in pursuance of the by-laws, on failure of the makers to pay the same, were entitled to have the shares applied for their relief. *Petersburg Sav. & Ins. Co. v. Lumsden*, 75 Va. 327.

ness which had been contracted subsequently thereto by him.²⁴

When a corporation sells and assigns a claim against a stockholder for which it has a lien on his shares by virtue of a charter or statutory provision, it loses the lien, and as the lien is given for the benefit of the corporation only, it cannot be enforced by the assignee or by the corporation for his benefit.²⁵

§ 3613. Transfer subject to lien. The fact that a corporation has a lien on shares for a debt due from the stockholder, even when it gives the corporation a right to refuse to transfer the shares on its books until the indebtedness is satisfied, does not prevent the stockholder from assigning the shares subject to the lien, so as to transfer his interest.²⁶ And it has been held that, under such circumstances, the transferee has a right to have the stock transferred to him on the books, and to have a new certificate issued to him,²⁷ since the lien is on the shares, and not on the certificate, and is not affected by the transfer.²⁸

A lien in favor of the corporation is not lost by a transfer on the corporate book of the stock of a deceased stockholder to his executor as such.²⁹

§ 3614. Enforcement of lien—In general. When a corporation is given a lien on its stock for debts due from the stockholders, and no special remedy is provided for enforcement of the same, it may resort to such methods for the enforcement of its claim as are consistent with the general principles of law applicable to the enforcement of like claims.³⁰

²⁴ *People's Bank of Talbotton v. Exchange Bank*, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269.

²⁵ *Ralston v. Bank of California*, 112 Cal. 208, 44 Pac. 476.

²⁶ *United States v. Cecil Nat. Bank v. Watson town Bank*, 105 U. S. 217, 26 L. Ed. 1039.

California. *Craig v. Hesperia Land & Water Co.*, 113 Cal. 7, 35 L. R. A. 306, 54 Am. St. Rep. 316, 45 Pac. 10.

Pennsylvania. *Bank of Kentucky v. Schuylkill Bank*, 1 Pars. Eq. Cas. 180.

Texas. *Milner v. Brewer-Monaghan Mercantile Co.*, — Tex. Civ. App. —, 188 S. W. 49.

Wisconsin. *Herdegen v. Cotzhausen*, 70 Wis. 589, 36 N. W. 385.

²⁷ *Craig v. Hesperia Land & Water Co.*, 113 Cal. 7, 35 L. R. A. 306, 54 Am. St. Rep. 316, 45 Pac. 10; *Milner v. Brewer-Monaghan Mercantile Co.*, — Tex. Civ. App. —, 188 S. W. 49.

²⁸ *Craig v. Hesperia Land & Water Co.*, 113 Cal. 7, 35 L. R. A. 306, 54 Am. St. Rep. 316, 45 Pac. 10.

²⁹ *London, P. & A. Bank v. Aronstein*, 117 Fed. 601, certiorari denied 187 U. S. 641, 47 L. Ed. 345 (mem. dec.).

³⁰ *Tutwiler v. Tuscaloosa Coal, Iron & Land Co.*, 89 Ala. 391, 7 So. 398; *United States & C. Land Co. v. Sulli-*

Since the method of enforcing the lien relates merely to the remedy, the legislature may provide a new or different method at will, and may make the same applicable to corporations previously organized.³¹

It is not necessary for a corporation to comply with a statutory provision requiring the authentication of claims against the estates of deceased persons in order to entitle it to enforce its lien on the stock of a deceased stockholder for a debt owing by him to the corporation.³²

§ 3615. — Refusal to transfer stock on books. When a corporation has a lien on shares for a debt of the holder, it may refuse to transfer the shares on its books, and may set up its lien in a suit in equity to compel it to make a transfer, or in an action to recover damages for its refusal to do so,³³ unless the transferee is entitled to a transfer

van, 113 Minn. 27, Ann. Cas. 1912 A 51, 128 N. W. 1112.

³¹ Tutwiler v. Tuskaloosa Coal, Iron & Land Co., 89 Ala. 391, 7 So. 398.

³² McIlroy Banking Co. v. Dickson, 66 Ark. 327, 50 S. W. 868.

³³ United States. Brent v. Bank of Washington, 10 Pet. 596, 9 L. Ed. 547.

California. Ralston v. Bank of California, 112 Cal. 208, 44 Pac. 476; Jennings v. Bank of California, 79 Cal. 323, 5 L. R. A. 233, 12 Am. St. Rep. 145, 21 Pac. 852.

Connecticut. First Nat. Bank of Hartford v. Hartford Life & Annuity Ins. Co., 45 Conn. 22; Vansands v. Middlesex County Bank, 26 Conn. 144.

Georgia. People's Bank of Talbotton v. Exchange Bank, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269.

Kansas. Faulkner v. Bank of Topeka, 77 Kan. 385, 94 Pac. 153.

Maryland. Reese v. Bank of Commerce, 14 Md. 271, 74 Am. Dec. 536; Farmers' Bank v. Iglehart, 6 Gill 50.

Massachusetts. Bishop v. Globe Co., 135 Mass. 132.

Michigan. Moore v. Royal Oak Lumber & Supply Co., 171 Mich. 400, 137 N. W. 270; Newberry v. Detroit & L. S. Iron Mfg. Co., 17 Mich. 141, 55 E. 162.

Ohio. Stafford v. Produce Exch.

Banking Co., 61 Ohio St. 160, 76 Am. St. Rep. 371, 55 N. E. 162.

Pennsylvania. Sewall v. Lancaster Bank, 17 Serg. & R. 285; Grant v. Mechanics' Bank of Philadelphia, 15 Serg. & R. 140; Rogers v. Huntingdon Bank, 12 Serg. & R. 77; Morgan v. Bank of North America, 8 Serg. & R. 73, 11 Am. Dec. 575.

Rhode Island. Lockwood v. Mechanics' Nat. Bank, 9 R. I. 308, 11 Am. Rep. 253.

Texas. Milner v. Brewer-Monaghan Mercantile Co., — Tex. Civ. App. —, 188 S. W. 49.

Vermont. White River Sav. Bank v. Capital Sav. Bank & Trust Co., 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

Virginia. United Cigarette Mach. Co. v. Brown, 119 Va. 813, L. R. A. 1917 F 1100, 89 S. E. 850.

Washington. See Lacaff v. Dutch Miller Mining & Smelting Co., 31 Wash. 566, 72 Pac. 112.

In such case the transferee has no right to demand a transfer on the books unless he offers to discharge the lien. People's Bank of Talbotton v. Exchange Bank, 116 Ga. 820, 94 Am. St. Rep. 144, 43 S. E. 269.

A pledgee cannot compel a transfer where the corporation has a lien inferior to the lien of the pledge, but is

subject to the lien.³⁴ And it may hold the whole of the debtor's stock until the debt is paid, although the debt is less than the value of the stock. It cannot be compelled to appropriate a part and transfer the rest.³⁵

§ 3616. — Sale or attachment of shares. Generally where the corporation has a lien, it may sell the shares to satisfy the debt after notice to the stockholder, without bringing an action.³⁶

The corporation is an indispensable party to a suit to enjoin such a sale upon the ground that the debt on account of which the lien is claimed is not due, or has been paid, or that the corporation is indebted to the shareholder in an amount exceeding that claimed to be due the corporation, and praying a statement of account. In such a suit the complainant must offer to do equity by averring a readiness to pay whatever may be found to be due from him upon the statement of the account. Equity has no jurisdiction to enjoin such a sale merely on the ground that the stockholder has a proper set-off against his indebtedness to the corporation, but he must show other facts justifying the interposition of a court of equity, such as the insolvency of the corporation, or the like.³⁷

If the amount of the debt is not realized by the sale of the stock, the corporation may maintain an action at law to recover the balance. and, if more than the amount of the debt is realized, the surplus belongs to the stockholder.³⁸

only entitled to a foreclosure of his lien. *White River Sav. Bank v. Capital Sav. Bank & Trust Co.*, 77 Vt. 123, 107 Am. St. Rep. 754, 59 Atl. 197.

Where the lien is pleaded merely as a defense, and not by way of a cross-action, the court is not authorized to grant the corporation affirmative relief by way of foreclosure. *Milner v. Brewer-Monaghan Mercantile Co.*, — Tex. Civ. App. —, 188 S. W. 49.

³⁴ *Milner v. Brewer-Monaghan Mercantile Co.*, — Tex. Civ. App. —, 188 S. W. 49.

As to the right to transfer subject to the lien, see § 3613, *supra*.

³⁵ *Sewall v. Lancaster Bank*, 17 Serg. & R. (Pa.) 285.

³⁶ *Elliott v. Sibley*, 101 Ala. 344, 13 So. 500; *In re Farmers' Bank of Maryland*, 2 Bland (Md.) 394. Compare

Tete v. Farmers' & Mechanics' Bank, 4 Brewst. (Pa.) 308.

The Alabama statute, Code 1907, § 3476, provides for a foreclosure by sale on notice without bringing an action, if a sale is necessary for the payment or satisfaction of the debt or liability in respect to which the lien is claimed. *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 So. 228.

The statute requires a personal demand of payment or satisfaction before foreclosure, and this requirement must be complied with in order to render the foreclosure valid. *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 So. 228.

³⁷ *Elliott v. Sibley*, 101 Ala. 344, 13 So. 500.

³⁸ *In re Farmers' Bank of Maryland*, 2 Bland (Md.) 394.

It has been held that a corporation may enforce its lien by attachment of the shares where the statute allows the attachment of stock.³⁹

§ 3617. — Foreclosure in equity. According to the weight of authority, courts of equity have jurisdiction to enforce or foreclose such liens.⁴⁰ But some courts hold that the lien is not an equitable one, and that a court of equity has no jurisdiction of a bill filed solely for the purpose of foreclosing it, although it may decree a foreclosure for the purpose of doing complete justice between the parties in cases where other independent grounds of equity jurisdiction exist.⁴¹ And it has been held that equity has jurisdiction even where the statute giving a lien provides another mode of foreclosure, "when necessary to do complete justice between the parties, or when there is a special cause for chancery interposition, and the enforcement

³⁹ *Sabin v. Bank of Woodstock*, 21 Vt. 353.

Where the lien is sought to be enforced by attachment, the defendant must be served with process in one of the methods prescribed by law. *Owens v. Atlanta Trust & Banking Co.*, 119 Ga. 924, 47 S. E. 215.

As to the liability of shares of stock to attachment, see § 3436 et seq., supra.

⁴⁰ *United States. United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, 194 Fed. 947; *In re Morrison*, 10 N. B. R. 105, Fed. Cas. No. 9,839.

Alabama. *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 So. 228; *Tutwiler v. Tuskaloosa Coal, Iron & Land Co.*, 89 Ala. 391, 7 So. 398.

California. *Mechanics' Building & Loan Ass'n v. King*, 83 Cal. 440, 23 Pac. 376.

Maryland. See *Reese v. Bank of Commerce*, 14 Md. 271, 74 Am. Dec. 536.

Minnesota. *United States & Canada Land Co. v. Sullivan*, 113 Minn. 27, Ann. Cas. 1912 A 51, 128 N. W. 1112; *Dorr v. Life Ins. Clearing Co.*, 71 Minn. 38, 70 Am. St. Rep. 309, 73 N. W. 635.

Although the lien may be foreclosed

by obtaining judgment for the indebtedness and levying execution on the stock, this would not be an adequate remedy where a pledgee of the stock claims to hold it as a bona fide purchaser, and as such under a title paramount to the corporation's lien. Under such circumstances the lien may be foreclosed and the priorities of the parties determined in a single suit in equity, the determination of priorities among conflicting claimants being one of the ordinary branches of equity jurisdiction. *H. W. Wright Lumber Co. v. Hixon*, 105 Wis. 153, 80 N. W. 1110, 1135.

⁴¹ *Aldine Mfg. Co. v. Phillips*, 118 Mich. 162, 42 L. R. A. 531, 74 Am. St. Rep. 380, 76 N. W. 371.

A court of equity has jurisdiction to foreclose the corporation's lien on a cross-bill filed by it for that purpose in a suit by a transferee to compel it to transfer the stock on its books. The transferor is not a necessary party to the foreclosure proceeding under such circumstances where no personal decree is sought against him. *Citizens' State Bank of Monroeville v. Kalamazoo County Bank*, 111 Mich. 313, 69 N. W. 663.

in equity of such lien is incidental and necessary to the enforcement of such other equities in the suit. But in such cases the requisites of the statute for enforcement must be complied with, in so far as is practicable in a court of equity."⁴²

Ordinarily equity has no jurisdiction of a suit to enforce a lien based on a claim for unliquidated damages for breach of contract until after such claim has been adjudicated and reduced to judgment in an action at law,⁴³ unless there is some independent ground for equitable interference, so as to render applicable the rule that the court, having obtained jurisdiction for one purpose, will do complete justice.⁴⁴ If there is no such independent ground, and the right to the enforcement of the lien can arise only after the complainant has successfully maintained his claim to a right to damages, the jurisdiction cannot possibly be maintained on the theory that damages would be awarded merely as incidental to the equitable relief by way of foreclosure. On the contrary, under such circumstances, the sole right to equitable relief is dependent on and merely auxiliary and incidental to the demand for damages.⁴⁵ It has been held that the damages are liquidated within this rule where they do not lie in mere opinion, but can be readily ascertained by calculation or computation.⁴⁶

A bill to enforce a lien must particularly describe the debt or liability secured by the lien,⁴⁷ and must aver all the facts which the statute giving the lien requires to exist before there can be a foreclosure.⁴⁸

A valid by-law providing that stock must first be offered to the corporation before it is sold has been held to apply to a foreclosure sale and to make the method of sale so provided exclusive as between the parties.⁴⁹

⁴² *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 So. 228.

⁴³ *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, 194 Fed. 947.

⁴⁴ See *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, 194 Fed. 947.

⁴⁵ *United Cigarette Mach. Co. v. Winston Cigarette Mach. Co.*, 194 Fed. 947.

⁴⁶ As where the damages for breach of a contract, for which the lien is sought to be enforced, may be ascertained by subtracting from the price at which certain machines were sold

the price which was to have been paid for them under the contract. *United Cigarette Mach. Co. v. Brown*, 119 Va. 813, L. R. A. 1917 F 1100, 89 S. E. 850.

⁴⁷ *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 So. 228.

⁴⁸ Such as that it is necessary for the payment or satisfaction of the debt or liability to sell the shares, and the making of a personal demand for payment or satisfaction before instituting the proceedings for foreclosure. *Wynn v. Tallapoosa County Bank*, 168 Ala. 469, 53 So. 228.

⁴⁹ *Blue Mountain Forest Ass'n v. Borrowe*, 71 N. H. 69, 51 Atl. 670.

§ 3618. — **Right to waive lien and sue on debt.** As a rule the corporation may waive its lien,⁵⁰ and proceed against the stockholder by action as in the case of any other debt.⁵¹ But where a statute requires a tax on corporate stock to be paid by the corporation and gives it a lien on the stock of each of its shareholders for his proportionate share of the amount so paid, a receiver who pays such a tax under a decree of court cannot maintain an action in personam against a stockholder residing in another state, and who was not a party to the suit in which such decree was rendered, for his share of such tax.⁵²

It has also been held that, where the corporation refuses to sell the stock to satisfy the debt, and sues the executor or administrator of the stockholder to recover therefor, a bill in equity may be maintained to compel the corporation to sell the stock and apply the proceeds to payment of the debt.⁵³

§ 3619. — **Marshaling assets and securities.** In a Kentucky case it was held that a charter provision giving a corporation a lien on stock for a debt due to it from the holder merely gave the corporation, in the case of a stockholder's insolvency, a preference similar to that allowed to partnership creditors over individual creditors. The lien it was said is "similar to the preference allowed to partnership creditors of having their debts paid out of the partnership fund before the private creditors of either of the partners can assert their claims. In the one case, the preference is given by a statutory provision, and in the other it grows out of a well established and inexorable rule of equity practice. * * * Where such preferences are claimed the unsecured creditors may demand that the assets shall be marshaled, and when the bank shall have applied the whole of the proceeds of the bank stock to the payment of their debts, equity demands that they shall be postponed until the general creditors have been indemnified out of the general and unincumbered estate, and when this is done

⁵⁰ See § 3620, *infra*.

⁵¹ *Lankershin Ranch Land & Water Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134.

Such a lien is not a mortgage, and is not within a statutory provision making the remedy by suit to foreclose exclusive in the case of mortgages. The corporation may enforce payment of the indebtedness without any foreclosure of its lien. *People's Home Sav. Bank v. Sadler*, 1 Cal. App. 189, 81 Pac. 1029.

As to the right of a corporation to sue for the amount of a call although it also has a right to forfeit and sell the stock of the defaulting stockholder, see § 658, *supra*.

⁵² *Mercantile Trust & Deposit Co. of Baltimore v. Mellon*, 196 Pa. St. 176, 46 Atl. 308.

⁵³ *In re Farmers' Bank of Maryland*, 2 Bland (Md.) 394.

the balance will then be distributed *pari passu* among all the creditors." ⁵⁴

Where a corporation has other exclusive security for its claim against a stockholder besides a first lien on his stock, and other creditors of the stockholders have subordinate liens on the stock only, the latter are entitled to have the securities marshaled; that is, the corporation may resort to any or all of its securities, and if there is anything left of the securities-held by it exclusively, after the payment of its claims, the other creditors will be entitled to subrogation in the order of their liens. ⁵⁵

§ 3620. Waiver or estoppel to assert lien. Where a corporation has a lien on its shares for a debt due from a stockholder, it may expressly or impliedly waive the same. ⁵⁶ Or its conduct, or the con-

⁵⁴ *German Security Bank v. Jefferson*, 10 Bush (Ky.) 326.

⁵⁵ *Covington City Nat. Bank v. Commercial Bank*, 65 Fed. 547.

⁵⁶ *United States. Cecil Nat. Bank v. Watsontown Bank*, 105 U. S. 217, 26 L. Ed. 1039.

California. *Lankershin Ranch Land & Water Co. v. Herberger*, 82 Cal. 600, 23 Pac. 134.

Maryland. *Hodges v. Planters' Bank*, 7 Gill & J. 306.

Michigan. *Porter v. Marine Sav. Bank*, 186 Mich. 355, 153 N. W. 19.

Minnesota. *St. Paul Nat. Bank v. Life Ins. Clearing Co.*, 71 Minn. 123, 73 N. W. 713.

Mississippi. *Bank of Holly Springs v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330.

Missouri. *Moore v. Bank of Commerce*, 52 Mo. 377.

Pennsylvania. *Sproul v. Standard Plate Glass Co.*, 201 Pa. 103, 50 Atl. 1003.

Rhode Island. *Cross v. Phenix Bank*, 1 R. I. 39.

If a corporation agrees to release its right to claim its charter lien for a period of six months, and within that time the stock is pledged, of which fact the corporation has notice, its right to acquire a charter lien is subor-

dinate to the rights of the pledgee until his debt is paid. *Bank of America v. McNeil*, 10 Bush (Ky.) 54.

A by-law forbidding a transfer by one who is indebted to the corporation without the consent of the directors will not invalidate a transfer to which the directors have not formally assented, where the board has never questioned the validity of the transfer, but has recognized the transferee as a stockholder by electing him a director. *Just v. State Sav. Bank*, 132 Mich. 600, 94 N. W. 200.

The pledgee of stock went to the treasurer of the corporation and consented to his paying a dividend thereon to the pledgor on condition that the stock be transferred to the pledgee. The treasurer stated that he had no authority to make the transfer, but that in accordance with the agreement between the pledgor and pledgee he would give the former a check for the dividend, which was done. The pledgee at the time knew that the corporation was asserting its lien against the stock. Held that under these circumstances the corporation did not waive its lien to the extent of the dividend so paid to the pledgor. *Bank of Searcy v. Merchants' Grocer Co.*, 123 Ark. 403, 185 S. W. 806.

duct of its authorized officers or agents, may be such as to estop it from asserting the lien as against a transferee. It will be held to have waived its lien, or to be estopped, if, when inquiry is made by an intending purchaser of shares, it assures him that it has no claim against the stockholder, or if it so acts as to reasonably lead him to believe that it has no claim, and the shares are purchased or taken as collateral in reliance upon such assurance or conduct.⁵⁷ And it has been held that a bank will be estopped where such an assurance is given by its cashier, although the statute requires the consent of the directors to a transfer upon the books where the holder of the stock is indebted to it,⁵⁸ unless the fact of the indebtedness to the corporation is known to the transferee.⁵⁹ On the other hand it has been held that such an assurance by an assistant secretary of a corporation, who is not a director and has no power to transact the general business of the company with third persons, is not binding on it.⁶⁰

If a by-law of a corporation reserves a lien on shares for debts due from its stockholders, but provides that notice of the lien shall be

In *Conant v. Reed*, 1 Ohio St. 298, it was held that a statutory lien of a bank could not be defeated by a transfer without the consent of a majority of the board of directors, if the debt had not matured, nor even with their consent if it was overdue.

See *Owens v. Atlanta Trust & Banking Co.*, 122 Ga. 521, 50 S. E. 379, where it was held that the evidence warranted a finding that the lien had not been waived.

In *Young Coal Co. v. Hill*, 112 Ark. 180, 165 S. W. 292, it was held to be a question for the jury under the evidence, whether the corporation had waived its lien.

⁵⁷ *United States*. *Cecil Nat. Bank v. Watsontown Bank*, 105 U. S. 217, 26 L. Ed. 1039.

Iowa. *Des Moines Loan & Trust Co. v. Des Moines Nat. Bank*, 97 Iowa 668, 66 N. W. 914.

Kentucky. *Bank of Kentucky v. Bonnie*, 102 Ky. 343, 43 S. W. 407.

Massachusetts. *Bishop v. Globe Co.*, 135 Mass. 132.

Michigan. *Oakland County Sav. Bank v. State Bank of Carson City*,

113 Mich. 284, 67 Am. St. Rep. 463, 71 N. W. 453. See also *Moore v. Royal Oak Lumber & Supply Co.*, 171 Mich. 400, 137 N. W. 270.

Mississippi. *Bank of Holly Springs v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330.

Missouri. *Moore v. Bank of Commerce*, 52 Mo. 377.

But where the cashier of a bank wrote to a stockholder that the bank had no lien on his shares, it was held that a purchaser of the stock twelve months later could not claim that the bank was thereby estopped to set up a lien as against him. *Planters' & Merchants' Mut. Ins. Co. v. Selma Sav. Bank*, 63 Ala. 585.

⁵⁸ *Oakland County Sav. Bank v. State Bank of Carson City*, 113 Mich. 284, 67 Am. St. Rep. 463, 71 N. W. 453.

⁵⁹ As to one having such knowledge, the cashier is without authority to waive the lien. *Oakland County Sav. Bank v. State Bank of Carson City*, 113 Mich. 284, 67 Am. St. Rep. 463, 71 N. W. 453.

⁶⁰ *Kenton Ins. Co. v. Bowman*, 84 Ky. 430, 1 S. W. 717.

given in the certificates of stock, and the corporation issues certificates which do not give such notice, it waives any lien it would otherwise have upon the shares represented by such certificates, as against transferees thereof.⁶¹ And if a corporation, or the officer whose duty it is to receive and register transfers of stock, recognizes and registers a transfer, the legal title to the stock becomes vested in the transferee, and the corporation waives any lien it may have had for a debt due from the transferor,⁶² unless the transferee, at the time of the transfer, has notice that the transferor is indebted to the corporation.⁶³ If he has such notice, then no act or failure to act on the part of such an officer will, without acquiescence on its part, estop the corporation. Even his express agreement or waiver will not estop it under such circumstances.⁶⁴ But by permitting a transfer of part of a debtor's stock, a corporation does not waive its lien on the remainder.⁶⁵

⁶¹ *Bank of Holly Springs v. Pinson*, 58 Miss. 421, 38 Am. Rep. 330; *Brinkerhoff-Farris Trust & Savings Co. v. Home Lumber Co.*, 118 Mo. 447, 24 S. W. 129.

⁶² *United States. Cecil Nat. Bank v. Watsontown Bank*, 105 U. S. 217, 26 L. Ed. 1039.

Michigan. See *Moore v. Royal Oak Lumber & Supply Co.*, 171 Mich. 400, 137 N. W. 270.

New Hampshire. *Hill v. Pine River Bank*, 45 N. H. 300.

New York. *Robertson v. Sully*, 157 N. Y. 624, 52 N. E. 668.

Ohio. *Downer's Adm'r v. Bank of Zanesville*, Wright 477.

Oklahoma. *Farmers' & Merchants' Bank of Kiel v. Cherokee Trust Co.*, 32 Okla. 700, 123 Pac. 153.

Pennsylvania. *Chambersburg Ins. Co. v. Smith*, 11 Pa. 120; *Presbyterian Congregation v. Carlisle Bank*, 5 Pa. St. 345.

The lien is waived where the stock is presented to the corporation in order to give it notice that it has been assigned as collateral, and the fact of the transfer is indorsed by the corporation's bookkeeper upon the stubs of the certificates, and no lien is then claimed. *Des Moines Loan*

& Trust Co. v. Des Moines Nat. Bank, 97 Iowa 668, 66 N. W. 914.

In *Bishop v. Globe Co.*, 135 Mass. 132, it was held that the corporation was not estopped to assert its lien by reason of the fact that, when the certificate was presented for transfer, the person in charge of the transfer book agreed to make out the new certificates as soon as another whose signature was necessary, returned, where it did not appear that such person had any authority except to receive requests for transfers and to communicate them to the proper officers, or that he had any knowledge of the stockholder's indebtedness, and as soon as the matter was brought to the attention of the president of the company, the lien was asserted and the transfer refused.

⁶³ In *Moore v. Royal Oak Lumber & Supply Co.*, 171 Mich. 400, 137 N. W. 270, it is said that the transfer of the stock on the books would not estop the corporation under such circumstances.

⁶⁴ *Moore v. Royal Oak Lumber & Supply Co.*, 171 Mich. 400, 137 N. W. 270.

⁶⁵ *First Nat. Bank v. Hartford Life & Annuity Ins. Co.*, 45 Conn. 22.

In order that a corporation may be held to have waived its lien, there must be some evidence showing such an intention in fact, or else its conduct must be such as to estop it to deny such an intention. As a general rule, mere failure to assert a lien is not evidence of a waiver.⁶⁶ A corporation does not waive its lien on the shares of a debtor by taking additional security from him or from a joint debtor,⁶⁷ unless it is agreed that the new security shall be in lieu of the lien.⁶⁸ Nor does a corporation waive its lien on shares for a debt due it from the holder by consenting to an assignment by the holder for the benefit of creditors, "with no other preference than is or may be authorized by law";⁶⁹ or by failure to require a surrender of the certificates of stock at the time of making a loan to a stockholder.⁷⁰

A corporation does not waive its lien for a debt owing it by a bankrupt copartnership of which the stockholder is a member by proving its claim against the estate of the bankrupt copartnership as an unsecured creditor and accepting dividends based on the allowance of the full claim.⁷¹

A certificate of stock declaring that the holder is entitled to a certain number of shares of stock, transferable on the books of the corporation on surrender of the certificate, is not a waiver of the lien given by a provision in the charter of the corporation that all debts actually due to it by a stockholder offering to transfer his shares must be discharged before such transfer shall be made.⁷² And a by-law

⁶⁶ *Jennings v. Bank of California*, 79 Cal. 323, 5 L. R. A. 233, 12 Am. St. Rep. 145, 21 Pac. 852; *First Nat. Bank v. Hartford Life & Annuity Ins. Co.*, 45 Conn. 22; *Moore v. Royal Oak Lumber & Supply Co.*, 171 Mich. 400, 137 N. W. 270; *H. W. Wright Lumber Co. v. Hixon*, 105 Wis. 153, 80 N. W. 1110, 1135.

⁶⁷ *Union Bank of Georgetown v. Laird*, 2 Wheat. (U. S.) 390, 4 L. Ed. 269; *Kenton Ins. Co. v. Bowman*, 84 Ky. 430, 1 S. W. 717; *German Nat. Bank v. Kentucky Trust Co. of Louisville*, 19 Ky. L. Rep. 361, 40 S. W. 458.

⁶⁸ *St. Paul Nat. Bank v. Life Ins. Clearing Co.*, 71 Minn. 123, 73 N. W. 713.

⁶⁹ *Dobbins v. Walton*, 37 Ga. 614, 95 Am. Dec. 371.

⁷⁰ *Bohmer & Osterloh v. City Bank*, 77 Va. 445.

The corporation's lien is not affected by the fact that a pledgee of the stockholder holds the certificate, where such certificate on its face gives notice of the lien. *Wilkinson v. Home Bank*, 137 Tenn. 198, 192 S. W. 920.

⁷¹ This is true because under the bankruptcy law a claim is not a secured one unless it constitutes a lien on the property of the bankrupt estate, and because under that law the copartnership is regarded as a separate entity for certain purposes. *Bank of Searcy v. Merchants' Grocer Co.*, 123 Ark. 403, 185 S. W. 806.

⁷² *Reese v. Bank of Commerce*, 14 Md. 271, 74 Am. Dec. 536; *National Bank of Republic of New York v. Rochester Tumbler Co.*, 172 Pa. St. 614, 33 Atl. 748.

A lien given by statute to a bank on the shares of its stock, to the ex-

of a corporation providing that its stock shall be transferable by delivery and indorsement, the transfer to be complete and binding on the corporation only when recorded on its books, is not a waiver of a lien created by a stipulation previously inserted in a certificate of stock to the effect that the stock will not be transferred by the corporation until all the indebtedness of the holder to the corporation shall be paid.⁷³

The fact that the corporation has transferred shares of a stockholder after notice that certain other shares belonging to him have been pledged, does not affect its right to refuse to make a transfer to the pledgee where its claim against the stockholder for which it has a lien is greater than the value of all of the stock, including that transferred after notice.⁷⁴

If the charter merely gives the board of directors the option to create a lien, so that none exists unless such option is exercised, the failure of the corporation to exercise it will not discharge a surety where the latter does not call upon it to retain the dividends or to refuse to transfer the stock for his protection.⁷⁵

tent of any debt due to it from the holders, is not waived by a by-law providing that the holders of stock desiring to sell shall give the bank an option to purchase, and that, if it fails to purchase at the expiration of ten days' time, the holders may sell at pleasure. *Citizens' State Bank of Monroeville v. Kalamazoo County Bank*, 111 Mich. 313, 69 N. W. 663.

⁷³ *Jennings v. Bank of California*, 79 Cal. 323, 5 L. R. A. 233, 12 Am. St. Rep. 145, 21 Pac. 852. See also *Citizens' State Bank of Monroeville v. Kalamazoo County Bank*, 111 Mich. 313, 69 N. W. 663.

⁷⁴ Where the amount of an indebtedness to a corporation by a stockholder is greater than the value of the entire holdings of such stockholder, that the corporation has transferred certain of the stock of such holder at the request of such holder does not affect its right to refuse to make a transfer to a pledgee of the holder of certain remaining stock. *Sproul v. Standard Plate Glass Co.*, 201 Pa. 103, 50 Atl. 1003.

⁷⁵ *Perrine v. Fireman's Ins. Co.*, 22 Ala. 575.

[Chap. 56 is concluded in Vol. 6.]

